UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

COGNIZANT TECHNOLOGY SOLUTIONS CORPORATION, Plaintiff, - against - BOHRER, PLLC and JEREMY I. BOHRER, Defendants,	:	21 Civ. 5340 (RA)

MEMORANDUM OF LAW OF DEFENDANTS BOHRER, PLLC AND JEREMY I. BOHRER, IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, STAY THE ACTION

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INTRODUCTION

This action is an impermissible attempt by Plaintiff, Cognizant Technology Solutions Corporation ("Cognizant"), to circumvent an Order of the Delaware Court of Chancery (the "Delaware Court"), requiring Cognizant to advance to Steven Schwartz—Cognizant's former Executive Vice President, Chief Legal and Corporate Affairs Officer (and plaintiff in the Delaware Court)—the legal fees of defendant Bohrer PLLC, in connection with representation of Mr. Schwartz, including his defense in a criminal case.[1] This Court should dismiss the Complaint, because, among other things, a) it has been filed in the wrong forum pursuant to a valid and enforceable indemnification agreement between Mr. Schwartz and Cognizant (the "Indemnification Agreement"); b) it is substantively barred by the Indemnification Agreement's prohibition on interim determinations of Mr. Schwartz's right to have Cognizant pay his legal fees; and c), the issues it raises have already been decided against Cognizant by the Delaware Court and are subject to enforcement by that Court. In the alternative, this Court should stay the action because there is a parallel Delaware proceeding and the Bohrer Firm's defense against the Complaint's false allegations would implicate privileged information, including defense strategy for, and attorney-client communications with, Mr. Schwartz.

On April 17, 2020, the Delaware Court—which Cognizant agreed would be the sole forum for litigation regarding the Indemnification Agreement, and which is also the exclusive forum for advancement and indemnification disputes under Cognizant's By-Laws—ordered Cognizant to advance fees for Mr. Schwartz's legal representation. The Delaware Court entered an April 17, 2020 Order implementing summary judgment (the "April 17, 2020 Order," Exh. A),

[1] Defendant Jeremy I. Bohrer is managing partner of the Bohrer Firm; defendants are jointly "the Bohrer Firm." "Exh. __" refers to exhibits to the Declaration of Claude M. Millman. "Dkt. __" refers to ECF filings in this action.

notwithstanding Cognizant's arguments that the Bohrer Firm's fees were unreasonable and its invoices contained "possible indica of fraud" (Exh. B (2/20 Oral Arg. Tr.) at 88) and Cognizant's purported affirmative defenses that submission of these invoices for payment "breached the implied covenant of good faith and fair dealing" and reflected "unclean hands." (*see also id*. at 105 (arguing there are "substantial indicia that at least raise a significant question as to fraudulent billing")). The Delaware Court retained jurisdiction and, consistent with the framework of the Indemnification Agreement and Delaware law, contemplated that claims of billing impropriety by the Bohrer Firm would be litigated at a later date, in an indemnification phase of litigation ***in that Court***, as the Indemnification Agreement requires. The Complaint violates the words and spirit of the Indemnification Agreement and the Delaware Court rulings.

Cognizant seeks from this Court exactly the relief it was denied in Delaware, by changing the caption to replace Mr. Schwartz's name with the Bohrer Firm's, and asserting meritless "fraud" claims. This Court should reject Cognizant's attempt to do so, and dismiss this action.

FACTUAL BACKGROUND

A. Steven Schwartz's Advancement and Indemnification Rights

Mr. Schwartz worked at Cognizant from 2001 to 2016, departing as its Executive Vice President and Chief Legal and Corporate Affairs Officer. (Dkt. 1 ("Comp.") ¶ 20.)

Mr. Schwartz's right to the advancement and indemnification of his legal fees arises first under Cognizant's Amended and Restated By-Laws ("By-Laws"). (*Id*. ¶¶ 22, 23.) The By-Laws provide that Cognizant must "indemnify and hold harmless [Mr. Schwartz], to the fullest extent permitted by the DGCL [Delaware General Corporations Law]" against reasonable expenses, including attorneys' fees, in connection with an action brought against him by reason of his employment at Cognizant. The By-Laws further provide that Cognizant must advance those fees and expenses "to the fullest extent not prohibited by applicable law," through to an action's final

disposition. (Exh. C (B-Laws) Art. IX, §§ 1, 3.) The By-Laws require Mr. Schwartz to provide an undertaking to repay advanced fees if he is later found ineligible for indemnification. (*Id*. § 3.) Mr. Schwartz has undisputedly executed that undertaking.

The indemnification and advancement rights in the By-Laws are further broadened by a June 4, 2013 Indemnification Agreement between Cognizant and Mr. Schwartz. Through that agreement—the existence and terms of which are undisputed—Cognizant bound itself to advance all of Mr. Schwartz's litigation expenses, defined broadly to include "reasonable attorneys' fees, retainers, court costs, transcript costs, fees of experts and other professionals, witness fees, travel expenses, duplicating costs, printing and binding costs, telephone charges, postage, [and] delivery service fees" (collectively "fees"). (Dkt. 1-1 (Indem. Agr.) at 4, § 2(g).)

The Indemnification Agreement provides that Mr. Schwartz's requested advancement of fees shall conclusively be presumed reasonable. That provision states, in its entirety, that:

> The parties agree that for the purposes of any advancement of Expenses for which [Mr. Schwartz] has made written demand to the Company in accordance with this Agreement, all Expenses included in such demand that are certified by affidavit of [Mr. Schwartz's] counsel as being reasonable ***shall be presumed conclusively to be reasonable***.

(*Id*. (emphasis added); Dkt. 1 (Comp.) ¶ 26.) Cognizant says that all required certifications were submitted. (*See* Dkt. 1 (Comp.) ¶¶ 27, 35.) Both the By-Laws and the Indemnification Agreement provide, in accordance with Delaware law's established procedures, for advancement of fees during Mr. Schwartz's defense, followed by a later indemnification proceeding where Mr. Schwartz's ultimate right to indemnification of these fees will be determined once the actions against him are concluded. (Dkt. 1-1 (Indem. Agr.) at 11, § 4, 7, § 10; Exh. C (By-Laws) at 19, Art. IX, §§ 1-2, 4.)

B. Steven Schwartz Sues in Delaware to Enforce His Advancement Rights

In 2016, in accordance with the By-Laws and Indemnification Agreement, Mr. Schwartz sought advancement from Cognizant for defense expenses related to Department of Justice and Securities and Exchange Commission investigations of alleged Foreign Corrupt Practices Act ("FCPA") violations, arising from Cognizant's business in India, and, later, for the defense of his subsequent indictment (the "New Jersey Action"), a suit brought by the SEC (the "FCPA Action."), and related private securities class action and derivative cases. Mr. Schwartz, who hired the Bohrer Firm to represent him in those matters in 2018, has consistently denied any wrongdoing.

In 2019, Cognizant gave notice that it would stop advancing the Bohrer Firm's fees, claiming they were "unreasonable." (Dkt. 1 (Comp.) ¶ 34.) Cognizant's decision to withhold advancement of fees was exclusive to the Bohrer Firm—it continued to advance fees to Mr. Schwartz's other counsel. Because Cognizant thereby violated the Indemnification Agreement and its By-Laws, Mr. Schwartz promptly brought suit in Delaware pursuant to those agreements' forum selection clauses (generally, the "Advancement Case"). (Exh. D (Adv. Comp.).) In filing that suit, Mr. Schwartz made clear that he necessarily believed that the Bohrer Firm's fees were reasonable, challenging Cognizant's "question[ing of] Mr. Schwartz's choice of counsel or the reasonableness of the services that they provide," and stating that the Bohrer Firm's services are "critical [to his] efforts to preserve his liberty." (*Id*. ¶¶ 45, 62-63.) To be clear, ***Mr. Schwartz*** has ***never*** claimed fraud by the Bohrer Firm.

Under the Indemnification Agreement's forum selection clause, "[a]ny action or proceeding ***arising out of or in connection with this Agreement*** shall be brought only in the Delaware Court." (Dkt. 1-1 (Indem. Agr.) at 15, § 23 (emphasis added).) The By-Laws also contain a clause making the Delaware Court "the sole and exclusive forum" for "any action or

proceeding to interpret, apply, [or] enforce" the By-Laws. (Exh. C (By-Laws) Art. XII.)

On April 7, 2020, the Delaware Court granted summary judgment, holding that Cognizant was required to pay the Bohrer Firm's fees, and declaring that the Indemnification Agreement requires "payment for legal services rendered by the Bohrer Firm [after September 2019] and going forward." (Ex. E (4/7/20 Tr. Del. Ruling) at 5.) The Delaware Court's ruling left open a single narrow issue for trial: whether, "had the parties thought to address the issue [in the Indemnification Agreement, Cognizant] would have agreed to advance fees to contract attorneys [used by the Bohrer Firm] at marked up-rates[.]" (*Id*. at 26.).

On April 17, 2020, the Delaware Court entered an implementing Order providing, *inter alia*, that Cognizant would pay all of the Bohrer Firm's outstanding invoices, less marked-up charges for contract attorneys. (Ex. A (4/17/20 Del. Order) ¶¶ 1.a., c.) The Order provided unequivocally that all of Mr. Schwartz's legal fees in the New Jersey and FCPA Actions "certified by affidavit of Plaintiff's counsel as being reasonable shall be presumed conclusively to be reasonable for purposes of advancement" (*Id*. ¶ 2.a.); and that "Cognizant shall not withhold advancement of any fees or expenses incurred in [these actions] supported by documentation submitted after the date of this Order" (*Id*. ¶ 2.e.). After the parties resolved the contract attorney issue, the Court dismissed the advancement claims in a September 22, 2020 Order. ("Sept. 22 Order") Ex. F ¶ 1.) The September 22 Order resolved Cognizant's defenses "for the purposes of advancement" and reserved for subsequent determination, as per the Indemnification Agreement, "claims or defenses with respect to any claims by Plaintiff for indemnification from Defendant." (Exh. F (9/20 Del. Order) ¶¶ 1.) The Delaware Court retained jurisdiction to enforce the April 17, 2020 Order. (*Id*. ¶ 4.) The Delaware Court recognized when it resolved the advancement issues that—as the Indemnification Agreement provides (Dkt. 1-1

(Indem. Agr.), at 12, §§ 14(d) & (e))—there would be subsequent indemnification litigation ***in that same Court***, and that the reasonableness of the Bohrer Firm's fees would be determined at that time. (Exh. A (4/17/20 Del. Order) ¶ 24 (clarifying that nothing in the Order determined Mr. Schwartz's entitlement to indemnification).)

C. Cognizant Tries to Circumvent the Delaware Court's Ruling by Filing this Action in the S.D.N.Y.

Ignoring the forum selection clauses and the Delaware Court's retention of jurisdiction, Cognizant has brought this suit raising exactly the same issue previously resolved against it in Delaware, *i.e.*, whether allegations of improper and excessive billing by the Bohrer Firm can be pursued, in derogation of Cognizant's advancement obligations, ***before*** Mr. Schwartz's ultimate right to indemnification is determined in the Delaware Court. And Cognizant devotes six paragraphs of the Complaint to the "contract attorney issue" (Dkt. 1 (Comp.) ¶¶ 12, 50-54), despite resolving that same issue in Delaware (Exh. F (9/20 Del. Order) ¶ 1).[2]

Cognizant alleges that, "***during the course of the Advancement Proceeding***," in July 2020, Cognizant's counsel received an "anonymous whistleblower email" purporting to be from a former Bohrer Firm employee and alleging fraud in the Bohrer Firm's billing. (Dkt. 1 (Comp.) ¶ 40 (emphasis added).) But, while Cognizant alleges that the Bohrer Firm committed fraud on the Delaware Court (*Id.* § D. ¶¶ 58-59)—which, if true, would be of primary interest to that Court—Cognizant carefully omits from its Complaint that it received the "anonymous email" two months ***before*** it resolved the Advancement Case, and deliberately chose not to seek relief from the April 2020 Order. (*Id.* ¶ 40.)

[2] All advanced fees attributable to the so-called contract attorney "markup" were returned, without prejudice to the indemnification proceeding, to Cognizant before the Stipulation and Order of Dismissal of the Delaware action (Ex. F (Sept. 22 Order)).

Instead of waiting to challenge Mr. Schwartz's ultimate right to indemnification in Delaware—as Cognizant had agreed to do (Dkt. 1-1 (Indem. Agr.) at 12, §§ 14(d) & (e)), and the Delaware Court contemplated—and raising any claims about Mr. Schwartz's legal fees in that forum, Cognizant filed this action alleging improper billing by the Bohrer Firm in the hopes that it will receive a better ruling here than it did in Delaware.

D. Steven Schwartz Seeks Injunctive Relief in Delaware

On July 21, 2021, Mr. Schwartz filed a Complaint for Injunctive Relief (Ex. G) and a Motion for Expedited Proceedings (Exh. H) in the Delaware Court,[3] seeking an order enforcing the Delaware Court's April 2020 and September 2020 Orders, and asking the Delaware Court either to enjoin Cognizant from prosecuting this action, or to impose contempt sanctions to induce Cognizant to withdraw this action. Mr. Schwartz alleges that Cognizant's filing of this lawsuit (i) "disregarded the Delaware Court's exclusive jurisdiction to hear and determine advancement and indemnification actions involving Delaware corporations"; (ii) "disregarded the Delaware Court's previous rulings against Cognizant, including an Order retaining jurisdiction over these disputes"; and (iii) "violated an expansive forum selection provision" selecting the Delaware Court as the exclusive jurisdiction. (Exh. G (Del. Comp.) ¶1.) On August 5, 2021, Cognizant filed an opposition to Mr. Schwartz's motion for expedited proceedings, claiming that Cognizant will continue to advance the Bohrer Firm's fees, while at the same time seeking them back in this action and, speciously, that this action therefore "has nothing to do with advancement." (Exh. I at 1). Mr. Schwartz has replied (Exh. J) and the motion is fully-

[3] While styled as a "Complaint," it is, in fact, a continuation of the prior Delaware proceedings. It was brought on by Complaint because the Chancellor who presided over the Advancement Case retired from the bench in April 2021, and the Register in Chancery advised counsel that "a new action to enforce orders of this Court in the Advancement Case is preferable to moving to enforce those orders in the dormant Advancement Case." (Exh. G (Del. Comp.) ¶ 11.)

briefed in Delaware.

ARGUMENT

THE COURT SHOULD DISMISS THE COMPLAINT, OR, IN THE ALTERNATIVE, STAY THE ACTION

A. This Court is a *Forum Non Conveniens* Under the Forum Selection Clauses

The Complaint should be dismissed based on the doctrine of *forum non conveniens* because Cognizant bound itself to a forum selection clause in the Indemnification Agreement, which states:

> [Cognizant] and [Mr. Schwartz] hereby irrevocably and unconditionally (i) agree that ***any action or proceeding arising out of or in connection with this Agreement shall be brought only in the [Delaware Court],*** and ***not in any other state or federal court*** in the United States of America or any court in any other country, [and] (ii) consent to submit to the ***exclusive jurisdiction*** of the [Delaware Court] for purposes of any action or proceeding arising out of or in connection with this Agreement ….

(Dkt. 1.1 (Indem. Agr.) at 15, § 23 (emphases added); *cf. id*. (Delaware law applies).) The Delaware Court is also "the sole and exclusive forum for … any action or proceeding to interpret, apply, [or] enforce" Cognizant's By-Laws. (Exh. C (By-Laws) at 22, Art. XII; *cf. id*. at 19, Art. IX §§ 1, 3.)

These forum selection clauses as a matter of law render this Court *non conveniens* for Cognizant's action. *See Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas*, 571 U.S. 49, 60-61 (2013)) ("the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*"); *Jones v. Ponant USA LLC*, 2020 WL 2489076, at *3 (S.D.N.Y. May 14, 2020). For that reason alone, dismissal is required here.

1. The Forum Selection Clauses Are Presumptively Enforceable

Cognizant's selection of the Delaware Court as the exclusive forum is presumptively

valid because "(1) the [forum selection] clause[s] w[ere] reasonably communicated to [Cognizant]; (2) the clause[s] [are] mandatory, rather than permissive, in nature; and (3) the clause[s] encompass[] the plaintiff's claims." *Hansen v. Miller*, 2020 WL 5802289, at *7 (E.D.N.Y. Sept. 29, 2020); *see also Phillips v. Audio Active, Ltd.*, 494 F.3d 378, 383-384 (2d Cir. 2007) (forum selection clause "is presumptively enforceable").

First, the forum clauses in the Indemnification Agreement and By-Laws were reasonably communicated to Cognizant, *Hansen*, 2020 WL 5802289, at *7; it executed both documents.

Second, the forum selection clauses are mandatory. *See id*. Cognizant "irrevocably and unconditionally" agreed that it could not bring "any action … arising out of or in connection with" the Indemnification Agreement except in the Delaware Court—and specifically "not in any . . . federal court in the United States of America." (Dkt. 1.1 (Indem. Agr.) at 15, § 23.) The By-Laws designate the Delaware Court as "sole and exclusive forum." (Exh. C (By-Laws) Art. XII.)

Third, these forum selection clauses encompass Cognizant's claims. No matter how Cognizant attempts to characterize them—nor how sophistically it argues it will still advance the Bohrer Firm's legal fees while demanding, through this action, that those fees (and more) be returned—its claims boil down to whether Cognizant can recoup fees advanced to Mr. Schwartz pursuant to the Indemnification Agreement and By-Laws. These claims therefore "arise out of or in connection with" the Indemnification Agreement and seek to "apply" the By-Laws. (Dkt. 1 (Comp.) ¶¶ 4,21,24,25,27,35,50.) The Delaware Court is therefore the exclusive forum.

2. It Makes No Difference that the Bohrer Firm Was Not a Signatory to the Indemnification Agreement or By-Laws

For this purpose, it does not matter whether the Bohrer Firm is a signatory to the forum selection agreements signed by Cognizant. The proper focus is on ***Cognizant's*** binding commitment to bring in the Delaware Court any action "arising out of or in connection with" the

Indemnification Agreement, or to "apply" the By-Laws.

"[A] non-signatory to a contract containing a forum selection clause may enforce the forum selection clause against a signatory when the non-signatory is 'closely related' to another signatory." *Magi XXI, Inc. v. Stato Della Città del Vaticano*, 714 F.3d 714, 723 (2d Cir. 2013) (citation omitted). "'[T]he fact that a party is a non-signatory to an agreement is insufficient, standing alone, to preclude enforcement of a forum selection clause.'" *Id*. at 722. "[T]he relationship between the non-signatory and [the] signatory must be sufficiently close that the non-signatory's enforcement of the forum selection clause is 'foreseeable' to the signatory against whom the non-signatory wishes to enforce the forum selection clause." *Id*. at 723. The Second Circuit cited *In re Optimal U.S. Litig*., 813 F. Supp. 2d 351 (S.D.N.Y. 2011), which said:

> In discerning whether parties are "closely related," courts look to whether the non-signatory "[is an] intended beneficiar[y] entitled to enforce" the clause in question …. "[A] third party will have an enforceable right 'if the promised performance will be of pecuniary benefit to him and the contract is so expressed as to give the promisor reason to know that such benefit is contemplated by the promisee as one of the motivating causes of his making the contract.'" However, "'while ... third-party beneficiaries to a contract would, by definition, satisfy [this] requirement[ ] ..., a third-party beneficiary status is not required.'"

Id. at 369 (brackets in original) (citations omitted).

The Bohrer Firm and Mr. Schwartz are clearly "closely related" within this meaning. Cognizant's promise to advance Mr. Schwartz's legal fees is obviously of "pecuniary benefit" to his counsel; and the "benefit"—that fees of Mr. Schwartz's chosen counsel will be advanced—is the primary purpose of the Indemnification Agreement. (*Cf*. Dkt. 1.1 (Indem. Agr.) at 1 (purpose of Agreement is that Mr. Schwartz will "serve [Cognizant] free from undue concern that [he] will not be … indemnified.")) Cognizant undoubtedly had "reason to know" that its advancement promise was a "motivating cause" of Mr. Schwartz's acceptance of that Agreement, and it has acknowledged Mr. Schwartz's "contractually endowed rights to select counsel[.]" (Cognizant's

Answering Brief in Opposition to Plaintiff's Motion for Summary Judgment in the Advancement Case, Exh. K ("Cognizant Opp.") at 28.) Though third-party beneficiary status is not required, *In re Optimal*, 813 F. Supp. 2d at 369, "it is reasonable to assume that a provider of legal services is a third-party beneficiary of an agreement to pay for those services," *Newman & Schwartz v. Asplundh Tree Expert Co., Inc*., 102 F.3d 660, 662-63 (2d Cir. 1996).[4]

In addition, "[a] non-party is 'closely related' to a dispute if its interests are 'completely derivative' of and 'directly related to, if not predicated upon' the signatory party's interests or conduct." *Cuno, Inc. v. Hayward, Indus. Prods., Inc*., 2005 WL 1123877, at *6 (S.D.N.Y. May 10, 2005) (citations omitted). Here, of course, the Bohrer Firm's interests are completely derivative of, and predicated on, Mr. Schwartz's interest in advancement of his legal fees. To illustrate this point, Cognizant spoke of the Bohrer Firm and Mr. Schwartz in one breath in Delaware, asserting "facts regarding Bohrer PLLC's excessive billing practices ***and*** Schwartz's bad faith management"; that "***[t]he same facts*** with respect to the unreasonableness of the billings ***of Bohrer PLLC*** create a triable issue as to whether ***Schwartz's*** claim is barred by the doctrine of unclean hands"; and that Cognizant "does not believe that ***Schwartz's advancement requests*** reflect good faith billing ***by Bohrer PLLC***") (Exh. K (Cognizant Opp.) at 30-31; emphases added). *See Weingard v. Telepathy, Inc*., 2005 WL 2990645, at * 6 (S.D.N.Y. Nov. 7, 2005) (non-signatories held closely related when alleged to act in concert with signatory).

[4] Delaware's law is the same. Its seminal case on non-signatories' use of forum selection clauses, *Ashall Homes Ltd. v. ROK Entertainment Group Inc*., 922 A.2d 1239, 1249 (Del. Ch. 2010) (non-signatory that is "'closely related to one of the signatories such that the non-party's enforcement of the clause is foreseeable'" can enforce the clause), stems from a case in the Second Circuit, *Morag v. Quark Expeditions, Inc*. 2008 WL 3166066, at *5 (D. Conn. Aug. 5, 2008); *see also Lexington Services Ltd. v. U.S. Patent No. 8019807 Delegate, LLC*, 2018 WL 5310261, at *6 (Del. Ch. Oct. 26, 2018) (non-signatories could invoke forum selection clause "because of acts they took in regard to" agreement).

3. Cognizant Cannot Rebut the Forum Selection Clauses' Enforceability

While the presumptive enforceability of a forum selection clause can be "rebutted" in narrow circumstances, Cognizant has not and cannot rebut that presumption here. Cognizant could "rebut the presumption of enforceability only by demonstrating that "(1) the [forum selection] clauses['] incorporation [in the Indemnification Agreement and By-Laws] were the result of fraud or overreaching; (2) the law to be applied in the selected forum is fundamentally unfair; (3) enforcement contravenes a strong public policy of the forum in which suit is brought; or (4) trial in the selected forum will be so difficult and inconvenient that the plaintiff effectively will be deprived of [its] day in court." *Donnay USA Ltd. v. Donnay Int'l S.A.*, 705 Fed. App'x 21, 24 (2d Cir. 2017) (citation omitted); *see also Jones v. Ponant*, 2020 WL 2489076, at *7; *Phillips*, 494 F.3d at 392. None of these exceptions applies.

Cognizant cannot seriously suggest that the forum selection clauses in either the Indemnification Agreement or the By-Laws were the result of fraud or overreaching, nor could it credibly claim that Delaware law, which it chose, is fundamentally unfair. There is also no public policy that requires Cognizant's claims to be heard in this forum. And finally, Cognizant, a Delaware corporation, has already had the opportunity to assert claims concerning the Bohrer Firm's fees in the Delaware Court—and will have the further opportunity to press those claims later at the indemnification proceeding—and thus will not be deprived of its day in court if this Court dismisses the Complaint because this action violates the Indemnification Agreement's and By-Laws' forum selection clauses. *Forum non conveniens* requires dismissal.

B. The Complaint is Substantively Barred By the Indemnification Agreement's Prohibition on Interim Determinations

The Complaint must also be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted because it violates the Indemnification Agreement and is

at odds with Delaware's scheme for advancement and indemnification.[5]

The Indemnification Agreement sets out Cognizant's broad obligation: "Advances shall be made ***without regard to … [Mr. Schwartz's] ultimate entitlement to indemnification***[.] " (Dkt. 1.1 (Indem. Agr.) at 7, § 10 (emphasis added).) The Complaint's extensive references to indemnification, rather than advancement, Dkt. 1 (Comp.) ¶¶ 25, 26, are, therefore, irrelevant here. The ***only*** conditions precedent to advancement are a) that Mr. Schwartz undertake to repay advanced amounts if it "is ultimately determined that he is not entitled to indemnification" (Dkt. 1.1 (Indem. Agr.) at 7, § 10), which he has done (*id*. at 8, § 10 (his signature is his undertaking)); and b) that the fees be certified as reasonable, which was done (*see* Dkt. 1 (Comp.) ¶ 35).

Further, under the Indemnification Agreement, "no determination as to entitlement of [Mr. Schwartz] to indemnification under this Agreement shall be required to be made prior to the final disposition" of a case for which Cognizant has advanced fees. (Dkt. 1.1 (Indem. Agr.) at 12, § 14(e); *cf*. *id*. at 6, §§ 5, 7 (Cognizant must therefore indemnify Mr. Schwartz ***after*** he is "successful, on the merits or otherwise" in a case where fees were advanced).) Moreover, in "any judicial proceeding" to enforce Mr. Schwartz's advancement rights, Cognizant may not "assert[] … that the procedures and presumptions of this Agreement are not valid, binding and enforceable," and, indeed, "shall stipulate that [it] is bound by all the provisions of this Agreement[.]" (*Id*. at 12, § 14, ¶ (d).)

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[5] On a Fed. R. Civ. P. 12(b)(6) motion, the Court may consider "documents attached to the complaint as exhibits [or] incorporated [therein] by reference"; "public records of which the court [may] take judicial notice"; documents on which the Complaint "relies heavily [for their] terms and effect," and "are undisputedly authentic and accurate," *Gaston v. Ruiz*, 2018 WL 3336448, at *2 (S.D.N.Y. July 6, 2018); or documents "in the plaintiff['s] possession or of which the plaintiff[] has knowledge and relied on in bringing suit," *Ide v. British Airway PLC*, __ F. Supp. 3d __, 2021 WL 1164307, at *3 (S.D.N.Y. March 26, 2021) (brackets in original). For this and Section C., we cite i) the Indem. Agr. (Comp. Ex. A); ii) the Delaware Court's April 7, 2020 ruling (Comp. Ex. E); iii) the Delaware Court's Orders; and iv) the Adv. Comp.

This standard order of operation (confirmed in the Advancement Case)—advancement of a corporate officer's legal fees, only later to be followed by a determination of the officer's entitlement to indemnification—is routine under Delaware law. *Compare* DGCL § 145(a)-(d) (defining a corporation's power to indemnify) *with id*. § 145(e) (governing when a corporation may advance defense expenses). *See Sider v. Hertz Global Holdings, Inc*., 2019 WL 2501481, at *3 (Del. Ch. June 17, 2019) ("'The policy of Delaware favors advancement when it is provided for, with the Company's remedy for improperly advanced fees being recoupment at the indemnification stage,' or on appeal after issues of reasonableness have been finally resolved.") (citations omitted).

Of course, the Indemnification Agreement's framework of advancement-then-indemnification would be meaningless if Cognizant could avoid its obligations under the law and in accordance with the Delaware Court's rulings simply by claiming billing fraud in this Court because it is dissatisfied with the Delaware Court's summary judgment ruling in the Advancement Case. Cognizant's payment of the Bohrer Firm's fees is simply an extension of Mr. Schwartz's advancement rights. Cognizant may pay the Bohrer Firm directly out of convenience, but it is in fact advancing the Bohrer Firm's fees ***to Mr. Schwartz***. Notably, Mr. Schwartz has never alleged fraud by the Bohrer Firm. (*See* Exh. D (Adv. Comp.) ¶¶ 45, 62-63.)

Under the advancement-then-indemnification framework, Cognizant will have an opportunity to challenge Mr. Schwartz's legal expenses during the indemnification stage of Delaware litigation. However, until and after indemnification proceedings are completed, Cognizant has not suffered any injury in fact and therefore may not assert its claims at this time, *See Spokeo, Inc. v. Robins*, 578 U.S. 856 (2016) (plaintiff "bears the burden of establishing" "irreducible constitutional minimum" of standing by demonstrating "an injury in fact" "fairly

traceable to the challenged conduct of the defendant" "likely to be redressed by a favorable judicial decision").

C. Principles of *Res Judicata* and Collateral Estoppel Also Require Dismissal

The Delaware Court ruled that "the conclusive presumption in the indemnification agreement applies to the invoices of the Bohrer Firm at issue here that relate to the criminal and SEC actions and will apply to future invoices of the Bohrer firm relating to those two actions," (Exh. E (4/7/20 Tr. Del. Ruling) at 23-24), and specifically addressed "whether the application of the conclusive presumption to the Bohrer firm's fees and expenses for the criminal and SEC actions makes those invoices immune to any challenge for reasonableness," (*Id*. at 24). The Delaware Court ruled that the only issue to which that presumption did not apply was billing for contract attorneys, which was ultimately resolved, as noted above. Yet, this action seeks to claw back fees Cognizant has advanced and will advance to the Bohrer Firm on behalf of Mr. Schwartz.

The Delaware Court's Orders together are a final judgment on the merits "for res judicata purposes." *Rafter v. Liddle*, 704 F. Supp. 2d 370, 375 (S.D.N.Y. 2010) (summary judgment had preclusive effect). This "constitutes an absolute bar to a subsequent action between the same parties, or those in privity with them, upon the same claim or demand." *7 West 57th Street Realty Co., LLC v. Citigroup, Inc.*, 2015 WL 15145397, at *23 (S.D.N.Y. March 31, 2015) (quoting *Epperson v. Entm't Express, Inc*., 242 F.3d 100, 108–09 (2d Cir. 2001)).

Res judicata binds the parties "both as to issues actually litigated and determined in the first suit, and as to those grounds or issues which might have been, but were not, actually raised and decided in that action." *Id*. (citation omitted). Here, Cognizant actually litigated in Delaware the issue of whether it could raise its billing objections as a defense to advancement, and lost.

There can be no question that the Bohrer Firm is "in privity" with Mr. Schwartz with

respect to the Delaware ruling. "Privity requires that a non-party to an earlier litigation must have had his or her interests adequately represented … by reason of legal interest or control in the first action." *Sweeper v. Tavera*, 2009 WL 2999702, at *4 (S.D.N.Y. Sept. 21, 2009) (internal quotation marks omitted). Cognizant cannot dispute "privity," since it alleges that the Bohrer Firm had a "direct, active role" in Delaware (Dkt. 1 ¶ 58), and had not only a legal interest, but also "control," there. Even if this were not so, "'[c]ourts have held that the attorney-client relationship ***itself*** establishes privity.'" *Ray Legal Consulting Grp. v. Gray*, 37 F. Supp. 3d 689, 701 (S.D.N.Y. 2014) (emphasis added; citation omitted); *Hansen*, 2020 WL 5802289, at *16.

Similarly, the Complaint is barred by collateral estoppel, which "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior [] proceeding and decided against that party … whether or not the tribunals or causes of action are the same." *Wenegieme v. U.S. Bank Nat'l Ass'n*, 2017 WL 1857254, at *9 (S.D.N.Y. May 4, 2017), *aff'd*, 715 Fed. App'x 65 (2d Cir. 2018) (internal quotation marks omitted); *see also Epperson*, 242 F.3d at 108. Whether Cognizant can object to the Bohrer Firm's billing in advance of an indemnification proceeding was raised and decided against Cognizant in the Delaware Court. Since Cognizant had a "full and fair opportunity" to litigate in the Delaware Court, *id*, it is precluded from relitigating this issue here and this case should therefore be dismissed.

D. <u>This Court Should Abstain Under the *Colorado River* Abstention Doctrine</u>

This Court should also dismiss or stay the action under the *Colorado River* abstention doctrine, because of the parallel litigation in the Delaware Court, which (a) retained continuing jurisdiction over these attorneys' fees issues; (b) is adjudicating Mr. Schwartz's recent application for injunctive and other relief; and (c) has exclusive jurisdiction over the later indemnification phase of the attorneys' fees dispute.

In *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), the

Supreme Court held that federal courts may abstain when there is similar litigation pending in state court. Abstention may take the form of a stay or dismissal. *Id.* at 813 ("a District Court may decline to exercise or postpone the exercise of its jurisdiction'") (citation omitted); *Sitgraves v. Fed. Home Loan Mortg. Corp.,* 265 F. Supp. 3d 411 (S.D.N.Y. 2017) (granting dismissal); *Gabelli v. Sikes Corp.,* 1990 WL 213119 (S.D.N.Y. Dec. 14, 1990) (granting stay).

Colorado River contemplates a two-step inquiry. "First, the court must determine that the state and federal proceedings are parallel." *Pappas Harris Cap., LLC v. Bregal Partners, L.P.*, 2021 WL 3173429, at *3 (S.D.N.Y. July 27, 2021). If so, a court then assesses six *Colorado River* factors to decide whether abstention is warranted. *See Sitgraves,* 265 F. Supp. 3d at 413 (synthesizing factors from *Colorado River* and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*, 460 U.S. 1, 23-26 (1983)). *Colorado River* abstention is warranted here.

1. <u>There Are Parallel Proceedings in the Delaware Court</u>

The proceedings in the Delaware Court are "parallel" to this action under *Colorado River*. Cases are "parallel" where "'substantially the same parties are contemporaneously litigating substantially the same issue[s]' in both forums." *Pappas Harris Cap., LLC*, 2021 WL 3173429, at *3 (brackets in original) (citations omitted). That is clearly the case here. As noted above, the recent Delaware filing is no more than an attempt to enforce the Delaware Court's ruling in the Advancement Case.

<u>Substantially the same parties</u>: Under *Colorado River*, the Bohrer Firm and Mr. Schwartz are "substantially the same parties," because their interests—the Bohrer Firm's continuing representation of Mr. Schwartz in the underlying matters—are congruent. *Canaday v. Koch*, 608 F. Supp. 1460, 1475 (S.D.N.Y.), *aff'd sub nom. Cannady v. Valentin*, 768 F.2d 501 (2d Cir. 1985) ("Where the interests of the [relevant parties] in each of the suits are congruent, *Colorado River* abstention may be appropriate notwithstanding the nonidentity of the parties."); s*ee also*

Greenburgh No. 11 Fed'n of Tchrs. v. Bd. of Educ. of Greenburgh Eleven Union Free Sch. Dist., 2006 WL 4490731, at *2 (S.D.N.Y. Sept. 26, 2006) ("exact identity of parties is not required ").

While Cognizant tries to distinguish the Bohrer Firm and Mr. Schwartz, the Complaint instead cements their interests as congruent. *Cf. Pappas Harris*, 2021 WL 3173429, at *7 (parties' interests are congruent when they allegedly "act in unison"); *Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285, 1288 (7th Cir. 1988) (parties are substantially the same when "the relief requested will benefit [both of] them") (citing *Canaday*, 608 F. Supp. at 1475).

The Complaint states that Mr. Bohrer "played a direct, active role in the [Advancement Case]," and that the Bohrer Firm was "intimately involved in the filings made on Schwartz's behalf, including drafting significant portions of the filings." (Dkt. 1 (Comp.) ¶¶ 58, 59.) It alleges that the Bohrer Firm (***not*** Mr. Schwartz, the party to the Advancement Case) was "not candid with the [Delaware] court." (*Id*. ¶ 59.) It says that invoices for Mr. Schwartz's representation submitted to Cognizant under the Indemnification Agreement were presented under cover of the Bohrer Firm's affidavits. (Dkt. 1 (Comp.) ¶ 35.) Cognizant's letter to this Court (opposing an extension of time) asserts that the Bohrer Firm "enlisted Steven Schwartz, their client" to file his most recent Delaware Court papers to enjoin this action. (Dkt. 18 at 1). All of these allegations indicating that Mr. Schwartz and the Bohrer Firm acted in unison underscore that their interests cannot be viewed separately in this case. And, of course, the Delaware litigation has been, at all times, about the Bohrer Firm's fees. Just as the *Colorado River* doctrine cannot be avoided "by the simple expedient of naming additional parties," *Phillips v. Citibank, N.A.*, 252 F. Supp. 3d 289, 298 (S.D.N.Y. 2017), the doctrine cannot be avoided simply by ***not*** naming Mr. Schwartz—for whom the Bohrer Firm submits its invoices—as a party here.

Substantially the same issues: Cognizant is litigating substantially the same issues in

Delaware and here. *Colorado River* does not require "[p]erfect symmetry of … issues[.]" *Sitgraves,* 265 F. Supp. 3d at 413. The core issue here and in Delaware—whether Cognizant can object to the Bohrer Firm's fees at this time on the basis of purported billing fraud—was decided against Cognizant by the Delaware Court, and Mr. Schwartz is currently asking the Delaware Court to re-confirm that decision. This readily satisfies the parallelism requirement. *Amex, Inc. v. Rowland*, 25 F. Supp. 2d 238, 244 (S.D.N.Y. 1998) ("[r]ather than apply a rigid rule that entire lawsuits must be identical, … the 'parallel' requirement is satisfied when the main issue in the case is the subject of pending litigation") (citations omitted). Indeed, Cognizant cannot avoid the fact that it is litigating substantially the same issues here and in Delaware by attempting to characterize this action as one for fraud by the Bohrer Firm, when Cognizant seeks to recover "all payments" it advanced to the Bohrer Firm on behalf of Mr. Schwartz. (Dkt. 1 (Comp.) at 18.) "Merely raising an alternative theory of recovery, which may ***still*** be raised in state court, is not enough to differentiate the federal suit from the state suit." *Telesco v. Telesco Fuel and Mason's Materials, Inc.* 765 F.2d 356, 362 (2d Cir. 1985) (emphasis added). Cognizant can ***still*** raise its billing objections, including the allegations made here, in a Delaware indemnification proceeding.

Alternative bases for parallelism: Parallelism is also achieved where there "is a substantial likelihood that the state litigation will dispose of *all* claims presented in the federal case." *Sitgraves*, 265 F. Supp. 3d at 413 (emphasis in original); *see also Bernstein v. Hosiery Mfg. Corp. of Morgantown, Inc*., 850 F. Supp. 176, 184 (E.D.N.Y. 1994) ("even if the claims asserted in the two proceedings are not identical, if the state proceeding would permit adjudication of the claims asserted in the federal proceeding, the proceedings are parallel") (citing *Telesco*, 765 F.2d at 362). If the Delaware Court a) uses its injunctive or contempt

authority to end this litigation now, and/or b) ultimately decides that Cognizant may or may not recoup the Bohrer Firm's legal fees it has advanced to Mr. Schwartz, this will dispose of all claims presented in this case, and "there will be no basis for a claim against [the Bohrer Firm] in this Court [.]" *Phillips v. Citibank*, 252 F. Supp. 3d at 297.

Even if it could be said "that [Cognizant] seek[s] different, and even conflicting forms of ***recovery*** in this action," that would not "defeat parallelism, where the underlying events remain identical." *Id*. at 296 (emphasis added). Cognizant's affirmative defenses to advancement in the Delaware Court, and its recharacterization of those defenses as fraud claims in this Court, arise out of identical "underlying events"—Mr. Schwartz's requests for advancement of the Bohrer Firm's legal fees and the Bohrer Firm's underlying billing practices.

Finally, "the introduction of theories of recovery in [federal court] that would necessarily interfere with [state court] proceedings demonstrates exactly why the two actions should not proceed contemporaneously." *Id*. at 296-97. Cognizant's claims here necessarily interfere with pending Delaware proceedings which Mr. Schwartz recently filed as a continuation of the Advancement Case to enforce the Delaware Court's Orders.

The Delaware Court proceedings and this action are thus "parallel."

2. The *Colorado River* Factors Favor Abstention

The *Colorado River* factors favor abstention here. Courts have derived six factors from the *Colorado River* cases, but the doctrine does not "prescribe a bright line rule," *Gabelli*, 1990 WL 213119, at *3; no single factor is determinative; and "[t]he weight to be given to any one factor may vary greatly from case to case," *Moses H. Cone*, 460 U.S. at 16.

Assumption of Jurisdiction over a *Res* favors abstention because the Delaware Court has already assumed jurisdiction over the *res* in dispute by ordering Cognizant to advance attorneys' fees, subject to further proceedings concerning any recovery by Cognizant of those advances. *Cf.*

First Union Nat. Bank of Fla. v. Margo Farms del Caribe, Inc., 875 F. Supp. 73, 77 (D.P.R. 1995) ("the *res* in dispute is the money loaned under the agreement"); *In re Motors Liquidation Co*., 460 B.R. 603, 616 n.61 (S.D.N.Y. Bankr. 2011) (loan proceeds were "a res" "with potential value"), *rev'd and remanded on other grounds*, *U.S. Dep't of Treasury v. Official Committee of Unsecured Creditors of Motors Liquidation Co*., 475 B.R. 347 (S.D.N.Y. 2012).

Inconvenience of the Federal Forum weighs in favor of abstention because "there is plainly inconvenience in having to litigate actively in both state and federal courts at the same time." *Phillips v. Citibank*, 252 F. Supp. 3d at 299 (quoting *Lefkowitz v. Bank of N.Y.*, 676 F. Supp. 2d 229, 275 (S.D.N.Y. 2009)).

Avoidance of Piecemeal Litigation, a "paramount consideration" under *Colorado River* due to the possibility of "inconsistent disposition of the[] claims," *Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York*, 762 F.2d 205, 211 (2d Cir. 1985), favors abstention. There is a risk here of inconsistent rulings if Delaware a) now re-confirms Cognizant's advancement liability, or b) ultimately approves the Bohrer Firm's bills, thereby precluding Cognizant from recouping those fees from Mr. Schwartz, but this Court, on the other hand, finds fault with those same bills and orders damages (*i.e.,* a return of some or all of the same fees). "Because preserving these parallel proceedings would 'waste judicial resources and invite duplicative effort,' and possibly allow inconsistent results, this factor heavily favors abstention." *Gustavia Home, LLC v. FV-1, Inc*., 2020 WL 927579, at *2 (E.D.N.Y. Feb. 26, 2020) (citing *Arkwright*, 762 F.2d at 211).

Order in Which Jurisdiction Was Obtained favors abstention because the Delaware Court first obtained jurisdiction. Cognizant admits as much by alleging a prior fraud on the Delaware Court. (Dkt. 1 (Comp.) § D & ¶ 59.) There has been considerable activity in Delaware (*see e.g.* Exh. L (Adv. Case Dkt.)), and virtually no activity in this Court. Mr. Schwartz filed his

complaint in the Advancement Case, specifically seeking advancement ***of the Bohrer Firm's legal fees***, on December 16, 2019, exactly eighteen months before Cognizant filed its Complaint here. The Advancement Case was actively litigated in Delaware in 2019 and 2020, with at least 22 substantive filings, seven telephone conferences, and two oral arguments (Exh. L), until Cognizant resolved the "contract attorney issue," and the Delaware Court issued its Sept. 22 Order retaining jurisdiction. (Exh. F (9/20 Del. Order).) The recent and continuing Delaware proceedings are no more than an effort to enforce the Delaware Court's Orders and was only styled as a "Complaint" for administrative convenience. *See* n.3, *supra*. Meanwhile, "[i]n this action, in contrast, the instant motion is the only substantive activity to date. Thus, this factor weighs strongly in favor of a stay or abstention." *Pabco Const. Corp. v. Allegheny Millwork PBT*, 2013 WL 1499402, at *4 (S.D.N.Y. Apr. 10, 2013); *see American Disposal Services, Inc. v. O'Brien* 839 F.2d 84, 88 (2d Cir. 1988) (affirming abstention when state court "received extensive briefing on the issues involved, has heard oral arguments, and has rendered interlocutory orders addressing the merits of the underlying claims," whereas "the federal court proceedings … have instead concentrated on the propriety of bringing suit in federal court at all").

Whether Federal or State Law Provides the Rule of Decision favors abstention because the Complaint alleges exclusively state-law issues. "Abstention is favored where 'the bulk of litigation would necessarily revolve around the state-law … rights' of the parties." *IT Source, LLC v. Yash Tech., Inc*., 2007 WL 9753188, at *5 (D. Conn. Dec. 19, 2007) (citing *General Reinsurance Corp. v. Ciba-Geigy Corp*., 853 F.2d 78, 82 (2d Cir. 1988)). Both the Indemnification Agreement and the By-Laws unequivocally state that Delaware Law applies. DGCL § 145 contains a comprehensive scheme governing advancement and indemnification,

and the Delaware Chancery Court routinely decides whether a Delaware corporation is liable for advancement or indemnification. *See, e.g., DeLucca v. KKAT Management, LLC*, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006) ("this is yet another case in which defendants in an advancement case seek to escape … the broad grant of mandatory advancement they forged on a clear day"); *Hyatt v. Al Jazeera America Holdings II, LLC*, 2016 WL 1301743 (Del. Ch. March 31, 2016) ("Advancement cases in this Court tend to follow a familiar pattern[, where] an employer offers a prospective employee an incentive: a right to advancement for litigation costs arising from her employment, … [t]he employee seeks to exercise her right to advancement, and a kind of 'hirer's remorse' sets in with the employer[.]"). The Delaware Court has already applied Delaware law in ordering advancement of the Bohrer Firm's legal fees, and Delaware law is without question the exclusive means of resolving Mr. Schwartz's ultimate entitlement to indemnification. (Dkt. 1.1 (Indem. Agr.) at 15, § 23).

Adequacy of State Procedures to Protect Plaintiff's Federal Rights is a neutral factor: No federal rights are at stake here, since the Complaint alleges only state-law claims "all of which can be sufficiently litigated in, and resolved by, the [Delaware] court." *Ferolito v. Menashi*, 918 F. Supp. 2d 136, 144 (E.D.N.Y. 2013); *see Gustavia Home*, 2020 WL 927579, at *3.

3. The Court Should Dismiss or Stay the Action

The Delaware Court is presiding over parallel proceedings and five *Colorado River* factors favor abstention (one factor is neutral), so this Court should dismiss or stay this action on that basis, should it not dismiss on the bases set forth above. There is no reason for this Court to adjudicate a Delaware-law dispute about whether Cognizant's advancements of the Bohrer Firm's legal fees, ordered by the Delaware Court, result from fraud.

In that regard, a court may take into account "the vexatious or reactive nature" of later litigation in deciding whether to abstain under *Colorado River. Bernstein*, 850 F. Supp. at 184

(quoting *Moses H. Cone*, 460 U.S. at 17 n.20)); *see also Abe v. New York University*, 2016 WL 1275661, at *9 (S.D.N.Y. March 30, 2016) (collecting cases). The Indemnification Agreement, the Delaware Court Orders, and Delaware law, all guarantee Mr. Schwartz's right to counsel of his choosing, something Cognizant has admitted. (Exh. K (Cognizant Opp.) at 28.) Requiring the Bohrer Firm to devote resources to defending this action and risk disclosure of Mr. Schwartz's criminal defense strategy and privileged information, under the threat of a (meritless) demand for "damages," is vexatious, not only because it could hamper Mr. Schwartz's defense of the underlying actions, but also because it is reactive and corrosive to the Delaware Court's jurisdiction and Orders. The Complaint should be dismissed.

In the alternative, this Court should stay this action pending final resolution of the indemnification issue in Delaware. A court may stay proceedings in anticipation of a state court's ruling, to avoid waste and duplication of judicial resources. *See IT Source*, 2007 WL 9753188, at *6 (citation omitted). That is precisely the case here, per the Delaware Court's prior Orders, where Cognizant's fraud claims for damages may be addressed in the Delaware Court during the indemnification phase. *See Phillips v. Citibank*, 252 F. Supp.3d at 303 ("Following [the Delaware Court]'s determinations regarding liability and relief, … [a remaining fraud] claim will either be foreclosed completely or [this] Court will be left with very little to do.").

E. <u>This Court Should Stay this Action Regardless of *Colorado River*</u>

Finally, even if this Court declines to abstain on *Colorado River* grounds, the Court should exercise its authority to stay the action pursuant to its inherent authority to manage its own docket. *In re World Trade Ctr. Disaster Site Litig.*, 722 F.3d 483, 487 (2d Cir. 2013) ("[D]istrict courts possess the 'inherent power' and responsibility to manage their dockets 'so as to achieve the orderly and expeditious disposition of cases.'") (citation omitted); *Chartis Seguros Mexico, S.A. v. HLI Rail & Rigging, LLC*, 2011 WL 13261585, at *2 (S.D.N.Y. Nov. 3, 2011).

That is because, even where no particular abstention doctrine applies, "a federal court is not precluded, in the exercise of its discretion, from staying proceedings in the action before it pending a decision by the state court, with a view to avoiding wasteful duplication of judicial resources and having the benefit of the state court's views." *Giulini v. Blessing*, 654 F.2d 189, 193 (2d Cir. 1980).[6]

An additional factor strongly favors a stay: the Bohrer Firm's defense here would be hampered by its confidentiality obligations to Mr. Schwartz. The Complaint's fraud allegations are untrue, but it would be challenging for the Bohrer Firm to justify all the work that it has done for Mr. Schwartz without revealing defense strategy and information protected by Mr. Schwartz's attorney-client privilege—and it cannot do this, at least while proceedings against Mr. Schwartz are pending. Basic equity requires a stay until the underlying actions are completed. If there is any doubt about whether the Court should dismiss the Complaint or abstain, it should stay the matter, at least until the Delaware Court has had an opportunity to rule.

CONCLUSION

The Court should dismiss the Complaint, or, in the alternative, stay the action.

[6] The following is pertinent: "(1) considerations of comity; (2) promotion of judicial efficiency; (3) adequacy and extent of relief available in the alternative forum; (4) identity of parties and issues in both actions; (5) likelihood of prompt disposition in the alternative forum; (6) convenience of the parties, counsel and witnesses; and (7) possibility of prejudice to a party as a result of the stay." *Van Wagner Enterprises, LLC v. Brown*, 367 F. Supp. 2d 530, 531 (S.D.N.Y. 2005). Some of these factors have already been discussed, and weigh in favor of a stay. In addition, Cognizant is a Delaware corporation, and did not previously object to a trial in the Delaware Court, so it will not be inconvenienced. Cognizant, which has opposed expedited proceedings in the Delaware Court (Exh. I), will not be prejudiced by any delay. Again, Cognizant will be able to raise its fraud claims in the indemnification proceedings. Since Cognizant says it will continue advancing the Bohrer Firm's fees until the conclusion of the cases against Mr. Schwartz, it can claim no prejudice by waiting until then.

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