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IN THE

Supreme Court of the State of Delaware

BRIAN E. PEIERLS AND
E. JEFFREY PEIERLS,

Petitioners Below-Appellants.

No. 11, 2013
No. 12, 2013
No. 13, 2013

COURT BELOW:

COURT OF CHANCERY OF
THE STATE OF DELAWARE
C.M. No. 16810-N-VCL
C.M. No. 16811-N-VCL
C.M. No. 16812-N-VCL

AMICUS CURIAE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS
AND STATEMENT OF INTEREST

Petitioners are current beneficiaries or trustees of thirteen trusts — five *inter vivos*, seven testamentary, and one charitable — variously formed and administered in New York, New Jersey, Texas, and Washington. On October 10 and 11, 2012, claiming dissatisfaction with the trusts' institutional trustees and seeking to "modernize" the trust instruments, petitioners filed eight consent petitions in the Court of Chancery under recently adopted Rules 100-103. The Rules contain detailed requirements for disclosure of information bearing on the court's independent review of consent petitions.

The petitioners asked the court to approve (a) replacing the long-standing institutional trustees with a new, directed corporate trustee with greatly reduced fiduciary responsibilities; (b) altering the investment advisory structure of the trusts, including who could be paid from the trusts; (c) changing other substantive terms of trust administration; and (d) moving the situs of the trusts to Delaware.

Instead of rubber-stamping the consent petitions, the Court of Chancery conducted an independent review and found multiple ways that the petitions did not comply with court rules and applicable law, disregarded settlor intent, and created actual or potential conflicts with other states. In opinions dated December 10 and 11, 2012, the court denied the petitions. These appeals followed.

On February 6, 2013, this Court *sua sponte* designated Collins J. Seitz, Jr. as *amicus curiae* for the purpose of filing an answering brief in the appeals. Neither Mr. Seitz nor his law firm have any personal interest in the appeals.

SUMMARY OF ARGUMENT

Because consent petitions are non-adversarial, it is especially important that they comply with the court rules and applicable law. Far from "unilaterally developing on its own and imposing requirements that did not exist previously" as petitioners claim (Op. Br. 41), the Court of Chancery reviewed the very items that its rules require to be addressed in a petition seeking to confirm a change of situs of a trust from another state. *See* Ct. Ch. R. 100(d)(2) (choice-of-law provisions); (d)(3) (whether application has been made to courts of the other state); (d)(4) (why Delaware is the "principal place of trust administration"); (d)(5) (whether a court of another jurisdiction has taken action relating to the trust). The court found the petitions deficient on multiple grounds, some of which were not contested in petitioners' opening brief. The Court of Chancery's denial of the petitions should be affirmed.

I. Denied. The Court of Chancery correctly respected the settlors' designation of the law of other states to govern administration of the *inter vivos* trusts. 12 *Del. C.* § 3332(b) does not change this conclusion. Among other things, § 3332(b) does not apply if "otherwise expressly provided by the terms of a governing instrument" — the case here. And the choice of law expressed in the statute only applies *after* a trust has been moved to Delaware. Because the statute did not control the law governing administration of these trusts, the court correctly looked to common law and Restatement principles for guidance. Under these authorities, "where the donor in a trust agreement has expressed . . . his intent to

have his trust controlled by the law of a certain state, there seems to be no good reason why his intent should not be respected." *Wilmington Trust Co. v. Wilmington Trust Co.*, 24 A.2d 309, 313 (Del. 1942). Point I.C.2, below.

II. Denied.

A. The Court of Chancery correctly held that it could not rule on some aspects of the petitions relating to the *inter vivos* and charitable trusts that did not present an "actual controversy." IVT Op. 7-10; CLU Op. 5-7. Petitioners do not dispute that the requests did not present an actual controversy under the Declaratory Judgment Act. Instead, petitioners argue that invocation of Rule 100 alone is sufficient to confer jurisdiction. Op. Br. 29-30. But the requirement of an actual controversy is jurisdictional. Rule 100, like all Court of Chancery Rules, "shall not be construed to extend . . . the jurisdiction of the Court of Chancery." Ct. Ch. R. 82. It is bedrock law that Chancery jurisdiction exists only to decide actual controversies. Points I.C.3 & III.C.1, below.

B. Whether characterized as "reformation" or "modification," the Court of Chancery correctly declined to grant petitioners' requests to change certain *inter vivos* and charitable trust provisions because the petitions failed to address the law of the trusts' home states regarding reformation and modification. Points I.C.4 & III.C.2, below.

C. The Court of Chancery correctly inquired as to the "principal place of administration" of the *inter vivos* trusts. Contrary to petitioners' suggestion that this was a novel requirement, such information is expressly called

for by the very rule under which the petitions were submitted. Ct. Ch. R. 100(b)(3) & (d)(4). Point I.C.2.b.iii, below.

D. The Court of Chancery acted within its discretion in dismissing the testamentary trust petitions on the basis of comity. The trusts already were, or appeared likely to be, subject to the jurisdiction of the courts of other states. Point II, below.

E. Other grounds for the Court of Chancery's decision, which petitioners' brief does not address, were also valid and should be affirmed. *See* Points I.C.1, I.C.5.

III. Denied. As an initial matter, petitioners' claim that the Court of Chancery "substitut[ed] its view of what the policy of the State should be for that of the legislature" (Op. Br. 41) is belied by the fact that the consent petition practice is not even authorized by statute, but is instead an exercise of the Court of Chancery's historic equitable powers over trusts. In any event, the court's rulings are fully consistent with Delaware public policy. The General Assembly's statutory enactments do not reflect the sweeping public policy concerns that petitioners purport to extract from them. Indeed, Delaware's interests cut the other way. In this era of multi-jurisdictional corporate litigation and heightened tensions between Delaware and sister states over forum issues, showing respect for other states before declaring non-resident trusts to be under Delaware control is fully consistent with Delaware's important interest in encouraging other states to show similar respect for our courts in cases involving Delaware corporations and other Delaware entities. Point IV, below.

STATEMENT OF FACTS

A. The Peierls Trusts

At issue are five *inter vivos* trusts, seven testamentary trusts, and one charitable lead unitrust established by various members of the Peierls family. The relationships between those settlors and beneficiaries Jeffrey Peierls, Brian Peierls, and Brian's children Stefan Peierls and Derek Peierls are shown below.

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Delaware is not the current situs of any of the trusts. With one exception discussed below, none of the current trustees are Delaware residents. See Exhibit A (summarizing trust provisions).

1. The *inter vivos* trusts

Four petitions concerned *inter vivos* trusts. Jennie settled two trusts under a January 14, 1953 agreement; Edgar created one trust under a May 24, 1957 agreement; and Ethel established two trusts under an August 14, 1975 agreement.

i. The 1953 Trusts

Jeffrey and Brian are each sole current beneficiaries of one of the two 1953 Trusts. Brian is the presumptive remainder beneficiary of Jeffrey's 1953 Trust. Stefan and Derek are contingent remainder beneficiaries of Jeffrey's 1953 Trust and presumptive remainder beneficiaries of Brian's 1953 Trust. B703, B862.

Article TENTH of the 1953 Trusts' governing documents requires that the trusts always have two individual trustees and an institutional trustee. B723, B881. Under Article TWELFTH, the corporate trustee is entitled to one full trustee's commission as allowed on principal and income by New York law, while the individual trustees may split between them any excess testamentary commissions. B726, B884. Article TWELFTH also allows the Trustees to employ counsel and agents, and to pay them from the trusts. B726-27, B884-85. The 1953 trust agreements include no provisions concerning the indemnification of trustees.

The initial situs of the 1953 Trusts was New York. B703, B861. Article THIRTEENTH of the 1953 Trusts provides:

> This trust has been created by the Settlor and accepted by the Trustees in the State of New York, and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of the State of New York.

B727, B885.

In August 1999, Jeffrey and Malcolm Moore ("Malcolm") exercised their power as individual trustees to replace U.S. Trust Company of New York ("U.S. Trust New York") as corporate trustee with U.S. Trust Company of Texas, N.A.

("U.S. Trust Texas"). B702, B861. Notwithstanding Article THIRTEENTH, petitioners maintain that the 1953 Trusts have been administered in accordance with Texas law since 1999. B703, B862.

ii. The 1957 Trust

Edgar created the 1957 Trust for the benefit of Jeffrey, Brian, and Ethel (Edgar's wife). Jeffrey, Brian, Stefan and Derek are the current beneficiaries of the 1957 Trust. Stefan and Derek are the presumptive remainder beneficiaries. B110.

Paragraph 5 of the 1957 Trust's governing document requires the trust always to have two individual trustees and a corporate trustee. B124. Jeffrey, Malcolm, and U.S. Trust New York currently serve as trustees. B109-10.[1]

All trustees are permitted commissions allowed on principal and income according to New York law applicable to testamentary trustees. B127. The 1957 trust agreement contains no provisions concerning indemnification of trustees.

Section 7(h) of the 1957 Trust provides: "This Indenture shall be construed and regulated, and its validity and effect determined by the laws of the State of New Jersey." B128. The 1957 Trust's situs was originally in New Jersey. B32. An order of the Superior Court of New Jersey dated March 16, 2001 transferred the situs of the 1957 Trust to New York. B32. Although the order makes no reference

[1] Paragraph 7(f) of the 1957 trust agreement provides: "A son shall not be counted for the purpose of determining the number of individual Trustees under the first sentence of paragraph 5 of this agreement." B128. It is unclear from the petition how the trustees satisfied this requirement.

to a change of governing law, petitioners assert that the 1957 Trust has been administered in accordance with New York law since the transfer. B32, B97-99.

iii. The 1975 Trusts

Ethel created the two 1975 Trusts for the benefit of Jeffrey and Brian, respectively. Jeffrey and Brian are the sole current beneficiaries of their 1975 Trusts. Brian is the presumptive remainder beneficiary of Jeffrey's trust. Stefan and Derek are the presumptive remainder beneficiaries of Brian's trust. B554. Jeffrey, Malcolm, and U.S. Trust New York currently serve as trustees. B554.

The 1975 trust agreement provides that Jeffrey and Brian, if trustees, "shall serve as Trustees without compensation." B569. The 1975 trust agreement contains no provisions regarding indemnification of the trustees.

Section 8(b) of the agreement provides that "[t]his Agreement shall be governed by and its validity, effect and interpretation determined by the laws of the State of New York." B571. New York is the original and current situs. B554.

2. The testamentary trusts

Three of the petitions addressed seven testamentary trusts: two trusts created via Edgar's will dated June 30, 1960; two trusts created via Jennie's will dated November 18, 1969; and three trusts created via Elizabeth's will dated April 4, 2005.

i. The 1960 Trusts

Article SIXTH, Subdivision (e) of the Last Will and Testament of Edgar S. Peierls ultimately created two trusts for the benefit of Brian and Jeffrey,

respectively. B934. Brian, Stefan and Derek are current beneficiaries of Brian's trust, Stefan and Derek are presumptive remainder beneficiaries. Jeffrey is a remote contingent beneficiary. Jeffrey is the current beneficiary of his trust, with Brian as a presumptive remainder beneficiary. Stefan and Derek are the remote contingent beneficiaries. B1021.

Edgar died a resident of New Jersey. As a result, New Jersey is the situs of the 1960 Trusts. B1020. Petitioners assert that the current trustees are Jeffrey, Brian, and Northern Trust. B1020, B1024. On September 13, 2012, the New Jersey Surrogate's Court for Essex County certified the appointment of Northern Trust as trustee and issued letters of succeeding trusteeship. B1076.[2]

Article EIGHTH, section (n) of the Edgar's will permits the trustees to employ investment advisors, but specifically grants the trustees the "absolute discretion [to] follow or refrain from following any recommendations so obtained . . . ." B1047. The will contains no provisions for indemnification of trustees.

The will creating the 1960 Trusts is silent as to governing law. The petition asserts that New Jersey law has governed administration since inception. B1020.

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[2] As the court below noted, the petition contradicts the September 13, 2012 certificate issued by the New Jersey court in certain respects. *First*, the certificate lists Jeffrey, Brian, Philip J. Hirsch ("Hirsch") and Northern Trust as trustees, while the petition neither mentions Hirsch nor suggests that he has resigned as Trustee. B1076. *Second*, the certificate states that Jeffrey is a resident of New Jersey, while the letter accompanying the petition states that he is a resident of Colorado. B945, B1076. *Third*, the petition states that "[t]he situs of the Trusts was moved to Delaware by virtue of the Certification. . . ." B1025. The certificate does not speak to situs at all (B1076) and, were this true, would render redundant the Transfer of Situs executed by Northern Trust, which is contingent on approval of the court below (B1095).

On March 16, 2001, the Superior Court of New Jersey, Chancery Division, Essex County approved an "intermediate" accounting of the 1960 Trusts. B1058-61. Nothing in the record indicates that the New Jersey court has received a final accounting or released jurisdiction.

ii. The 1969 Trusts

Article FOURTH of the Last Will and Testament of Jennie Newgass Peierls created two trusts, one for Brian and one for Jeffrey. Brian, Stefan and Derek are current beneficiaries of Brian's trust, Stefan and Derek are presumptive remainder beneficiaries, and Jeffrey is a remote contingent beneficiary. B244. Jeffrey is sole current beneficiary of his trust, with Brian as a presumptive remainder beneficiary and Stefan and Derek as remote contingent beneficiaries. B244. The current trustees of the 1969 Trusts are Jeffrey, Malcolm, and U.S. Trust Texas. B243-44.

Article SIXTH of Jennie's will, as amended, provides that while Brian or Jeffrey may qualify as trustees, either of them "before qualifying hereunder, shall waive compensation for his services. . . ." B274. Article EIGHTH, Section (a) provides that every executor or trustee "shall not be liable to my estate or any person beneficially interested hereunder for any loss or depreciation which may arise from any investment retained or made in accordance with the provisions of this Will. . . ." B270. Article SIXTH does not specifically provide for indemnification of trustees.

The will is silent as to the law governing the 1969 Trusts. B243. The initial situs was New York. By a September 23, 1999 order of the Probate Court of

Dallas County, Texas, the situs was moved to Texas, contingent upon an order of the Surrogate's Court of New York, which was granted on March 29, 2000. B243, B277-82. A May 18, 2001 order of the Texas court stated that Texas law governs administration and New York law governs disposition of property. B284-86. There is no indication in the record that the Texas court has released jurisdiction.

iii. The 2005 Trusts

The Last Will and Testament of Elizabeth B. Peierls, Dated April 4, 2005, created three trusts, described by petitioners as The Peierls Marital Trust No. 1, The Peierls Marital Trust No. 2, and The Peierls By-Pass Trust. B1217. Brian is the sole current beneficiary of the Marital Trusts. Brian, Stefan and Derek are the current beneficiaries of the By-Pass Trust. Stefan and Derek are presumptive remainder beneficiaries of all three 2005 Trusts. Brian is the current trustee. B1221.

Elizabeth's will established rules for who could be a trustee or co-trustee. For example, if Brian fails to serve as co-trustee, her children, subject to conditions, have the option to appoint themselves as co-trustees. B1233. Brian is the only trustee not entitled to "fair and reasonable compensation." B1234.

Trustees are entitled to appoint "a corporate fiduciary as a special agent or investment advisor" to administer trusts created under the will. The will makes no provision for individual special agents or investment advisors. B1236.

The current situs of the trusts is in Texas. PART TWO, Article 3, Paragraph 3.1(u) of the Elizabeth's will provides that:

> [I]f the Trustee shall be or become a resident of or have principal place of business in a state other than Texas, the situs of the trust may be changed to the place of residence of an individual Trustee who is serving alone as sole Trustee or to the place of business of a corporate Trustee if one is then serving as sole or Co-Trustee.

B1282. This change may be "by agreement of the Trustee . . . and the adult income beneficiaries of the Trust, without court approval or joinder of any minor." Paragraph 3.1(u) further provides that "[u]nless the situs of any trust is changed, the laws of the State of Texas shall control the administration and validity of any trust." B1282. The petition does not state where Elizabeth died or whether any court is engaged in ongoing probate matters with respect to the trusts. TT Op. 9.

3. The Charitable Lead Unitrust

One of the petitions addresses the Ethel F. Peierls Charitable Lead Unitrust, which Ethel created by an instrument dated September 12, 1994. The Peierls Foundation is the trust's sole current beneficiary. B428. Brian and Jeffrey, acting jointly, may designate "Qualified Organizations" as alternate beneficiaries. Those Qualified Organizations are thus potential current beneficiaries. B427. Stefan and Derek are the presumptive remainder beneficiaries. B427.

Jeffrey and Brian serve as current trustees, and neither may receive compensation for their service. B426, B450. The trust's governing instrument does not provide for indemnification of trustees.

Article SEVENTH, Paragraph 7.1 states that the situs of the trust, as to personal property, shall be either "the location of the main business office of the Trustee who then has custody of the trust records, wherever the Trustee may locate

that office," or "any other situs (designated by the Trustee in a writing filed with the trust) that has sufficient contact with the trust to support jurisdiction of its courts over the trust." B450-51. Jeffrey and Brian originally designated the state of Washington as the situs of the trust. B456.

Article SEVENTH, Paragraph 7.2 provides (B451):

> Washington law shall govern the execution and construction of this Trust Agreement. The administration of this trust, however, shall be governed first by the provisions of this Trust Agreement, including any laws incorporated in this Trust Agreement by reference or otherwise made applicable by this Trust Agreement, and second, to the extent consistent with such provisions, the laws of the trust's situs.

B. The Consent Petitions

On October 10 and 11, 2012, petitioners filed eight petitions in the Court of Chancery collectively requesting that the court (i) take jurisdiction over the trusts, (ii) approve various actions taken by current or prospective trustees and fiduciaries, and (iii) change certain substantive terms of the trusts' governing documents.

1. Delaware's consent petition practice

"Delaware has no statutory law establishing a legal standard for modification of trusts." Committee Report 10 (A49). Instead, consent petitions to modify trusts invoke the Court of Chancery's broad equitable powers over trusts. *Id.* at 8-9 (A47-48).

The petitions here were filed under recently adopted Court of Chancery Rule 100. Previously, consent petitions were submitted under an "informal procedure." *Id*. at 5 (A44). The procedure was "formalized" in a Standing Order

issued by the Court of Chancery in August 2007. *Id.* In June 2010, the Court of Chancery issued a further Standing Order that expanded the filing requirements but did not require several categories of information — including information on potential jurisdictional conflicts — that Rule 100 now requires. A7-8.

In remarks to the 2010 Delaware Trust Conference on consent petitions, then-Chancellor William B. Chandler III reflected on the evolution of the consent petition practice. William B. Chandler, *Death of the Dead Hand?, Remarks to 2010 Delaware Trust Conference*, Tuesday, Nov. 20, 2010, Hotel DuPont, DuBarry Room (A59-76) (cited at Op. Br. 5-6, 40; DBA Br. 12). In the concluding portion of his remarks, the then-Chancellor identified "[i]nteresting jurisdictional questions remain[ing] to be decided," stating:

- "The interests and prerogatives of a jurisdiction, named as a trust situs by the settlor, in a petition to transfer the trust to Delaware have yet to be considered by our courts." A75.
- "Is a decision by the Court of Chancery, accepting jurisdiction over a trust and changing the situs from another state to Delaware, based upon a consent petition made without reference to the settlors' intent, entitled to the full faith and credit of the other state's courts?" *Id.*
- "May another state's common law, or legislature, put limitations on changes of trust situs that Delaware courts must respect?" *Id.*

These concerns appear to be reflected in the new Rules 100-103, which became effective May 1, 2012 (A1-5). Rule 100(d) requires petitions seeking "to confirm a change of situs" or "to apply Delaware law to a trust despite a choice of law provision selecting the law of another jurisdiction" to address:

(1) Whether the trust instrument contains a provision expressly allowing the situs of the trust or the law governing the administration of the trust to be changed;

(2) If the trust was settled or created in a jurisdiction other than Delaware or contains a choice of law provision in favor of the law of a jurisdiction other than Delaware, whether or under what circumstances the law of the other jurisdiction authorizes changing the situs of the trust or the law governing the administration of the trust;

(3) Whether application has been made to the courts of the jurisdiction in which the trust had its situs immediately before the change of situs to Delaware for approval of the transfer of situs of the trust to Delaware . . . or if no application was made, why such approval need not be sought;

(4) Whether Delaware law governs the administration of the trust, and, if so, why. . . . [and] why Delaware is the principal place of trust administration . . . .

(5) Whether a court of any other jurisdiction has taken any action relating to the trust.

Ct. Ch. R. 100(d)(1)-(5). The accompanying release stated: "Taken together, these amendments add important integrity to the process for presenting consent petitions by making sure that the Court is presented with a full record to determine whether the proposed modifications are consistent with the intentions of the trust creator, the policy interests of other states with a connection to the trust, and, importantly, the interests of minor and unborn beneficiaries." Release, "Court of Chancery Announces Rules to Improve the Integrity of the Process for Approving Consent Applications to Modify Trusts" (Apr. 12, 2012).

2. The contingent resignations

Petitioners, the current trustees, and the prospective trustees executed documents that purported to move the situs of the trusts to Delaware — but only if first approved by the court below. Each consent petition attached a "contingent" resignation of the current trustees and "contingent" acceptance by Northern Trust of the position as successor trustee. B137-38, B143, B292-93, B299, B462-63, B468, B584-85, B591, B741-42, B748, B899-900, B906, B1066-67, B1294, B1303. The sole exception is the 1960 Trusts, where Northern Trust's acceptance was contingent on the approval of the New Jersey Surrogate's Court. B1074.

The petitions' cover letters stated that the Court of Chancery "*shall have* jurisdiction over the Trust[s] by virtue of the appointment of Northern Trust Delaware. . . ." B40, B183, B341, B508, B630, B786, B945, B1117 (emphasis added).

3. Relief requested by the consent petitions

Each of the petitions requested similar relief. First, petitioners sought Court of Chancery approval of the current trustees' resignation, and (for all but the 1960 Trusts) approval of the appointment of Northern Trust as a successor trustee. B112-13, B246-47, B429-30, B556-57, B705-06, B864, B1023, B1222-23.

Second, the petitions ask the Court of Chancery to accept jurisdiction over the trusts. In cases where the trust's governing document selects non-Delaware law as governing trust administration, the petitions seek orders "reforming" the trusts such that Delaware law would apply to trust administration. B113, B558, B707, B865, B1024. These petitions request that new language be inserted into the

trusts' governing documents expressly providing that Delaware law governs administration. B146, B594, B751, B909, B1079. Where the trusts do not expressly select the governing law (*e.g.*, the 1969 Trusts), petitioners ask the court below to "confirm" that Delaware law will henceforward govern administration of the trusts, while non-Delaware law will continue to govern their validity and construction. B247-48, B430, B1224.

Third, petitioners ask the court below to confirm that Delaware is the situs of the trust or to approve Northern Trust's transfers of situs to Delaware. B113, B247, B430, B558, B707, B865, B1024, B1224-25.

Fourth, while the various trust documents specify different numbers of trustees and other procedures, the petitions seek to "reform" the trusts to establish identical positions and procedures across all trusts, primarily focused on changing the trusts to "directed trusts," including the following:

- *Single Trustee*: Northern Trust would serve as the single corporate trustee to every trust. The Trustee would be absolved of responsibility for the investment, voting and asset management decisions of the Trust. Those responsibilities would be handled by the Investment Direction Adviser. B149-51, B307-09, B476-77, B597-99, B753-54, B912-14, B1082-84, B1313-15.

- *New Investment Direction Adviser position*: As modified, each of the trusts would have at least one Investment Direction Adviser, with sole and absolute authority to direct the trustee on all investment and management decisions. B149-51, B307-09, B476-77, B597-99, B753-54, B912-14, B1082-84, B1313-15.

- *New Trust Protector position*: Similarly, every trust would have at least one Trust Protector with the power to remove any Trustee or Investment Direction Adviser, to appoint a new

> Trustee if one resigns, or to appoint additional Investment Direction Advisers (up to a maximum of three). The Trust Protector would have the further power to amend "administrative and technical" provisions of the Trusts. The trustee would not be liable for the acts or failure to act of the Trust Protector. B154-56, B312-14, B481-83, B603-04, B759-62, B918-20, B1087-90, B1318-20.

4. Changes that the petitions did not address

The petitions were silent on several matters that Rule 100(c) requires to be addressed "with particularity." For example, Rule 100(c)(8) requires consent petitions to address "[w]hether the relief sought in the petition would lead to any limitation on, exculpation from, or indemnification for any existing or potential future liability on the part of any fiduciary." But neither the petitions nor the accompanying cover letters discuss new indemnities that study of the attached blacklines reveals. B80, B84, B228, B231-32, B400, B405-06, B537, B540, B682, B686-87, B840-41, B846, B1004, B1008, B1205-06, B1208-09.

Similarly, Rule 100(c)(6) requires a consent petition to address "[a]ny personal interest of any petitioner, or person who will serve as a fiduciary if the relief requested in the petition is granted, creating an actual or potential conflict between the interests of such person and the interests of the current, vested future, or contingent beneficiaries." Neither the petitions nor the accompanying letters mention that Jeffrey and Brian would be able to receive compensation for services in their new roles as Investment Direction Adviser that they currently must render

gratis as trustees. Unless it independently studied the attachments to the petitions and cover letters, the court would not be aware of this issue.[3]

The petitions also do not address that the proposed modifications strip certain beneficiaries of rights to which they would otherwise be entitled, *e.g.*, Stefan and Derek's right to appoint themselves co-trustees of any of the 2005 Trusts should Brian step down. *See* p. 11, above. The petitioners propose to remove that right (B1190), while Derek and Stefan would enjoy no corresponding right to appoint themselves as Investment Direction Advisors or Trust Protectors. Again, the court was left to discover the issue through review of blacklines.

C. The Opinions Below

1. The *inter vivos* trusts opinion

On December 10, 2012, the Court of Chancery denied the four petitions relating to the *inter vivos* trusts. Because the governing documents of the 1953 and 1957 Trusts provided "that there shall always be three trustees for each trust," the court reasoned that it could not approve Jeffrey and Malcolm's resignations with regard to those trusts without reforming them, which the court declined to do for reasons discussed below. IVT Op. 7. Because the governing documents for the

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[3] For example, Jeffrey and Brian may not receive compensation as trustees of the Charitable Lead Unitrust; Brian may not be paid as trustee of the 2005 Trusts; and Brian and Jeffrey must waive compensation to qualify as trustees of the 1969 Trusts. *See* pp. 10-12, above. The blacklines to these trusts' governing documents either remove these restrictions or authorize the Investment Direction Adviser (including Jeffrey or Brian) to be compensated. B229, B402, B1207.

1975 Trusts expressly authorized changing the trustees without judicial approval, the court held that there was no "actual controversy" to resolve. *Id.* at 7-10.

Second, the court denied the request for orders confirming that Delaware law governs administration. After a detailed analysis of Delaware law and Restatement principles, the court held that such orders "would be contrary to the choice of law provisions in the trust agreements," among other things. *Id.* at 10.

Third, the court below held that the request to change the situs of the trusts to Delaware must be determined according to "the law of the state which presently governs administration of the trust." *Id.* at 31. The court held that it was not in a position to address the change of situs because "[t]he petitions do not address the parameters of New York law or New Jersey law" and "it is not clear factually where trust administration principally is taking place." *Id.* at 32.

Fourth, the court held that whether the *inter vivos* trusts could be reformed was governed by New York or New Jersey law. Because "[t]he petitions do not address the parameters or New York or New Jersey law," the court held that it was "therefore not in a position to address the requests for reformation." *Id.* at 32-33.

Having denied all other relief, the court declined to accept continuing jurisdiction over the *inter vivos* trusts. *Id*. at 33.

2. The charitable lead unitrust opinion

On December 10, 2012, the Court of Chancery denied the petition relating to the Charitable Lead Unitrust. First, the court held that the governing agreement already permitted Brian and Jeffrey to resign as trustees, designate successor

trustees, and change the situs and governing law "by exercising powers expressly granted in the trust instrument" and "without judicial involvement." CLU Op. 8. The court accordingly declined to issue an advisory opinion. Second, the court found that the petition did not sufficiently establish the grounds for equitable reformation. *Id.* at 9-10. Having denied all other relief, the court declined to accept continuing jurisdiction over the Charitable Lead Unitrust. *Id.* at 10.

3. The testamentary trusts opinion

On December 11, 2012, the Court of Chancery denied the three petitions relating to the testamentary trusts. While recognizing that it had the power to accept jurisdiction, the court declined to do so based on comity.

With regard to the 1960 Trusts, the court noted that the 2001 court order and the 2012 certificate indicated the New Jersey court's ongoing jurisdiction. TT Op. 7. With regard to the 1969 Trusts, the court found that the Texas probate court had jurisdiction as a result of its orders. *Id.* at 8-9. With regard to the 2005 Trusts, the court inferred from the fact that the Marital Trusts were still being funded that there might be ongoing probate matters or issues of estate administration. *Id.* at 9.

The Court of Chancery dismissed the petitions without prejudice, indicating that the 1960 and 1969 Trust petitions could appropriately be filed in New Jersey or Texas. The court instructed that the petition with respect to the 2005 Trusts "should be filed in the jurisdiction where probate matters are ongoing or refiled with supplemental information in this Court." *Id.* at 9.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DENIED THE PETITIONS WITH RESPECT TO THE *INTER VIVOS* TRUSTS.

A. Question Presented

Did the Court of Chancery abuse its discretion or err as a matter of law in denying petitions with respect to non-resident *inter vivos* trusts where the petitioners (i) failed to address the home states' law governing change of administration, (ii) sought to override the settlors' designation of another state's law; (iii) sought advisory opinions, and (iv) failed to address the law applicable to other relief requested? The Court of Chancery raised these questions *sua sponte* and considered them. IVT Op. 6-33.

B. Scope of Review

"It is the Court's equitable power that allows it to reform a trust" and "the power to modify a trust is within the broad powers of the Court of Chancery." Committee Report 3, 8-9 (A42, A47-48). This Court reviews the Court of Chancery's decision to exercise or decline to exercise its equitable powers for abuse of discretion. *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 961 A.2d 521, 525 (Del. 2008); *In re Unfunded Ins. Trust Agreement of Capaldi*, 870 A.2d 493, 496 (Del. 2005). This Court reviews questions of law *de novo*, and reviews "challenges to subject matter jurisdiction to determine whether the trial court correctly formulated and applied legal precepts." *Shevock v. Orchard Homeowners Ass'n, Inc.*, 621 A.2d 346, 348 (Del. 1993); *Sanders v. Sanders*, 570 A.2d 1189 (Del. 1990).

C. Merits of Argument

1. The Court of Chancery may decline to change a trust's situs to Delaware where the petition does not address the other jurisdiction's law on change of situs.

a. The petitions seek orders "accept[ing] jurisdiction over the [*inter vivos* trusts] so that Delaware is the situs of the [t]rusts" and altering the instruments so that "Delaware law governs the administration of the Trust[s]." B113, B558, B707, B865. Regardless of what law might govern administration *after* a situs change, the currently governing law should apply to the change of situs itself. Yet the petitions below did not address under what circumstances New York or New Jersey law would authorize the change — instead discussing "decanting," a procedure not followed here. B37, B505. The court below found that it was therefore "not in a position to address the change of situs." IVT Op. 32.

b. The Court of Chancery was not creating a novel requirement. Rule 100(d)(2) expressly requires a consent petition to address this issue:

> [A]ny petition to modify a trust by consent that seeks to confirm a change of situs of a trust from another jurisdiction to Delaware . . . also shall address: . . . (2) If the trust was settled or created in a jurisdiction other than Delaware or contains a choice of law provision in favor of a jurisdiction other than Delaware, *whether or under what circumstances the law of the other jurisdiction* authorizes changing the situs of the trust or the law governing the administration of the trust.

Ct. Ch. R. 100(d)(2) (emphasis added).

c. On appeal, petitioners now assert that Delaware's "recogni[tion] that a trust settled under the law of a sister state c[an] be transferred to Delaware for

administration purposes . . . is the law in most other states as well." Op. Br. 38 (citing "Nonjudicial Transfer of Trust Situs Chart" (A77-93)). This is no substitute for addressing New York and New Jersey law. On that subject, petitioners' own chart states that New York statutory law is "silent with respect to the transfer of the situs or principal place of administration of a New York trust" and New Jersey statutory law is likewise "[s]ilent." A92-93.

d. The sole citation in petitioners' brief to New York or New Jersey authority is to *Matter of New York Trust Co.*, 87 N.Y.S.2d 787 (N.Y. Sup. Ct. 1949) (cited at Op. Br. 23-24). In that case, a New York trial court approved a transfer of situs for an *inter vivos* trust to California. But petitioners fail to note significant aspects of the case. Unlike here — where none of the beneficiaries or individual trustees reside in Delaware — the transfer was based on personal convenience, as California was "the present home state of those interested." *Id.* at 791, 795. Also unlike here, the trust instrument at issue "d[id] not contain a clause . . . that it is to be governed by the laws of [New York]." *Id.* at 790. And the transfer request was first presented to the *New York* court, not a California court.

e. Other New York and New Jersey cases indicate that change of situs is not automatic under their law. In *In re Rockefeller*, 773 N.Y.S.2d 529 (N.Y. Sur. Ct. 2003), trustees for a testamentary trust petitioned the court to permit a corporate trustee to resign in favor of its Delaware affiliate and to change situs to Delaware. *Id.* at 529. The court denied the request to change situs, holding that the governing instrument's contemplation of "[a]ppointment of an out-of-State trust company [as corporate trustee] . . . would not necessitate a change of situs since many out-of-

State trust companies are eligible to serve as New York trustees." *Id.* at 531. *See also In re Costello*, 2005 WL 6751005 (N.Y. Sur. Ct. Apr. 15, 2005) (Order) ("There is no authority for a change of situs simply because the parties request it."); *In re Bush*, 774 N.Y.S.2d 298, 299 (N.Y. Sur. Ct. 2003) (denying transfer of situs of testamentary trust to Delaware); *In re Hudson's Trust*, 286 N.Y.S.2d 327, 330 (N.Y. App. Div. 1968) (denying transfer of situs of *inter vivos* trust to Florida), *aff'd*, 245 N.E.2d 405 (N.Y. 1969); *cf. Swetland v. Swetland*, 149 A. 50, 52 (N.J. Ch. 1930) (expressing doubt that "the situs of a trust of personalty . . . is shifting and changes with every change in domicile of the trustee which is accompanied by a change of the location of the trust property itself"), *abrogated on other grounds by Cutts v. Najdrowski*, 198 A. 885, 886 (N.J. 1938).

2. Delaware's choice-of-law rules respect a settlor's designation of another state's law.

As the Court of Chancery found, "[e]ach of the [*inter vivos*] trusts affirmatively selects the governing law of a different jurisdiction." IVT Op. 6. The Court of Chancery held that "Delaware will enforce that choice . . . . even if a Delaware successor trustee is appointed or the situs of the trust shifts to Delaware." *Id.* at 31. Petitioners contend that, while this "is true with respect to questions of construction, interpretation or validity, it has never been the law of this State with respect to trust administration." Op. Br. 18. Petitioners also contend that that the court below "fail[ed] . . . to consider the intent of the settlor under the entirety of the trust instrument." Op. Br. 27. Petitioners are incorrect on both points.

a. "When conducting a choice of law analysis, Delaware courts generally rely on the Restatement (Second) of Conflicts." *Smith v. Del. State Univ.*, 47 A.3d 472, 480 (Del. 2012). The Restatement provides that "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." Restatement (Second) of Conflict of Laws § 6(1).

b. Petitioners cite 12 *Del. C.* § 3332(b) (Op. Br. 21-22), presumably contending that it provides a controlling statutory directive on choice of law. Section 3332(b) provides:

> Except as otherwise expressly provided by the terms of a governing instrument or by court order, the laws of this State shall govern the administration of a trust while the trust is administered in this State.

Section 3332(b) does not apply to the petitions for multiple independent reasons.

i. First, § 3332(b) does not apply where "otherwise expressly provided by the terms of a governing instrument." Each of the instruments governing the *inter vivos* trusts "otherwise expressly provide[s]":

1953 Trusts. Article 13 states: "This trust has been created by the Settlor and accepted by the Trustees in the State of New York, and all questions pertaining to its validity, construction *and administration* shall be determined in accordance with the laws of the State of New York." B727, B885 (emphasis added).[4]

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[4] The petitions recite that in August 1999, "[t]he situs of the [1953] Trust was transferred to Texas in conjunction with the appointment of U.S. Trust Texas . . . as the corporate Trustee . . . ." B703, B861. Although petitioners stated that "Texas law has governed the administration of the Trust since the appointment of U.S. Trust Texas" (B703, B862), petitioners cite no court order or other document reflecting that their understanding is correct.

1957 Trust. Section 7(h) states: "This Indenture shall be construed and regulated, and its validity and effect determined by the laws of the State of New Jersey." B128 (emphasis added). In *Wilmington Trust Co. v. Pennsylvania Co.*, 172 A.2d 63 (Del. 1961), this Court approvingly cited the Court of Chancery's holding that a provision stating "that the laws of the State of Delaware shall be controlling as to all questions pertaining to the Trusts" applied, among other things, to "questions concerning the administration of the trust." *Id.* at 67. *See also In re Bush*, 774 N.Y.S.2d at 299 (finding grantor intent that "[New York] Courts supervise the administration" based on provision that the trust "shall in all respects be construed and regulated by the laws of the State of New York").

Moreover, the 1957 Trust indenture contains numerous provisions addressing what petitioners characterize as trust administration issues — *e.g.*, the number and types of trustees (B124), removal and appointment of trustees (B124), whether a trustee must post a bond (B124), and discretionary powers of the trustees (B125-27). All of these "administrative" provisions in the indenture must be "construed and regulated . . . by the laws of the State of New Jersey."[5]

1975 Trusts. Section 8(b) states: "This Agreement shall be governed by and its validity, effect and interpretation determined by the laws of the State of New York." B571. Again, while not specifically using the word "administration," the

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[5] On March 16, 2001, the Superior Court of New Jersey, Chancery Division, entered a judgment approving appointment of U.S. Trust New York as successor corporate trustee. B97-99. Although the petitioners state that the trust has since "been . . . administered in accordance with New York law since the appointment of U.S. Trust New York" (B36), petitioners cite no court order or other document reflecting that their understanding is correct.

language is broad enough to encompass administration. *Wilmington Trust Co. v. Pennsylvania Co.*, 172 A.2d at 67. As with 1957 Trust, the agreements creating the 1975 Trusts contain numerous provisions addressing what petitioners characterize as trust administration issues. *See, e.g.*, B566-71. All of these "administrative" provisions must be "governed by" and have their "validity, effect and interpretation determined by" New York law.

ii. Second, even assuming that the *inter vivos* trusts did not select the law of other states, § 3332(b) would still not apply because those trusts are not yet being "administered in this State." Northern Trust's acceptance of the role of successor trustee was contingent on the court below issuing the very order that petitioners contend would give the court jurisdiction. B143, B591, B748, B906. Because the *inter vivos* trusts are not yet being administered in Delaware, the court below had to look somewhere besides § 3332(b) to determine the current governing law.

iii. Third, even if Northern Trust *had* become the successor trustee — which it has not — Section 3332(b) does not define what it means for a trust to be "administered in this State." At minimum, to satisfy constitutional requirements, the term "administration" in § 3332(b) must "have meaningful content" sufficient to give Delaware "grounds to trump the jurisdiction of its sister states or authority to implement its own public policies and regulatory regime to the exclusion of those of its sister states." IVT Op. 14; *see also* Restatement (Second) of Conflict of Laws § 9.

The court below did not determine that Northern Trust would fail to meet this standard if the petitions were granted. Rather, the court noted that "based on

the current record, the proposed allocation of powers, responsibilities, and functions among Northern Trust, the Investment Direction Adviser, and the Trust Protector raises serious questions about whether the trusts would be principally administered in Delaware." IVT Op. 15. Petitioners claim that "a 'principal' place of administration standard is inconsistent with applicable Delaware law and the policy of this state as established by the General Assembly." Op. Br. 36.

Far from being a novel concept, "principal place of administration" appears in the very rule under which the petitions were submitted. *See* Ct. Ch. R. 100(b)(3) (consent petitions shall address, "to the extent jurisdiction is based on Delaware being the *principal place of administration*, a description of the administrative tasks and duties carried out by the Delaware trustee or other Delaware fiduciaries and a comparison of those tasks and duties to those entrusted to fiduciaries or proposed fiduciaries domiciled outside Delaware" (emphasis added)); Ct. Ch. R. 100(d)(4) (consent petitions shall "explain why Delaware is the *principal place of trust administration*" (emphasis added)). Petitioners themselves elsewhere state that "[u]sually the law of the trust's *principal place of administration* will govern administrative matters." Op. Br. 26 (emphasis added; citing UTC § 107, cmt.).

iv. Finally, § 3332(b) does not apply where otherwise expressly provided "by court order." Section 3332(b) thus "does not dictate the outcome of a petition *seeking* a 'court order,' such as the petitions in this case." IVT Op. 13 (emphasis in original).

c. Because § 3332(b) does not apply, the choice of law for the *inter vivos* trusts must be determined by common-law rules. Delaware case law is clear:

> [W]here the donor in a trust agreement has expressed . . . his intent to have his trust controlled by the law of a certain state, there seems to be no good reason why his intent should not be respected by the courts if the selected jurisdiction has a material connection with the transaction.

Wilmington Trust Co. v. Wilmington Trust Co., 24 A.2d 309, 313 (Del. 1942) ("*Wilmington Trust III*").

It is not necessary that the choice of law clause specifically use the word "administration" to reach administration. *Wilmington Trust Co. v. Pennsylvania Co.*, 172 A.2d at 67. And even where "the trust instrument contains no expression of choice of jurisdiction . . . there is no sufficient reason why the donor's choice should be disregarded if his intention in this respect can be ascertained from an examination of attendant facts and circumstances . . . ." *Wilmington Trust III*, 24 A.2d at 313. *Lewis v. Hanson*, 128 A.2d 819 (Del. 1957), *aff'd sub nom. Hanson v. Denckla*, 357 U.S. 235 (1958), held that the fact that a trust agreement was "signed and the securities [were] delivered to a trustee doing business in Delaware" "clearly indicat[ed] the intent of [the settlor] to have the trust administered and governed according to the law of Delaware." 128 A.2d at 826.

The Restatement is in accord. Section 272 of Restatement (Second) of Conflicts states: "[t]he administration of an inter vivos trust of interests in movables is governed as to matters which can be controlled by the terms of the trust (a) by the local law of the state designated by the settlor to govern the administration of the trust." The accompanying commentary explains:

> Despite the absence of an express designation, it may otherwise be apparent from the language of the trust instrument or from

> other circumstances, such as the extent of the contacts with a particular state, that the settlor wished to have the local law of a particular state govern the administration of the trust. In such a case, the local law of this state will be applied.

Restatement (Second) of Conflict of Laws § 272, cmt. c. *See also* 7 Scott and Ascher on Trusts § 45.5.2.1 (2012 Rev.) (discussing UTC) ("[I]t would appear that the settlor's designation of applicable law for purposes of trust administration would almost always be effective.").

d. Under these choice-of-law rules, administration of all of the *inter vivos* trusts is governed by the laws of New York or New Jersey. As discussed in Point I.C.2.b.i, *supra*, the *inter vivos* instruments each contain provisions selecting New York or New Jersey law that are broad enough to encompass administration. Coupled with the choice-of-law provisions, the settlor's initial designation of New York and New Jersey corporate trustees provides ample facts and circumstances to ascertain the settlor's intent to have those states' laws govern administration.

e. Petitioners assert that, under *Wilmington Trust III*, where — as here — a trust instrument "provides for the removal and replacement of the corporate trustee with no restriction as to where the successor corporate trustee can be located," it is "generally understood" that "the law of the state in which the successor trustee is located and conducts business becomes the law which applies to the administration and management of the trust." Op. Br. 23.

Wilmington Trust III is distinguishable. First, unlike here, the settlor's intent as to what law governed "was not expressed in the instrument which declared the trust" at issue. 186 A. 903, 908 (Del. Ch. May 22, 1936). Second, *Wilmington*

Trust III turned on a clause in the trust instrument providing that a successor trustee should "hold the said trust estate subject to all the conditions herein *to the same effect as though now named herein*." 24 A.2d at 314 (emphasis in original). Applying this "Same Effect Clause," this Court found that "the successor trustee should have the same status . . . as an original appointee." *Id.* Thus, if the donor had "in the first instance named [a Delaware trustee]," the Court of Chancery "would readily have accepted these facts and circumstances as sufficient evidence of the donor's intention to submit his trust to the law of this jurisdiction." *Id.* There is no comparable "Same Effect Clause" in the *inter vivos* instruments here.

f. Petitioners also cite Restatement commentary indicating that when the trust instrument contains a power to appoint a trustee in another state, "the law governing the administration of the trust thereafter is the local law of the other state . . . ." Restatement (Second) of Conflict of Laws § 272, cmt. e (cited at Op. Br. 25). But nothing in this general commentary suggests that it means that a change in the place of administration trumps a settlor's designation of the law governing administration. On the contrary, the Restatement emphasizes that "[t]he chief purpose in making decisions as to the applicable law is to carry out the intention of the creator of the trust . . . . [H]is intention, to the extent to which it can be ascertained, should not be defeated . . . ." Restatement (Second) of Conflict of Laws, Ch. 10 (Introductory Note).

"Moving the situs or place of a trust from one state to another does *not* automatically result in a change in the law that applies. Thus, if the governing instrument provides that the validity, construction, and administration of the trust

will be governed by the law of a specific state, moving the trust will not change the applicable law." Richard W. Nenno, *The Trust from Hell: Can It Be Moved To A Celestial Jurisdiction?*, 22 Prob. & Prop. 60, 61 (May/June 2008); *Cf.* David F. Cavers, *Trusts Inter Vivos and the Conflict of Laws*, 44 Harv. L. Rev. 161, 163-64 n.10 (1930) ("[I]n a private trust where the settlor has indicated an intent that it should be administered in a certain jurisdiction . . . . a subsequent change of residence by the trustee does not alter the controlling law." (citations omitted)).[6]

3. Court of Chancery Rule 100 does not trump the jurisdictional requirement of an "actual controversy."

a. The petitions seek orders "approving" the contingent resignations of the individual trustees and "confirm[ing]" Northern Trust's conditional acceptance of a position as successor corporate trustee. B115-16, B560, B709, B868. Section 7(f) of the 1975 trust agreement empowers the trustees "to resign . . . without necessity for prior accounting or judicial approval." B570. Section 6 authorizes the individual trustees "to remove the corporate fiduciary, without being obliged to attribute any cause therefor, provided, they thereupon designate another corporate fiduciary in its place." B569. The Court of Chancery thus held, on this aspect of the petition regarding the 1975 Trusts, that there was "no actual controversy for this Court to resolve." IVT Op. 7, 9-10.

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[6] In arguing that the court below misapplied Delaware choice-of-law rules, petitioners state that "[n]one of the testamentary trusts at issue designate the law governing the administration of the trusts" and cite Restatement commentary relating to testamentary trusts. Op. Br. 25. That is a *non sequitur*. The court's decision regarding the testamentary trusts was not based on choice of law, but instead on the prior exercise of jurisdiction by other states' courts. *See* Point II, *infra.*

b. Petitioners do not contend that this aspect of the petition presented an "actual controversy" as required for a declaratory judgment. They concede that:

- "[n]o one consenting to the petitions sought a declaration of his or its rights, status or legal regulations with respect to those trusts" (Op. Br. 29);
- "[n]o one consenting to the proposed modifications sought a determination of a question of construction or validity arising under the trust indentures" (*id.*);
- "[n]o one sought a declaration of rights or legal relations with respect to the trusts" (*id.*);
- "nor did any of those consenting to the petitions seek by the petitions to settle or obtain relief from uncertainty and insecurity . . . relating to the trusts" (*id.*).

This concession should end this Court's inquiry on this issue. "[T]he requirement of an actual controversy goes directly to the court's subject matter jurisdiction over an action." *NAMA Holdings v. Related World Mkt. Ctr.*, 922 A.2d 417, 435 n.43 (Del. Ch. 2007) (citation omitted). Whether an "actual controversy" exists is "an issue which the court itself was bound to raise." *Stabler v. Ramsay*, 88 A.2d 546, 549 (Del. 1952). "That all parties consented to jurisdiction is immaterial." *Id.*

c. Petitioners' apparent position is that Rule 100 is itself a jurisdictional grant. Op. Br. 29-30. That is incorrect. Court of Chancery Rule 82 provides that "[t]hese Rules shall not be construed to extend . . . the jurisdiction of the Court of Chancery." *See also Crescent/Mach I Partners, L.P. v. Dr. Pepper Bottling Co.*, 962 A.2d 205, 209-10 (Del. 2008) (Rule 60(a)'s provision for correcting clerical mistakes in judgments cannot "trump settled principles of justiciability").

d. Applying the "actual controversy" requirement will not eliminate the utility of consent petitions. As the Court of Chancery noted, "[a] consent petition may be appropriate, for example, in cases where the trust agreement does not expressly authorize the action in question, the agreement is genuinely ambiguous, or there are minor or unborn beneficiaries whose interests must be protected through judicial oversight of the virtual representation process or, if necessary, the appointment of a guardian or attorney *ad litem*." IVT Op. 9.

4. The petitions failed to address New York and New Jersey law on reformation and modification.

a. The petitions with respect to the *inter vivos* trusts are styled as requests for "reformation" to change the provisions governing the number of trustees, change the trusts into directed trusts, change or add increased exculpation and indemnification, and change the choice-of-law clauses, among other things. The petitions and accompanying papers state that they are seeking orders "reforming" the trusts (*e.g.*, B169, B327, B495, B617, B773, B931, B1103, B1332) or, in other instances, "reformation and modification."

b. The court below held that New York law governs whether the 1953 and 1975 Trusts can or should be reformed, and that New Jersey law governs whether the 1957 Trust can or should be reformed. IVT Op. 33. Because the petitions "do not address the parameters of New York or New Jersey law" the court held that it was "therefore not in a position to address the requests for reformation." *Id.* Petitioners do not address those parameters, but concede that even under Delaware law the requirements for reformation are not met. Op. Br. 30-31.

c. Instead, petitioners state that "[w]hat the petition sought here was 'modification' of a valid and existing trust indenture." Op. Br. 30. But New York and New Jersey law also have their own requirements applicable to requests for modification of trusts. *See, e.g.*, N.Y. Estates, Powers & Trusts L. § 7-1.9 (mechanism for amending irrevocable trust where grantor and all beneficiaries consent); *Perosi v. LiGreci*, 948 N.Y.S.2d 629, 632-33 (N.Y. App. Div. 2012) (discussing same); *In re Irrevocable Funded Life Ins. Trust Established by Weinberg*, 2005 WL 4226155, at *12 (N.J. App. Div. July 20, 2006) (approving modification of trust). While petitioners mentioned the availability of "decanting" under New York law (B37, B505) — a procedure not followed here — petitioners also did not address the parameters of New York and New Jersey law on modification of trusts.

5. The Court of Chancery properly declined to accept ongoing jurisdiction over the *inter vivos* trusts.

The Court of Chancery declined to accept continuing jurisdiction over the *inter vivos* trusts, noting that "[t]he trusts will not have any ongoing obligations to the Court, and the trustees will not be submitting accountings." IVT Op. 33. The court noted that accepting jurisdiction "could imply a continuing jurisdictional relationship . . . that could be invoked in response to other litigation filed elsewhere," and that the court "will not accept an ill-defined, ongoing role that could be used for forum shopping." *Id.* Petitioners do not challenge this aspect of the decision below. If the rest of the decision is affirmed, it should also be affirmed on this point.

II. THE COURT OF CHANCERY CORRECTLY DENIED THE PETITIONS WITH RESPECT TO THE TESTAMENTARY TRUSTS.

A. Question Presented

Did the Court of Chancery abuse its discretion by dismissing petitions with respect to non-resident testamentary trusts, on grounds of comity, where courts in other states appeared to have already exercised jurisdiction over the trusts? The Court of Chancery raised this question *sua sponte* and considered it. TT Op. 3-9.

B. Scope of Review

This Court reviews a dismissal or stay of an action based on interstate comity for abuse of discretion. *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 282 (Del. 1970). The same standard of review should apply to the denial of a consent petition based on interstate comity.

C. Merits of Argument

1. New Jersey and Texas have already accepted jurisdiction over the 1960 and 1969 Trusts.

The 1960 and 1969 Trusts are testamentary trusts. With respect to these trusts, the petitions sought an order from the Court of Chancery approving the resignation of the individual trustees, confirming the appointment of Northern Trust as successor trustee, accepting jurisdiction over the trusts and confirming that Delaware law will govern administration of the trusts, and reforming various provisions of the trusts. B239, B1016. Although finding that it "ha[d] the power to address the petitions," the Court of Chancery determined that because the record reflected that both trusts were under the supervision of courts in other states, it

would decline to consider the petitions with respect to the 1960 and 1969 Trusts as a matter of comity. TT Op. 6. The Court of Chancery's ruling was appropriate, and certainly not an abuse of discretion.

a. Deference to courts of other states is enhanced in the transfer of testamentary trusts, due to likelihood of prior judicial involvement in the probate process. According to the Restatement commentary, in the case of a testamentary trust, "[s]ince the trustee is accountable to the court," "it is necessary to obtain the permission of the court for a change in the place of administration." Restatement (Second) of Conflict of Laws § 271, cmt. g.

Petitioners acknowledged this during the hearing below (A28):

> [T]ypically, what has to happen if you want to at least initially transfer a testamentary trust created under a will from its original jurisdiction, you need to do what we call a pitch and catch. And most states, especially if you're accounting to the Court in that state, require that. You have got to do a pitch and catch releasing jurisdiction from the one state and having the transferee state accept jurisdiction . . . .

Court of Chancery Rule 100(d)(3) contemplates that petitions to transfer situs may be preceded by an application to courts of the other jurisdiction:

> any petition to modify a trust by consent that seeks to confirm a change of situs of a trust from another jurisdiction to Delaware . . . shall address: . . . [w]hether application has been made to the courts of the jurisdiction in which the trust had its situs immediately before the change of situs to Delaware for approval of the transfer of situs of the trust to Delaware, and the status of the application, or if no application was made, why such approval need not be sought.

Ct. Ch. R. 100(d)(3).

b. The Court of Chancery appropriately applied the above principles here:

1960 Trusts. The petitions state that "[t]he Decedent died a resident of the State of New Jersey and, as such, New Jersey has been the situs of the Trusts and New Jersey law has governed the administration of the Trusts since their inception." B1020. In 2001, the 1960 Trusts were the subject of an "intermediate account[ing]" by the Superior Court of New Jersey, Chancery Division. B1058. The court below found that "the 1960 Trusts remain under the supervision of the New Jersey Court" and, accordingly, "the petition relating to the 1960 Trusts should be presented to the New Jersey Court," which was "best situated to determine whether the relief requested would run afoul of or conflict with any substantive or procedural aspect of New Jersey law." TT Op. 7.

1969 Trusts. The petition states that "[t]he Decedent died a resident of the State of New York and, as such, New York was the initial situs of the Trusts and New York law initially governed the administration of the Trusts." B243. Pursuant to March 29, 2000 Order of the Surrogate's Court for the State of New York (B280), the Probate Court of Dallas County Texas accepted jurisdiction over the 1969 Trusts in September 23, 1999 and May 18, 2001 Orders. B277, B284. The Court of Chancery found that "[u]nder the express language of both the 1999 Order and the 2001 Order, the 1969 Trusts remain subject to the jurisdiction of the Texas Court." TT Op. 8. As a result, the Court of Chancery held that "any request to move the situs of the trusts, change the governing law, or reform the trusts should be presented to the Texas Court." *Id.* at 9.

d. Petitioners' only response is to argue that that by declining to consider these petitions on the basis of comity, the Court of Chancery somehow "substitut[ed] its view of what the policy of the State should be for that of the legislature." Op. Br. 41. Petitioners' flawed public policy argument is addressed in Point IV, below. In any event, it was entirely proper for a Delaware court to respect the limits of its jurisdiction where serious questions were left unanswered about jurisdiction exercised by a sister state court for a lengthy period of time over the same trusts. The Court of Chancery's dismissal of the petitions with respect to the 1960 and 1969 Trusts should be affirmed.

2. Another state may have already accepted jurisdiction over the 2005 Trusts.

The 2005 Trusts are also testamentary trusts. B1216. The Court of Chancery found that the petition relating to the 2005 Trusts "suggest[ed] that there are still ongoing probate matters or issues of estate administration" but "does not identify where those matters are taking place, or even where Elizabeth died." TT Op. 9. The court thus held that "[b]ecause it seems likely that the [2005 Trusts] are under the supervision of another state's courts, judicial restraint dictates that this Court decline to act without further information." *Id.* The Court of Chancery therefore dismissed the petition without prejudice, directing that "[t]he petition should be filed in the jurisdiction where probate matters are ongoing or refiled with supplemental information in [the Court of Chancery]." *Id.* Petitioners have not raised any specific objection to this aspect of the Court of Chancery's ruling.

III. THE COURT OF CHANCERY CORRECTLY DENIED THE PETITION WITH RESPECT TO THE CHARITABLE LEAD UNITRUST.

A. Question Presented

Did the Court of Chancery err in denying a petition with respect to a non-resident charitable lead unitrust where the petitioners (i) sought advisory opinions; and (ii) failed to address the law applicable to other relief requested? The Court of Chancery raised these questions *sua sponte* and considered them. CLU Op. 5-10.

B. Scope of Review

This Court reviews the Court of Chancery's exercise of its equitable powers for abuse of discretion, and reviews challenges to subject matter jurisdiction to determine whether the trial court correctly formulated and applied legal precepts. *See* Point I.B, above.

C. Merits of Argument

1. With respect to the approvals and confirmations requested, the Court of Chancery held that there was no "actual controversy" because "[e]ach of the foregoing changes can be effectuated without judicial involvement by exercising powers expressly granted in the trust instrument." CLU Op. 5-7. This aspect of the decision should be affirmed for the reasons discussed in Point I.C.3, above.

2. With respect to the request for reformation, petitioners concede that they do not meet the requirements for reformation. Op. Br. 30-31. Nor have petitioners addressed Washington law on trust modification. This aspect of the court's denial of the petition should be affirmed for the reasons stated in Point I.C.4, above.

IV. THE OPINIONS BELOW FURTHER THE BROADER INTERESTS OF DELAWARE PUBLIC POLICY.

A. Question Presented

Should this Court reverse the Court of Chancery's decisions based on a purported "public policy" of maximizing the number of non-resident trusts transferred into Delaware without regard to court rules and other law, settlor intent, or other states' interests? This question was not raised or considered below, as it was raised for the first time in petitioners' opening brief.

B. Scope of Review

To the extent that the Supreme Court's decision turns on public policy grounds, the Supreme Court's review on pure questions of law is *de novo*. *Jones v. State Farm Mut. Auto Ins. Co*., 610 A.2d 1352 (Del. 1992).

C. Merits of Argument

Petitioners assert that "[t]he Opinions and Orders of the Court Below run against the public policy of Delaware as it relates to the administration of trusts." Op. Br. 37. Petitioners are incorrect and assert an overly narrow view of Delaware public policy. While Delaware certainly welcomes the lawful transfer of trusts to this state, Delaware public policy does not promote such transfers at all costs, in the face of contrary settlor intent or against a sister state's rightful interests.

1. The consent petition process is a creature of the Court of Chancery's equitable powers, not statute.

As an initial matter, petitioners' claim that the decisions below violate legislative policy is strange given that "*Delaware has no statutory law* establishing a legal standard for modification of trusts." Committee Report 10 (A49) (emphasis added). The consent petition process was created by the Court of Chancery, not the General Assembly. It is thus difficult to see how some purported legislative policy could prevent the Court of Chancery from applying its own rules to the consent petition process. In any event, petitioners' characterization of Delaware public policy is incorrect.

2. Delaware has not adopted the "English Rule."

a. The DBA claims that Delaware has undergone a "de facto adoption of the English rule," which "allows a court to modify the terms of a trust with the consent of the beneficiaries *regardless of the intentions of the settlor*." DBA Br. 11, 13 (emphasis added). That is not supported by statutes, case law, or court rules.

b. Petitioners suggest that this powerful public policy in favor of trust modification emanates from 12 *Del. C.* § 3332(b). Op. Br. 40. Nothing in § 3332(b)'s text suggests that it ushered in such a sweeping change. Indeed, the plain terms of § 3332(b) support the opposite conclusion, making clear that § 3332(b)'s default rule is overridden where "otherwise expressly provided by the terms of a governing instrument." As the DBA itself admits, § 3332(b) merely codified "more than 75 years of jurisprudence." DBA Br. 6.

The General Assembly knows how to announce policy when it wants to. For example, § 3303(a) provides that:

> Notwithstanding any other provision of this Code or other law, the terms of a governing instrument may . . . vary the rights and interests of beneficiaries. . . . *It is the policy of this section to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments*.

12 *Del. C.* § 3303(a) (emphasis added). If anything, this suggests a policy preference of respecting settlor intent, not disregarding it.

c. The DBA asserts that the Court of Chancery has "fully endorsed the concept of modifying trusts upon the consent of the beneficiaries" regardless of settlor intent through "the absence in [Rules 100-104] of any requirement to show that the modification requested is consistent with the settlor's intent." DBA Br. 12 & n.34. Such a change in Delaware law should not be extracted from silence. And the Rules are not silent — Rule 101(a)(1) requires consent petitions to include the core expression of a settlor's or testator's intent: the trust instrument.

d. Many settlors seek certainty that their trust design cannot later be undermined through cooperation between trustees and beneficiaries. And settlors who provide for appointment of an institutional trustee might well want the institutional trustee's moderating influence to continue notwithstanding the beneficiaries' less conservative investment preferences. Delaware has little interest in promoting itself as a jurisdiction where beneficiaries can circumvent

spendthrift provisions to gain quick access to trust assets, or rid themselves of uncooperative trustees or trust rules, regardless of the law of a trust's home state.[7]

Similar concerns may be implicated here. The petitions seek to replace arrangements that include traditional institutional trustees with a "directed trust" structure removing the institutional trustees from investment decisions. Petitioners acknowledged that the current beneficiaries "have maybe a desired investment portfolio that your typical conservative corporate trust wouldn't be 100 percent comfortable with." A15. And questions were raised at the hearing regarding Jeffrey's qualifications to serve as Investment Direction Adviser. A17-19.

Moreover, many of the governing instruments contain specific provisions regarding the number of trustees, succession and appointment, and limits on trustee compensation. "[T]he identity and number of the trustees is central to the structure of the trust and a key indicator of the intent of the settlor." *McNeil v. McNeil*, 798 A.2d 503, 513-14 (Del. 2002). Yet the petitions rewrite these provisions by reducing the number of trustees, adding "Trust Protectors," and appointing "Investment Direction Advisors" who are often beneficiaries. It is far from clear that Delaware law should sanction such deviations from a settlor's expressed intent simply because the changes can be characterized as "administrative."

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[7] One treatise on Delaware trust law touts moving trusts to Delaware "[t]o address dissatisfaction with the current corporate trustee," "[t]o avoid state income tax," "[t]o obtain more effective creditor protection for beneficiaries," and "[t]o avoid burdensome state regulatory requirements." Richard W. Nenno, Delaware Trusts § 85 (2012). Chancellor Chandler likewise noted that "[a] change in the trust's legal domicile can also serve other, less proper purposes, however, including frustration of legal process involving the trust or trust assets in the former domicile." Chandler, *Death of the Dead Hand?*, at 12 (A71). The potential for abuse of the consent petition process makes independent court review all the more important.

e. Finally, even assuming that Delaware has abandoned respect for settlor intent, other states have not. New York, for example, embraces the American Rule: "[w]hen asked to facilitate the administration of a trust, a [New York] Court will order modifications which are least disruptive to a grantor's or testator's scheme, *the choice of the maker of a trust having priority over the wishes of trust beneficiaries*." *In re Bush*, 774 N.Y.S.2d 298, 299 (N.Y. Sur. Ct. 2003) (emphasis added); *see also In re Estate of Bonardi*, 871 A.2d 103, 108 (N.J. App. Div. 2005) (reversing termination of trust even though all beneficiaries consented); *In re Cohen*, 760 A.2d 1128, 1137 (N.J. App. Div. 2000) (stating that court was "obligated" to examine testator intent "[e]ven if there was an agreement among all the beneficiaries"); Tex. Prop. Code § 112.054(b) ("The court shall exercise its discretion to order a modification [of a trust] . . . in the manner that conforms as nearly as possible to the probable intention of the settlor.").

3. Comity and respect for other states' interests is consistent with Delaware public policy.

a. Contrary to petitioners' claims, showing comity to courts in other states does not inherently bar the movement of trusts into Delaware. Respect for other jurisdictions merely requires that where another state's courts may retain jurisdiction, the courts of that state be given the first opportunity to address questions of their law. The court below recognized this fact by dismissing certain petitions without prejudice while directing that relief — *i.e.*, approval of transfer into Delaware — could be sought in the trusts' home state. TT Op. 9 (dismissing

petitions with regard to 1960 and 1969 Trusts with suggestion to refile in New Jersey and Texas).

b. The inter-jurisdictional issues faced by the Court of Chancery here present the flip side of the problems increasingly presented by multi-forum corporate litigation. Corporate litigants frequently ask courts in other states to stay or dismiss cases in favor of the Delaware courts in cases involving Delaware corporations or other Delaware entities. Promoting such deference is in the best interests of both Delaware and the development of a fulsome and consistent body of Delaware corporate law. There is some indication that Delaware is making progress in its relations with other states in this area.[8] But why should courts in sister states be expected to extend comity to Delaware if Delaware courts do not have the discretion to avoid potential inter-state clashes by declining to hear petitions regarding trusts that are already subject to the jurisdiction of other courts?

Delaware has much to lose from failing to respect the law of sister states. Even if Delaware's trust business generates $300 million per year in fiduciary fees paid to Delaware financial institutions, and $19-33 million in state income tax DBA Br. 9-10 (citing Schanzenbach Report 1-2, 7), those figures together come to slightly more than *half* of the $611 million that Delaware collected in franchise taxes in 2012. *See* DEFAC General Fund Revenue Worksheet, March 19, 2013,

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[8] *See, e.g.*, *Howard Lasker IRA v. Jefferies Group, Inc.*, Index No. 653924/2012 (N.Y. Sup. Ct. Apr. 16, 2013) (Order) ("Having conferred with Delaware Chancery Court Chancellor Leo Strine, this Court and Chancellor Strine have agreed that the interest of judicial economy will be better served in the cases before us concerning the recent Jefferies Group, Inc./Leucadia National Corp. merger by allowing all pre-trial matters to proceed in the Chancery Court and to stay the related cases pending in the New York Supreme Court.").

available at http://finance.delaware.gov/defac/mar13/revenues.pdf (showing FY 2012 franchise tax collections of $611.8 million compared to bank franchise taxes of $112.5 million). Delaware's preeminence in corporate and entity formation provides further benefits to the State through employment and economic growth.

c. Finally, the notion that extending comity to the courts of other states will destroy Delaware's ability to attract trust business appears overstated. Both petitioners and the DBA recognize that many states already have rules facilitating the free transfer of situs of a trust with the consent of all beneficiaries. Op. Br. 38; DBA Br. 5. Using these rules might require, in some cases, that a petitioner take an extra step in first petitioning a foreign court, or that a trustee employ another state's "decanting statute" to transfer a trust to Delaware without any judicial intervention. *See, e.g.*, A19 ("THE COURT: Why can't you use the New York decanting statute to do everything you want to do? [COUNSEL]: We could, Your Honor. That would be an option. It's just convincing a trustee to do that."). Petitioners make no showing that these requirements will unreasonably deter the transfer of trusts. Delaware can attract new trusts while respecting the wishes of settlors and the sovereignty of other states.

4. The decisions below do not affect consent orders previously entered by the Court of Chancery.

Petitioners claim that the decisions below "have cast doubt on the efficacy of numerous consent orders . . . approving the relocation of non-resident trusts to Delaware." Op. Br. 38. This claim is without foundation.

a. Previously issued consent orders are final judgments. They may only be reopened if a party can "demonstrate why there are 'extraordinary circumstances'" that would justify relief under Court of Chancery Rule 60(b). *See T.R. Investors, LLC v. Genger*, 2012 WL 5471062, at *3 (Del. Ch. Nov. 9, 2012). But because consent petitions by their nature require the consent of all interested parties, there is "no one with standing to object to the relief once implemented." Committee Report 10-11 (A49-50).

b. Nor can the court's decisions give other states grounds to disregard previously entered consent orders. Because such orders are *res judicata* under Delaware law, they would have the same full faith and credit in other states' courts as they have in Delaware courts. U.S. Const. Art. IV § 1; 28 U.S.C. § 1738; *cf. Pyott v. Louisiana Mun. Emps.' Ret. Sys.*, ___ A.3d ____, 2013 WL 1364695, at *2 (Del. Apr. 4, 2013).

c. Finally, even aspects of past consent orders that did not present an "actual controversy" would remain valid. "[A]lthough subject matter jurisdiction usually may be raised at any time prior to final judgment, the general rule is that 'a final judgment has *res judicata* effect in a subsequent proceeding, and a collateral attack based on the want of subject matter jurisdiction is barred.'" *Shearin v. Mother AUMP Church*, 2000 WL 975117, at *1 (Del. June 12, 2000) (quoting *Chem. Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co.*, 177 F.3d 210, 219 (3d Cir. 1999)).

CONCLUSION

Developing and maintaining Delaware's position as a leading jurisdiction for the formation and administration of trusts does not require departing from Delaware's long-standing respect for other states' laws and courts. Nor does it require ignoring clearly expressed settlor intent or the Court of Chancery rules. The decisions below should be affirmed.

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