No. _____

IN THE

Supreme Court of the United States

FALKBUILT LTD., *et al.*,

Petitioner,

v.

DIRTT ENVIRONMENTAL SOLUTIONS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the doctrine of *forum non conveniens* ("FNC"), federal courts may in appropriate circumstances exercise their discretion to dismiss parties to an action in favor of a foreign forum. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981). FNC dismissal, however, is only appropriate when an adequate "alternative forum" exists abroad. *Id.* at 254 & n.22 (citing *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 506–507 (1947)).

This case presents the question of whether FNC dismissal is appropriate only if all defendants can be sued in the proposed alternative forum. The District Court dismissed three of six defendants in favor of Canadian court, the "clearly * * * most convenient forum," while retaining the claims against three U.S.-based defendants. Pet. App. 66a. The Tenth Circuit reversed, holding that FNC is *never* "available as a tool to split or bifurcate cases," Pet. App. 15a, and that a district court commits legal error in doing so. In so holding, the Tenth Circuit deepened an entrenched circuit split, now pitting six circuits against four others.

The question presented is:

Whether, in a multi-defendant case, district courts are legally prohibited from dismissing any defendant under the doctrine of *forum non conveniens* unless there is a single adequate alternative forum where *all* defendants can be sued.

PARTIES TO THE PROCEEDING

Petitioners Falkbuilt Ltd., Falkbuilt, Inc., and Mogens Smed were defendants in the district court and appellees below.

Respondents DIRTT Environmental Solutions, Inc. and DIRTT Environmental Solutions, Ltd. were plaintiffs in the district court and appellants below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Falkbuilt, Inc. is a wholly-owned subsidiary of its parent company, Petitioner Falkbuilt Ltd. No parent company or publicly traded company owns 10% or more of Falkbuilt Ltd.

RELATED PROCEEDINGS

- *DIRTT Environmental Solutions, Inc. et al.,* v. *Henderson et al.*, No. 1:19-cv-00144, U.S. District Court for the District of Utah. Judgment entered May 21, 2021.

- *DIRTT Environmental Solutions, Inc. et al.,* v. *Falkbuilt Ltd. et al.*, Nos. 21-4078, 21-4153, U.S. Court of Appeals for the Tenth Circuit. Judgment entered April 11, 2023.

- *DIRTT Environmental Solutions, Inc.,* v. *Falkbuilt, Inc., et al.*, No. 3:21-cv-1483-N, U.S. District Court for the Northern District of Texas. Judgment entered March 10, 2022.

- *DIRTT Environmental Solutions, Inc.,* v. *Falkbuilt, Inc., et al.*, No. 22-10329, U.S. Court of Appeals for the Fifth Circuit.

- *DIRTT Environmental Solutions, Ltd.* v. *Falkbuilt Ltd.*, 1:20-cv-04637, U.S. District Court for the Northern District of Illinois. Judgment entered February 15, 2022.

- *DIRTT Environmental Solutions, Inc. et al.,* v. *Falkbuilt Ltd. et al.*, Nos. 1901-06550, 2101-12222. Court of King's Bench of Alberta.

There are no other proceedings in state or federal courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14(b)(1).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Tenth Circuit is reported at 65 F.4th 547 and reproduced at Appendix ("Pet. App.") 1a. The decision of the District of Utah is unreported but available at 2021 WL 2043216 and reproduced at Pet. App. 63a.

JURISDICTION

The Tenth Circuit filed its published decision on April 11, 2023. Pet. App. 1a. On June 28, 2023, this Court granted an extension of the time to file a petition for a writ of certiorari from July 10, 2023 to August 9, 2023. This petition is timely, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition arises from a motion to dismiss under the doctrine of *forum non conveniens*, which was invoked pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure. Rule 12(b)(3) reads: "(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (3) improper venue."

STATEMENT OF THE CASE

I. Legal Background

"The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when its jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 507 (1947). The *forum non conveniens* ("FNC") doctrine recognizes that, "[i]n rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 722 (1996). Originally applied to domestic disputes, the Court in *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), first applied the doctrine to a transnational dispute endorsing dismissal in favor of a foreign forum. See also *Sinochem Int'l Co.* v. *Malaysia Int'l Ship. Corp.*, 549 U.S. 422, 425 (2007).

Following the Court's decisions in *Gilbert* and *Piper*, lower courts may dismiss civil actions in their discretion based on three principal factors: (1) the deference owed to a plaintiff's choice of forum; (2) the existence of an "adequate alternative forum"; and (3) the balance of the public and private interest factors, articulated in *Gilbert*. See generally 14D Wright & Miller, Fed. Prac. & Proc. Juris. § 3828 (4th ed.); *e.g.*, *Wilson* v. *Island Seas Invs., Ltd.*, 590 F.3d 1264, 1269 (11th Cir. 2009); *Iragorri* v. *United Techs. Corp.*, 274 F.3d 65, 70–75 (2d Cir. 2001) (en banc).

II. Factual Background

In 2003, Petitioner Mogens Smed, a resident of Alberta, Canada, founded Respondents DIRTT Environmental Solutions, Ltd., a Canadian company, and DIRTT Environmental Solutions, Inc., its U.S. subsidiary (collectively, "DIRTT"). Pet. App. 17a–18a.

In 2018, after years of serving as DIRTT's Chief Executive Officer ("CEO") in Alberta, Smed was terminated. *Id*. Following his termination, Smed founded Petitioners Falkbuilt Ltd., a Canadian company, and Falkbuilt, Inc., its U.S. subsidiary (collectively, "Falkbuilt"). *Id.*

This case arises from a dispute between DIRTT and its former CEO, Smed. DIRTT alleges that Smed set up Falkbuilt as a direct competitor to DIRTT in the industry of designing and constructing prefabricated interior spaces, thereafter recruiting DIRTT employees and affiliates to join Falkbuilt and bring DIRTT's proprietary information. *Id.*

Lance Henderson was one such former employee, who served as DIRTT's Utah sales representative from 2009 to 2019, and later joined Falkbuilt. *Id.* at 4a. His wife, Kristy Henderson, was a former employee of a DIRTT affiliate and incorporated Falk Mountain States, LLC ("FMS") in 2019 to serve as Falkbuilt's Utah affiliate. *Id.* According to DIRTT, the Hendersons took DIRTT's confidential information to FMS and Falkbuilt. *Id.*

Other former employees of DIRTT, which has its headquarters in Alberta, Canada, were also alleged to

have taken DIRTT's trade secrets to Falkbuilt. Initially, DIRTT filed a lawsuit in Alberta, Canada against Smed, Falkbuilt, and other Canada-based defendants including its former Vice President of Software Development, alleging misappropriation of trade secrets, wrongful recruitment of its employees and affiliates, and breach of contract. Pet. App. 21a–22a; see also *DIRTT Environmental Solutions Ltd* v. *Falkbuilt Ltd*, 2021 ABQB 252.

Subsequently, DIRTT filed the present lawsuit based on many of the same allegations against Smed, Falkbuilt, the Hendersons, and FMS. *Id.*

Further, DIRTT filed additional lawsuits based on substantially the same or related allegations against Falkbuilt in other U.S. fora. See *DIRTT Environmental Solutions, Inc.* v. *Falkbuilt, Inc.*, 2022 WL 1051083 (N.D. Tex. Mar. 10, 2022) (dismissing for *forum non conveniens*); *DIRTT Environmental Solutions, Ltd.* v. *Falkbuilt Ltd.*, 1:20-cv-04637 (N.D. Ill. Aug. 6, 2020) (dismissed by stipulation).

III. Procedural History

A. The District Court Dismisses Three Of Six Defendants On *Forum Non Conveniens* Grounds

In December 2019, DIRTT filed this case in the U.S. District Court for the District of Utah against Falkbuilt, Smed, and the Utah-based defendants, the Hendersons, and FMS. The District Court had federal jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332.

In May 2021, the District Court held a hearing on a motion to dismiss DIRTT's first amended complaint filed by Falkbuilt and Smed. The motion to dismiss sought, in relevant part, dismissal of the claims against Falkbuilt and Smed based on *forum non conveniens* grounds in favor of a Canadian forum. Pet. App. 64a. The Utah-based defendants, the Hendersons and FMS, did not join the motion or consent to Canadian jurisdiction. Pet. App. 6a.

During the May 19, 2021 hearing, and later in a written order issued on May 21, 2021, the District Court granted Falkbuilt and Smed's motion to dismiss, holding that Canada is an adequate available forum, Canadian law is applicable, and the private and public interests favor dismissal. Pet. App. 66a–67a. In particular, the District Court held that the parent companies are in Alberta, Canada, Smed is in Alberta, the intellectual property at issue is owned by the Alberta parent company (DIRTT, Ltd.), and the primary alleged wrongdoing occurred in Alberta. *Id.* at 68a. The Court further held that DIRTT had previously sought and obtained dismissal of Falkbuilt's counterclaim in favor of proceedings in Canada, then-arguing that "the likely sources of proof are located in Canada, as both DIRTT and Falkbuilt are headquartered and do business there, with critical witnesses and documents located in Canada." Pet. App. 49a (citing DIRTT's prior motion to dismiss).

Further, the District Court refused to grant DIRTT's motion to amend its complaint on the basis that the proposed amendments would not result in a

different FNC determination. As the Court found, "[t]he court in Alberta, Canada where DIRTT, Ltd. first initiated litigation, where depositions already are scheduled, and where the two parent companies are located, clearly is the most convenient forum for the broader litigation and any trial between the parties—including Defendants' counterclaims which this court recently dismissed at Plaintiff's request in favor of the Alberta court—no matter what subsequent amendments Plaintiffs might propose in this litigation." *Id.* at 66a.

Accordingly, the District Court dismissed the claims against Falkbuilt and Smed on the basis that Alberta, Canada was a more convenient forum for the claims against them, while retaining the claims against the Utah-based defendants. *Id.* at 67a; see also 19a–24a (discussing bases for decision).

B. The Court of Appeals Reverses, Adopting A Bright-Line Rule Against Dismissing Some, But Not All, Defendants

The Tenth Circuit reversed. Analyzing whether there is an "available alternative forum" for FNC purposes, the Court held that an alternative forum must be available to *all defendants*. Pet. App. 11a. Since the Utah-based defendants, the Hendersons and FMS, did not consent to jurisdiction in Canada and were not otherwise subject to a Canadian court's jurisdiction, the Court held that Canada was not available for the purposes of an FNC dismissal of *any* defendants. *Id.* at 14a.

The Court provided the following rationale: since FNC is fundamentally concerned with convenience and is not primarily focused on any one party's interests, courts must consider convenience as it applies to the *entire case* and *all parties*. *Id.* at 13a. In other words, the Court established a bright-line rule in which FNC dismissals are only available where all defendants are subject to jurisdiction in an alternate forum. *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are Divided On The Question Presented

A. Six Circuits Apply A Bright-Line Rule Precluding Severance Or Splitting

Under the bright-line-rule approach to FNC dismissals, "[a] foreign forum is available when the *entire case* and *all parties* can come within the jurisdiction of that forum." *In re Air Crash Disaster Near New Orleans, La.*, *on July 9, 1982*, 821 F.2d 1147, 1165 (5th Cir. 1987) (en banc), *cert. granted*, *partially vacated on other grounds sub nom. Pan Am. World Airways, Inc.* v. *Lopez,* 490 U.S. 1032 (1989) (emphasis added).

In the decision below, the Tenth Circuit joined the Third, Fourth, Fifth, Seventh, and Ninth Circuits in holding that a foreign forum is adequate and "available" (so as to potentially permit FNC dismissal) only if *all defendants* in the U.S. action can be sued in the same foreign forum. E.g., *Wilmot* v. *Marriott*

Hurghada Mgmt., Inc., 712 Fed. Appx. 200, 203 (3d Cir. 2017) ("An alternative forum is available if all defendants are amenable to process there."); *dmarcian, Inc.* v. *dmarcian Eur. BV*, 60 F.4th 119, 136 (4th Cir. 2023) (an available alternate forum exists if "all parties can come within that forum's jurisdiction") (quoting *Jiali Tang* v. *Synutra Int'l, Inc.*, 656 F.3d 242, 249 (4th Cir. 2011)); *Fischer* v. *Magyar Államvasutak Zrt.*, 777 F.3d 847, 867 (7th Cir. 2015) ("An alternative forum is 'available if all parties are amenable to process and are within the forum's jurisdiction.'") (quoting *Kamel* v. *Hill-Rom Co.*, 108 F.3d 799, 803 (7th Cir. 1997)); *Gutierrez* v. *Advanced Med. Optics, Inc.*, 640 F.3d 1025, 1029 (9th Cir. 2011) (adequate alternative forum requires that "'the entire case and all parties can come within the jurisdiction of that forum'") (quoting *Alpine View Co.* v. *Atlas Copco*, 205 F.3d 208, 221 (5th Cir. 2000)).

These cases, however, were founded on shaky jurisprudential ground. All of them rely on the Fifth Circuit's decision in *In re Air Crash*, but that decision itself does not cite any case involving the question of whether to dismiss some rather than all defendants under FNC. See 821 F.2d at 1165 (citing inapposite cases). Accordingly, the holdings of at least six circuits—under which a district court legally errs by dismissing some but not all defendants from a U.S. case to a foreign forum—have never been considered or endorsed by the Supreme Court.

B. The First, Second, Sixth, and Eleventh Circuits Permit FNC Dismissal Of A Subset of Parties

In conflict with the decision of the Tenth Circuit in this case and of the five other circuits referenced above, the First, Second, Sixth, and Eleventh Circuits permit district courts to dismiss certain parties on the ground of FNC, even where the dismissal results in splitting or bifurcating the action and parties.

The First and Sixth Circuits expressly permit FNC dismissals as to some, but not all, defendants. E.g., *Mercier* v. *Sheraton Int'l, Inc.*, 981 F.2d 1345, 1349 (1st Cir. 1992) ("[A]n alternative forum generally will be considered 'available' provided *the defendant* who asserts *forum non conveniens* is amenable to process in the alternative forum." (emphasis added)); *Prevent USA Corp.* v. *Volkswagen AG*, 17 F.4th 653 (6th Cir. 2021) ("[W]e have affirmed dismissal for forum non conveniens even when the other forum lacked jurisdiction over one defendant") (emphasis added).

For example, in *Amyndas Pharms., S.A.* v. *Zealand Pharma A/S,* the First Circuit affirmed dismissal of a New Zealand pharmaceutical company for *forum non conveniens*, while retaining the claims against the U.S.-based defendant. 48 F.4th 18, 36 (1st Cir. 2022). Similarly, in *Watson* v. *Merrell Dow Pharms., Inc.*, the Sixth Circuit affirmed dismissal of a corporate defendant in favor of the United Kingdom, but reinstated claims against the two individual defendants based in the United States. 769 F.2d 354,

357 (6th Cir. 1985). The Sixth Circuit in *Watson* remanded the claims against the two individual U.S.-based defendants, reasoning that if they "do not consent to conditional terms of dismissal," including submitting to jurisdiction in the United Kingdom, then the case against them "should proceed to trial on the merits in the district court." *Id.*

The approach of the First and Sixth Circuits ensures that, unlike the instant case, a plaintiff cannot strong-arm all other parties into litigating in an inconvenient forum by adding a single U.S.-based defendant who cannot be sued, and does not consent to suit, abroad. In the present case, the Tenth Circuit expressly disagreed with the Sixth Circuit's reasoning in *Watson*. See Pet. App. 12a–13a, n.5 ("[T]he *Watson* court inexplicably decided to affirm the district court's decision as it applied to the pharmaceutical company but reversed it as it applied to the individual defendants—effectively splitting the case. * * * [W]e disagree with its ultimate resolution.").

Meanwhile, the Second and Eleventh Circuits have permitted *forum non conveniens* dismissals even where the result is that parties to the U.S. proceeding may be bifurcated into different fora. E.g., *Aenergy, S.A.* v. *Republic of Angola*, 31 F.4th 119, 131 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 576 (2023) ("Our statement that 'a court must satisfy itself that the litigation may be conducted elsewhere against all defendants' thus does not require a single foreign court."); *Tazoe* v. *Airbus S.A.S.*, 631 F.3d 1321, 1330–37 (11th Cir. 2011) (affirming dismissal of the claims

brought by a group of Brazilian family members in favor of Brazil, but reinstating the claims brought by a separate plaintiff); *King* v. *Cessna Aircraft Co.*, 562 F.3d 1374, 1378, 1381–1385 (11th Cir. 2009) (affirming dismissal of claims brought by European plaintiffs in favor of Italy, while retaining claims of an American plaintiff). This approach has been used by courts in the Second Circuit when they determine that certain defendants are "not essential to the adjudication of the core issues" in a case. *Murray* v. *Brit. Broad. Corp.*, 81 F.3d 287, 293, n.2 (2d Cir. 1996) (dismissing claims against British Broadcasting Corporation to England, but not those against U.S.-subsidiary).

* * * *

The circuits are deeply divided as to whether district courts may dismiss only a subset of defendants for *forum non conveniens*. As the foregoing demonstrates, six circuits (the Third, Fourth, Fifth, Seventh, Ninth, and Tenth) have adopted a bright-line rule prohibiting the dismissal of some, but not all, defendants under FNC. Those circuits split with at least four others (the First, Second, Sixth, and Eleventh), which permit district courts to split or bifurcate cases pursuant to FNC.

The Court should grant this petition to resolve the entrenched division of authority in the lower courts. Absent this Court's intervention, the division will continue to give rise to confusion and inefficiencies among lower courts, and disparate treatment for

defendants, while encouraging plaintiffs to forum-shop among the Circuits for a preferable U.S. anchor.

II. The Question Presented Is Important

A. *Piper* Should Be Clarified

In *Piper Aircraft Co.* v. *Reyno*, which was decided more than 40 years ago, the Court applied the FNC doctrine, as a matter of federal common law, to permit dismissal of a federal case in favor of a foreign forum. 454 U.S. 235 (1981). In the intervening four decades, while district courts have increasingly applied FNC to consider whether to retain jurisdiction over transnational cases, this Court has not revisited or clarified the basic and fundamental elements of the *forum non conveniens* standard, and the Courts of Appeals have diverged on various parts of the doctrine, including the requirement of an alternative forum. Considering the very great number of cases implicated by this issue,[1] review by the Court is needed to bring uniformity to the circuits.

To be sure, the Court has emphasized that dismissal for FNC is predicated on the existence of an adequate "alternative forum," in which a defendant is amenable to process. E.g., *Sinochem Int'l Co.* v. *Malaysia Int'l Ship. Corp.*, 549 U.S. 422, 429 (2007). But the Court has yet to address whether a subset of defendants in a case may obtain FNC dismissal where

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[1] Recent scholarship observes that "federal judges grant roughly half of motions to dismiss for forum non conveniens, at least in written opinions." Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 396 (2017).

the alternative foreign forum is available for those, but not all, defendants. In such a scenario, FNC dismissal results in a bifurcation of the case, permitting litigation to proceed in the United States as to those defendants for whom litigating abroad would *not* be convenient.

As noted, the circuits are deeply split on the question presented. And the confusion among the circuits about FNC doctrine and its adequate alternative forum requirement "has undermined the purpose and effectiveness of the forum non conveniens doctrine and put United States jurisprudence at odds with much of the global community." Megan Waples, *The Adequate Alternative Forum Analysis In Forum Non Conveniens: A Case For Reform*, 36 CONN. L.J. 1475, 1478 (2004).

In particular, the split implicated in this case speaks to disagreement about how flexible the FNC analysis should be, and the role of bright-line rules in the FNC analysis. This Court has traditionally emphasized that the FNC doctrine is *not* susceptible to hard-and-fast, bright-line rules (as compared to other doctrines). See, e.g., *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 722–723 (1996) (contrasting abstention doctrine with "[d]ismissal for *forum non conveniens*, by contrast, [which] has historically reflected a far broader range of considerations"); *Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 448 (1994) (describing "some of the multifarious factors relevant to the *forum non conveniens* determination"); *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 528 (1988)

("[T]he district court is accorded substantial flexibility"); *Koster* v. *Am. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 527 (1947) (FNC is not "a rigid rule"). By contrast, the decision below—and the decisions of like-minded circuits—interpolates a bright-line rule that disserves, rather than promotes, the interests embedded in the FNC doctrine.

The split implicated also raises fundamental questions about the purpose of FNC. While some courts suggest the doctrine is primarily meant to allocate venue based on the convenience and interests of the *parties*, *DiFederico* v. *Marriott Int'l, Inc.*, 714 F.3d 796, 805 (4th Cir. 2013), other cases suggest the primary rationale of FNC is to find the appropriate forum for an entire *case*. *In re Bridgestone/Firestone, Inc.*, 420 F.3d 702, 706 (7th Cir. 2005). See also Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 826 (2008) (FNC meant to "determine[e] whether another forum is better suited to adjudicate a claim."). Still others see different purposes behind FNC, ranging from international comity to avoiding "impermissible gamesmanship." *Est. of I.E.H.* v. *CKE Rests., Holdings, Inc.*, 995 F.3d 659, 665 (8th Cir. 2021). Resolving the split presented by this case will help answer this very question, which will lead to greater clarity on the application of FNC, generally, and may help the Circuits to clear up disagreements on other parts of the doctrine as well.

B. The Decision Below Invites Forum-Shopping, Undermines International Comity, And Invites U.S. Courts To Become Embroiled In Adjudicating Claims That Belong Abroad

The bright-line rule adopted in at least six circuits—under which FNC dismissal is barred unless every defendant is amenable to suit abroad—undermines the orderly and efficient adjudication of cases in federal court. To begin, the bright-line rule adopted by those circuits is inconsistent with principles of international comity, as it requires American courts to hear claims that a foreign forum has a stronger interest in deciding, and that American courts and the American public have a lesser interest in deciding and incurring the costs of administering. See *Am. Dredging Co.*, 510 U.S. at 466 (Kennedy, J., dissenting) (*forum non conveniens* promotes comity); *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 207 (2012) (Sotomayor, J., concurring) ("[C]onsiderations of justiciability or comity lead courts to abstain from deciding questions whose initial resolution is better suited to * * * another forum."); *cf. Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1419 (2018) (Gorsuch, J., concurring) (observing foreign-relations concerns caused by transnational civil litigation).

For the same reasons, the rule reflected in the decision below will require U.S. courts to adjudicate cases that have little to do with the United States, simply because not every defendant to a lawsuit is

subject to jurisdiction in a foreign forum. If plaintiffs can file lawsuits in U.S. federal courts and thwart FNC dismissal by joining even one defendant who cannot be sued in an otherwise more suitable forum—no matter how many defendants are joined in the U.S. proceedings, whether some are already subject to suit abroad, and how insignificant the U.S.-based defendant may be—the U.S. legal system will become an even more attractive venue for forum shopping.

Absent the Court's review of the question presented, the rule adopted by the decision below will not only draw more foreign plaintiffs to U.S. courts, but it will also encourage them to forum shop for particular circuits within the United States. Specifically, foreign plaintiffs will be drawn to the Third, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits, since that side of the circuit split at issue here (as opposed to the First, Second, Sixth, and Eleventh Circuits) allows plaintiffs to anchor cases in the United States and thwart bifurcation by adding parties that cannot be dismissed on FNC grounds.

* * * *

The Court has cautioned against rigid limitations on FNC dismissals to prevent U.S. courts from becoming "even more attractive" to plaintiffs who might anchor their claims to an American court having little interest in a foreign dispute. *Piper*, 454 U.S. at 251–252. And, the Court has consistently held that FNC dismissals may be granted based on convenience to the parties, *or* convenience to the courts. See *Sinochem Int'l Co.*, 549 U.S. at 429 (citing

Am. Dredging Co., 510 U.S. at 447–448). To reduce the international friction and undue burden on the U.S. court system that would result from the decision below, the petition for certiorari should be granted.

III. The Decision Below Is Wrong

Rigid restrictions on the FNC doctrine would cause it to "lose much of the very flexibility that makes it so valuable," *Piper*, 454 U.S. at 249–250, and undermine "the ultimate inquiry [of] where trial will best serve the convenience of the parties and the ends of justice," *Koster*, 330 U.S. at 518. See also *Williams* v. *Green Bay & W.R. Co.*, 326 U.S. 549, 557 (1946) ("Each case turns on its facts."). *Cf.* Stephen E. Sachs, *Five Questions After Atlantic Marine*, 66 HASTINGS L.J. 761, 772 (2015) ("Under the liberal joinder regime of the Federal Rules, the plaintiff might join a largely domestic claim with a wholly foreign one * * * and a court could, in theory, dismiss the latter while retaining the former."). The decision below adopts a rigid rule fundamentally at odds with these precepts.

A few exemplary cases applying the bright-line rule adopted by the decision below illustrate its perils. First, consider *Galustian* v. *Peter*, 591 F.3d 724 (4th Cir. 2010). Galustian sued Peter for defamation in Virginia, alleging that Peter sent a forged warrant for his arrest, purportedly issued by an Iraqi judge, to all members of the Private Security Company Association of Iraq. Peter moved to dismiss in favor of Iraqi courts. Rather than opposing the motion, Galustian sought to amend his complaint to add Colonel Jack Holly, a California resident, as a co-

defendant. Citing Galustian's right to amend, the Fourth Circuit reversed the *forum non conveniens* dismissal of Peter as "premature" on the basis that "the alternate forum must be available as to *all defendants*" and "no evidence was proffered regarding the availability of the forum as to Holly." *Id.* at 731 (emphasis added). After nearly another year of litigation, the U.S. district court found that it lacked personal jurisdiction over Holly and again dismissed Peter on *forum non conveniens* grounds. See 750 F. Supp. 2d 670, 678 (E.D. Va. 2010).

Next, consider *Domanus* v. *Lewicki*, 779 F. Supp. 2d 739 (N.D. Ill. 2011). Following the Seventh Circuit's adoption of the bright-line rule, the district court denied a motion to dismiss for *forum non conveniens* on the basis that "[a]n alternative forum is 'available' if *all parties* are amenable to process and are within the forum's jurisdiction" and the defendants met "a critical stumbling block on this issue." 779 F. Supp. 2d at 753.

In *Domanus*, the Illinois lawsuit was filed by a Polish company and its minority shareholders. *Id.* at 743–744. The plaintiffs alleged that the defendants defrauded them through a scheme of misappropriation and misuse of funds invested in a real-estate project in Poland. Notwithstanding the nexus with Poland—or the fact that the plaintiffs joined over 20 defendants or derivate defendants in the action, some of whom were Polish entities—the court held that it lacked the power to dismiss *any defendants* because three of them were U.S. residents

and Polish courts would not recognize their offer to submit to jurisdiction. *Id.* at 753. Thus, the entire action was retained, irrespective of the inconvenience to most parties or the respective countries' courts.

Finally, consider the present case. Canada-based DIRTT first sued Canada-based Petitioner Mogens Smed and Canada-based Petitioner Falkbuilt in Canada. Then, in a blatant act of forum-shopping, DIRTT initiated a largely duplicative lawsuit, this time filing suit in Utah federal court against the same parties, but also adding three U.S.-based parties (the Hendersons and FMS) in an apparent attempt to anchor the duplicative case in the United States, where DIRTT has access to U.S. discovery, potentially more generous remedies, and the American jury trial system. In both the first-filed Canadian action and the Utah-based lawsuit, the same underlying facts and real parties in interest are involved. Considering all these facts, the District Court exercised its discretion and found that the claims against Petitioners should clearly be heard by Canadian courts.[2]

Yet, despite the clear overlap in the two cases and the fact that the case filed in Utah has Canada written all over it, the decision below applied a bright-line rule reversing the district court's dismissal of Canada-based Smed and Falkbuilt from the Utah action as a matter of law. That is so, despite the fact that this

[2] Both the Canadian and Utah actions involve a few additional defendants who are not common to both actions, but they are not central to the dispute. In addition, DIRTT filed two other overlapping actions against Falkbuilt in Texas and Illinois.

Court has instructed the Circuits to review district-court dismissals for "clear abuse of discretion." *Piper*, 454 U.S. at 257.

In reversing, the Tenth Circuit created multiple inefficiencies and inconveniences: the decision below requires Petitioners to litigate in *both* a convenient forum (Canada), and an *in*convenient one (Utah) at the same time. And the Tenth Circuit imposed this requirement despite the district court's unchallenged FNC dismissal of Falkbuilt's counterclaim against DIRTT, which now must be litigated in Canada even as DIRTT's claims against Falkbuilt remain in Utah federal court. The bright-line rule engenders such inconsistencies and inconveniences, calling for review by the Court and clarification that flexibility to dismiss some but not all parties is permissible.

IV. This Case Presents An Ideal Vehicle To Decide The Question Presented

The question presented here is squarely implicated, and it was outcome-dispositive in the decision below. The issue was extensively developed below, and the Tenth Circuit's holding could not have been clearer: Reversing the District Court's partial dismissal, it "h[e]ld a district court clearly abuses its discretion when, as here, it elects to dismiss an action as to several defendants under a theory of forum non conveniens while simultaneously allowing the same action to proceed against other defendants." Pet. App. 2a. Because the decision below did not give any alternate or secondary holding, this case is an ideal vehicle to address the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED APRIL 11, 2023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 21-4078, 21-4153

DIRTT ENVIRONMENTAL SOLUTIONS, INC.;
DIRTT ENVIRONMENTAL SOLUTIONS, LTD.,

Plaintiffs-Appellants,

v.

FALKBUILT LTD.; FALKBUILT, INC.;
MOGENS SMED,

Defendants-Appellees,

and

LANCE HENDERSON; KRISTY HENDERSON;
FALK MOUNTAIN STATES, LLC,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF UTAH
(D.C. No. 19-CV-00144-DBB-DBP)

Before **CARSON**, **BALDOCK**, and **EBEL**, Circuit Judges.

BALDOCK, Circuit Judge.

In today's appeal we address a question of first impression in this Circuit: Can a district court appropriately dismiss part of an action pursuant to the

forum non conveniens doctrine while allowing the other part to proceed before it? Reasoning that the *forum non conveniens* doctrine is fundamentally concerned with the convenience of the venue—and relatedly the efficient administration of justice—we conclude the answer to that question is "no." Accordingly, we hold a district court clearly abuses its discretion when, as here, it elects to dismiss an action as to several defendants under a theory of *forum non conveniens* while simultaneously allowing the same action to proceed against other defendants. Exercising jurisdiction pursuant to Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1291,[1] we **REVERSE** the district court's judgment.[2]

I.

The Parties to this appeal are no strangers to the facts of the underlying dispute since they have litigated it in one form or another since May 2019. As a result, we limit our

1. We consider two consolidated appeals in this case. The first, no. 21-4078, addresses the district court's decision to dismiss part of the underlying action under a *forum non conveniens* theory. The district court certified this appeal under Fed. R. Civ. P. 54(b). The second, no. 21-4153, addresses the district court's decision to deny Appellants' motion filed under Fed. R. Civ. P. 60(b). Because we resolve this case by reversing the district court's underlying decision in appeal no. 21-4078, we **DISMISS** appeal no. 21-4153 as **MOOT**.

2. Appellants also filed a motion asking us to take judicial notice of filings from their Rule 60(b) motion and a related proceeding before another district court outside our Circuit. Because we do not need to consider these materials to grant Appellants the relief they seek by reversing the district court's decision, we **DENY** Appellants' motion as **MOOT**.

discussion of the facts and procedural history of this case solely to those necessary to resolve the issue before us.

The facts of this case—as alleged in Appellants' first amended complaint—concern the litigious aftermath of an acrimonious corporate divorce. Appellants are DIRTT Environmental Solutions, Inc., a Colorado corporation,[3] and DIRTT Environmental Solutions Ltd., its Canadian parent (collectively "DIRTT"). DIRTT operates a business specializing in the design and construction of prefabricated interior spaces and utilizes proprietary software in its design process. DIRTT was founded in 2003 by Mogens Smed and two other individuals. For years, DIRTT enjoyed a fruitful relationship with Smed, who served as DIRTT's CEO. That changed in 2018 when, for reasons that remain unclear based on this record, DIRTT decided to part ways with Smed. Following his termination, Smed established his own company, Falkbuilt Ltd. (and Falkbuilt, Inc., its U.S. based subsidiary). Like DIRTT, Falkbuilt's business also focuses on producing

3. DIRTT, Inc.'s principal place of business was the subject of some debate in the proceedings below. DIRTT originally stated in its complaint that DIRTT, Inc.'s principal place of business was in Canada. DIRTT later stated in its first amended complaint that DIRTT, Inc.'s principal place of business was in the United States. The district court noted that DIRTT's "filings and representations regarding DIRTT, Inc. have been many and varied." We offer no opinion on DIRTT, Inc.'s principal place of business. We note, however, that both parties appear to have taken contradictory positions on various matters at different stages of this litigation, depending on whether they were seeking or opposing dismissal for *forum non conveniens*. *See* Appellants' Br. at 5, Appellee's Br. at 10-11.

prefabricated interior spaces. Falkbuilt relies on a network of affiliates that are invested in Falkbuilt itself to facilitate the conduct of its business. DIRTT alleges that Smed remained heavily influenced by his time at DIRTT and that he continued "to identify himself as a 'DIRTTbag,' a phrase used by DIRTT employees to describe themselves and express pride in adhering to DIRTT's philosophy," even after his departure from the firm.

According to DIRTT, Smed set up Falkbuilt to directly compete with it. To this effect, DIRTT claims Smed recruited its employees and affiliates not only to join his new business, but to bring DIRTT's proprietary information with them. In this regard, DIRTT's allegations as they pertain to Lance Henderson ("Lance"), a former DIRTT employee, and his wife Kristy Henderson ("Kristy"), a former employee of a DIRTT affiliate, are particularly relevant. Lance worked as a Utah sales representative for DIRTT from 2009 until 2019. As part of his employment with DIRTT, Lance acknowledged receipt of DIRTT's confidentiality policy, which prohibited him from, amongst other things, retaining DIRTT's sensitive data.

Unbeknownst to DIRTT, Lance had a felony conviction for defrauding investors of between $6 and $8 million. Smed apparently knew about Lance's conviction but did not bring it to DIRTT's attention because DIRTT alleges it only first learned about Lance's past after Smed's departure when the State of Utah sent it an administrative garnishment order. Sometime thereafter, Lance decided to leave DIRTT and "either made contact or accelerated

plans with Mr. Smed and Falkbuilt to assist them in launching a business in Utah." Lance then uploaded 35 gigabytes of DIRTT's data on to his personal drives at Smed's behest or direction. DIRTT learned of this upload one week after it took place, and Lance admitted to uploading the information but denied any wrongdoing or nefarious intent. Less than one month before Lance's departure, Kristy incorporated Falk Mountain States, LLC ("FMS") to serve as Falkbuilt's Utah affiliate. When Lance ultimately parted ways with DIRTT in August 2019, he informed them he would be starting a construction business even though he intended to work for Falkbuilt. Smed allegedly recruited numerous other DIRTT employees to participate in similar schemes, although those former employees are not subject to this suit.

DIRTT began its legal campaign against Falkbuilt and Smed in May 2019—before Lance's departure—by filing suit against them for breach of contract in Canadian court. DIRTT expanded its legal campaign after it learned about Lance's apparent misappropriation of its data by filing the instant lawsuit against Falkbuilt Ltd., the Hendersons, and FMS. DIRTT's original complaint alleged various theft of trade secret claims under both federal and state law as well as a breach of contract claim against Lance. DIRTT also sought a preliminary injunction. Falkbuilt responded by filing a counterclaim, which DIRTT moved to dismiss on *forum non conveniens* grounds. The parties then engaged in a series of protracted discovery disputes. DIRTT subsequently amended its complaint in October 2020. The first amended complaint (amongst other things) added new parties—DIRTT Ltd. as a plaintiff as well

as Falkbuilt, Inc. and Smed as defendants—changed DIRTT, Inc.'s principal place of business from Canada to the United States and refined its allegations to be more focused on harm suffered in the United States. Falkbuilt and Smed moved to dismiss DIRTT's first amended complaint, based on *forum non conveniens*. The Hendersons and FMS refused to join this motion or consent to Canadian jurisdiction—the alternative forum proposed in Falkbuilt's motion to dismiss.

In March 2021, the district court held a hearing on DIRTT's motion to dismiss Falkbuilt's counterclaim for *forum non conveniens*. The district court granted that motion. Thereafter, in May 2021, the district court held a hearing on Falkbuilt and Smed's motion to dismiss DIRTT's first amended complaint. After hearing argument from the parties, the district court issued a preliminary ruling from the bench.[4] In doing so, the district court went through each factor of the *forum non conveniens* analysis and ultimately granted Falkbuilt and Smed's motion. DIRTT appealed that ruling and it is the subject of appeal no. 21-4078. DIRTT also filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) based on a series of emails disclosed by Falkbuilt

4. Although the district court described this ruling as a preliminary one, it provided no meaningful explanation of its *forum non conveniens* analysis in the written order it issued thereafter. As a practical matter, a district court generally should issue rulings on complex matters such as *forum non conveniens* in written form. This makes it easier for both parties and appellate courts to understand the district court's reasoning, thereby enhancing judicial economy and facilitating the efficient administration of justice.

during discovery. The district court denied that motion in a written order. DIRTT appealed that ruling as well, and it is the subject of appeal no. 21-4153. We consolidated these appeals for briefing and oral argument. But because our resolution of the *forum non conveniens* issue disposes of both appeals, we focus our analysis on DIRTT's first appeal. *See supra* n.1.

II.

Forum non conveniens is a discretionary common law doctrine under which "a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507, 67 S. Ct. 839, 91 L. Ed. 1055 (1947). "At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined." *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994). Those "conditions" are "central[ly] focus[ed]" on the convenience of the forum as compared to foreign alternatives. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248-249, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981). Accordingly, dismissal under a *forum non conveniens* theory "will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." *Id.* at 249. The doctrine therefore requires courts to ask whether a suit could be more conveniently resolved

in a foreign jurisdiction rather than the forum chosen by the plaintiff. To answer that question, our precedents follow a familiar framework. That framework gives effect to the principle that:

> [W]hen an alternative forum has jurisdiction to hear a case, and when trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to the plaintiff's convenience, or when the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems, the court may, in the exercise of its sound discretion, dismiss the case, even if jurisdiction and proper venue are established.

Am. Dredging Co., 510 U.S. at 447-48 (internal quotations and punctation omitted).

Accordingly, our inquiry begins with two threshold questions. *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1172 (10th Cir. 2009). First, we ask whether the Canadian forum is "an adequate alternative forum" in which Defendants are amenable to process." *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 605 (10th Cir. 1998) (citing *Piper Aircraft*, 454 U.S. at 254 n.22). Second, we consider whether Canadian, *i.e.*, foreign, law applies. *Id.* (citing *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 994 (10th Cir. 1993)). We may only proceed with the analysis if the answer to both questions is yes. *Id.* at 605-06. In the event we can continue the analysis, we then examine and balance various private and public interest factors, none of

which come into play here. *Id.* at 606. We will only reverse a district court's *forum non conveniens* determination "when there has been a clear abuse of discretion." *Piper Aircraft*, 454 U.S. at 257

III.

Appellants challenge virtually every aspect of the district court's decision to dismiss the Falkbuilt Entities and Smed from their suit. Because we conclude the district court abused its discretion by finding that Canada was an adequate alternative forum—the first of the two threshold inquiries in the analysis—we need only address the parties' arguments relating to this specific issue. This, of course, does not constitute an implicit endorsement of the aspects of the court's decision we need not address.

The threshold inquiry of "whether there is an adequate alternative forum" for the suit is itself comprised of two components: The alternative forum must be both "available" and "adequate." *Gschwind*, 161 F.3d at 606; *Yavuz*, 576 F.3d at 1174. The district court found that Canada was both available and adequate as an alternative forum. The district court devoted most of its analysis to the question of whether Canada was an adequate forum and appeared to simply assume it was an available forum because "DIRTT, Limited, filed suit against Falkbuilt, Ltd, and Mr. Smed in Alberta, Canada, on May 9, 2019." But we are concerned with the court's findings as to the first consideration—whether Canada was available as a forum.

Appellants argue this finding was erroneous and an abuse of discretion. Specifically, they contend the district court abused its discretion by concluding Canada was an available forum when three of the six defendants in the suit—Lance Henderson, Kristy Henderson, and Falk Mountain States—were not subject to Canadian jurisdiction and had not consented to proceeding with an action there. *See* Appellants' Br. at 42. For their part, Appellees argue the district court correctly concluded Canada was an available forum because "[t]he Falkbuilt Defendants explicitly agreed to be subject to the Canadian court's jurisdiction" and because DIRTT "'splintered' the litigation over this dispute when it filed one case in Canada and then filed a second, overlapping action seven months later in Utah." Appellees' Br. at 27-28.

The key question here is what does it mean for a foreign forum to be available under *forum non conveniens*? We have previously explained that an alternative forum is generally considered available "when the defendant is amenable to process in the other jurisdiction." *Fireman's Fund Ins. Co. v. Thyssen Mining Constr. of Can. Ltd.*, 703 F.3d 488, 495 (10th Cir. 2012) (quoting *Piper Aircraft*, 454 U.S. at 254 n.22). As such, we have stated that a forum can be considered available when the defendant consents to the jurisdiction of the alternative forum. *See Archangel Diamond Corp. Liquidating Tr. v. Lukoil*, 812 F.3d 799, 804 (10th Cir. 2016); *Yavuz*, 576 F.3d at 1174-75; *Gschwind*, 161 F.3d at 606. Appellees hang their hats on these statements and would have us hold a foreign forum is available for the purposes of *forum non conveniens* whenever *the particular defendants moving for dismissal*

are amenable to process in, and subject to the jurisdiction of, that foreign forum, even if that does not include other defendants in the action.

Adopting Appellees' position, however, would require us to accept the premise that *forum non conveniens* can be used to split cases. Appellees—who carry the burden of establishing that Canada is available as a forum, *see Rivendell*, 2 F.3d at 993—cite no authority on the question of whether a district court can split cases using *forum non conveniens*. *See* Appellees' Br. at 27-29. In contrast, Appellants point to authority from the Fifth Circuit stating "[a] foreign forum is available when *the entire case and all parties* can come within the jurisdiction of that forum." *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 835 (5th Cir. 1993) (emphasis added) (quoting *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1165 (5th Cir. 1987) (en banc), *partially vacated on other grounds*, 490 U.S. 1032 (1989)). Appellants have the better of this argument. Although our own precedents appear not to have expressly addressed this question, we have at least implicitly endorsed the Fifth Circuit's understanding of forum availability. As we stated in *Yavuz*: "The availability requirement is usually satisfied, however, where the *defendants* concede to be amenable to process in the alternative forum." 576 F.3d at 1174 (emphasis added). *Yavuz* addressed a multi-defendant situation, and this statement recognizes the basic logic of requiring all defendants in such suits be amenable to the jurisdiction of another forum before considering it available for the purposes of *forum non conveniens*.

Furthermore, we can find support for this understanding of availability from our sister circuits. The Seventh Circuit, for example, has expressly adopted the Fifth Circuit's understanding of forum availability, stating "[a]n alternative forum is available if *all parties* are amenable to process and are within the forum's jurisdiction." *Kamel v. Hill-Rom Co., Inc.*, 108 F.3d 799, 803 (7th Cir. 1997) (emphasis added) (citing *In re Air Crash Disaster*, 821 F.2d at 1165); *see also Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 867 (7th Cir. 2015) (same). The Sixth Circuit has also followed suit, noting that "a foreign forum is not truly 'available'—and a defendant is not meaningfully 'amenable to process' there—if the foreign court cannot exercise jurisdiction over both parties." *Associacao Brasileira de Medicina de Grupo v. Stryker Corp.*, 891 F.3d 615, 620 (6th Cir. 2018) (citing *Watson v. Merrell Dow Pharm., Inc.*, 769 F.2d 354, 357 (6th Cir. 1985)).[5] In other words, there is

5. *But see Watson v. Merrell Dow Pharms., Inc.*, 769 F.2d 354 (6th Cir. 1985). In *Watson*, the Sixth Circuit addressed a case where a series of plaintiffs sued a pharmaceutical company and several individuals for alleged birth defects. 769 F.2d at 355-56. The pharmaceutical company moved to dismiss the case under *forum non conveniens* and agreed to consent to the United Kingdom's jurisdiction. *Id.* at 356-57. The individual defendants did not consent to that jurisdiction. *Id.* at 357. The district court granted the motion, reasoning that the pharmaceutical company was the "primary" defendant. *Id.* at 357-58. The Sixth Circuit disagreed with that assessment and highlighted the principle that "dismissal predicated on *forum non conveniens* requires [the] availability of [an] alternative forum possessing jurisdiction as to *all* parties." *Id.* (citation omitted). Nevertheless, the *Watson* court inexplicably decided to affirm the district court's decision as it applied to the pharmaceutical company

support among the various circuits for the idea that *all parties* (and by extension the entire case) must be subject to the jurisdiction of an alternative forum in order for it to be considered available under *forum non conveniens*.

Logically, this makes good sense. *Forum non conveniens* is a doctrine that is fundamentally concerned with convenience. *See, e.g., Piper Aircraft*, 454 U.S. at 256; *Gschwind*, 161 F.3d at 605; *Yavuz*, 576 F.3d at 1172. And convenience is a multidimensional concept that is not primarily focused on any one party's interests. Instead, courts should consider convenience as it applies to the *entire case* when it analyzes the appropriateness of dismissal for *forum non conveniens*. That means considering the convenience as it relates to *all* parties as well as the court's inherent interest in the efficient administration of justice. *See Piper*, 454 U.S. at 257-61. As such, the Supreme Court has explained that dismissal for *forum non conveniens* "will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." *Id.* at 249. The latter consideration is particularly relevant to this case. This is clearly not a case "where the plaintiff is unable to offer *any* specific reasons of convenience supporting his choice [of forum]." *Id.* (emphasis added). When a plaintiff brings suit against multiple defendants in a forum where they are all subject to jurisdiction and the proposed alternative

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but reversed it as it applied to the individual defendants—effectively splitting the case. *Id.* While we agree with *Watson*'s description of the law, we disagree with its ultimate resolution.

forum could only exercise jurisdiction over some of those defendants, the plaintiff has satisfied the requirements of *Piper Aircraft*.[6]

Here, all the defendants are subject to the district court's jurisdiction. The Utah based defendants, however, are not subject to Canadian jurisdiction and neither consented to that jurisdiction nor joined the Canadian defendants' motion to dismiss for *forum non conveniens*. As a result, Canada is not an available alternative forum. Appellees failed to establish the first threshold requirement for dismissing a case under *forum non conveniens* and the district court abused its discretion by finding they had. Splitting cases in the manner employed by the district court fundamentally contradicts the

6. In general, the plaintiff's choice of forum is entitled to deference. *See, e.g., Gschwind*, 161 F.3d at 606; *Yavuz*, 576 F.3d at 1172; *Sinochem Int'l Co. v. Malaysia Shipping Corp.*, 549 U.S. 422, 430, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007). Foreign plaintiffs' choices are entitled to less deference, however. *Id.* The district court found DIRTT was a "foreign" plaintiff because it is incorporated in Colorado rather than Utah. While we offer no opinion on DIRTT, Inc.'s principal place of business or citizenship, we believe it is important to highlight that the district court misunderstood the meaning of "foreign" in this context. For the purposes of *forum non conveniens*, plaintiffs are not "foreign" if they are based in the United States. *See Ranza v. Nike, Inc.*, 793 F.3d 1059, 1076 (9th Cir. 2015) ("A plaintiff's choice of forum is generally entitled to deference, *especially where the plaintiff is a United States citizen or resident*, because it is presumed a plaintiff will choose her 'home forum.'" (emphasis added) (citing *Piper Aircraft*, 454 U.S. at 255)); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991) ("[T]he 'home' forum for the plaintiff is any federal district in the United States, not the particular district where the plaintiff lives." (footnote omitted)).

"central purpose" of *forum non conveniens* because it only increases the possibility of overlapping, piecemeal litigation that is inherently inconvenient for both the parties and the courts. *See Gschwind*, 161 F.3d at 605. We therefore foreclose this possibility by expressly holding that *forum non conveniens* is not available as a tool to split or bifurcate cases. Because we conclude Appellees failed to pass the first threshold requirement in the *forum non conveniens* analysis, we need not inquire any further to reverse the district court's judgment and dispose of this appeal.

IV.

We hold the district court abused its discretion by granting Appellees' motion to dismiss. We therefore **REVERSE** the district court's judgment in appeal no. 21-4078 and **REMAND** with instructions for the district court to exercise jurisdiction over the entirety of Appellants' action. We also **DISMISS** appeal no. 21-4153 as **MOOT** and **DENY** Appellants' motion to take judicial notice filed in appeal no. 21-4078 as **MOOT**.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, FILED DECEMBER 22, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

December 14, 2021, Decided;
December 22, 2021, Filed

Case No. 1:19-cv-144 DBB

DIRTT ENVIRONMENTAL SOLUTIONS, INC. AND DIRTT ENVIRONMENTAL SOLUTIONS LTD.,

Plaintiffs,

v.

LANCE HENDERSON, KRISTY HENDERSON, AND FALK MOUNTAIN STATES, LLC,

Defendants.

David Barlow, United States District Judge.

MEMORANDUM DECISION AND ORDER DENYING [201] MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. PROC. 60(b)

Appendix B

Before the court is Plaintiffs' Motion for Relief from Judgment Pursuant to Fed. R. Civ. Proc. 60(b) (Motion).[1] Having considered the briefing and the relevant law, the court concludes the motion may be resolved without oral argument.[2] For the reasons stated herein, the court DENIES the Motion.

BACKGROUND

In 2003, Mogens Smed and two others founded Plaintiff DIRTT Environmental Solutions, Ltd. (DIRTT, Ltd.).[3] DIRTT, Ltd. "is a Canadian company, incorporated in the Province of Alberta and with its headquarters and principal place of business in Calgary, Alberta, Canada."[4] It now is a public company and is listed on the Toronto Stock Exchange.[5]

In addition to founding DIRTT, Ltd., Smed was its CEO for 14 years and then its Executive Chairman until September 2018, when DIRTT, Ltd. terminated his

1. ECF No. 201, filed September 9, 2021.

2. *See* DUCivR 7-1(f).

3. Canadian Statement of Claim (Exhibit 1 to Falkbuilt Defendants' Motion to Dismiss First Amended Complaint) at ¶¶ 4-5, ECF No. 134-1, filed November 19, 2020.

4. First Amended Complaint at ¶ 2, ECF No. 117, filed October 20, 2020.

5. Statement of Claim at ¶ 10.

employment.[6] DIRTT, Ltd. describes Smed as one of its "directing minds."[7] Shortly after his termination, Smed founded Defendant Falkbuilt, Ltd. under the laws of Alberta.[8] Falkbuilt, Ltd.'s offices are in Calgary, Alberta.[9] Smed is the sole director and/or CEO of Falkbuilt, Ltd. and resides Calgary.[10]

DIRTT, Ltd. is the head of an international enterprise. It operates in the United States and in other countries through its affiliated "partners": "DIRTT offers interior construction solutions throughout the United States and Canada, as well as international markets, through a network of independent distribution partners."[11] DIRTT, Ltd. also is the parent[12] of DIRTT, Inc., a company incorporated in Colorado, which Plaintiffs originally described as having "its headquarters and principal place of business

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6. *Id.* at ¶¶ 16, 25.

7. *Id.* at ¶ 2.

8. Canadian Amended Amended Amended Statement of Claim (Exhibit 3 to Falkbuilt Defendant's Opposition to Plaintiffs' Rule 60(b) Motion) at ¶ 6, ECF No. 207-3, filed September 30, 2021.

9. First Amended Complaint at ¶ 20.

10. Canadian Statement of Claim at ¶ 2, ECF No. 134-1; Canadian Amended Amended Amended Statement of Claim at ¶ 6, ECF No. 207-3; First Amended Complaint at ¶ 150 (describing Smed as the "founder and CEO of Falkbuilt").

11. Canadian Statement of Claim at ¶ 6.

12. First Amended Complaint at ¶ 2.

in Calgary, Alberta, Canada."[13] Later, Plaintiffs dropped the reference to Calgary and said instead that DIRTT, Inc.'s "principal places of business" were "in Savannah, Georgia and Phoenix, Arizona."[14] Later still, Plaintiffs told a Canadian court that DIRTT, Inc.'s "principal offices [are] located in Calgary, Alberta."[15] Plaintiffs allege that Smed "directly or indirectly" controlled both DIRTT, Ltd. and DIRTT, Inc. as "the Calgary-based CEO."[16] DIRTT, Ltd. alleges that Smed misappropriated and misused trade secrets, copyrighted material, and other proprietary information from it while he worked for the Alberta company and after he was terminated from it.[17] Smed and Falkbuilt, Ltd. also engaged in other alleged misconduct by luring away DIRTT, Ltd. employees and customers and directly competing against DIRTT, Ltd.[18]

As a result, DIRTT, Ltd. filed suit against Smed and Falkbuilt, Ltd. in Calgary.[19] The case alleged that Smed, Falkbuilt, and another individual violated the Canadian

13. Verified Complaint at ¶ 1, ECF No. 2, filed December 11, 2019.

14. First Amended Complaint at ¶ 1.

15. Canadian Amended Amended Amended Statement of Claim at ¶ 2, ECF No. 207-3.

16. First Amended Complaint at ¶ 21.

17. *See* Canadian Statement of Claim at ¶¶ 43-44, 47, ECF No. 134-1.

18. Canadian Statement of Claim at ¶ 47.

19. *See* Canadian Statement of Claim.

Copyright Act, the Alberta Business Corporations Act, their contracts, and Canadian common law by the foregoing and other related actions. The claim seeks an interim and permanent injunction, numerous declaratory judgments, compensatory damages, punitive damages, exemplary damages, costs of the action, interest, and accounting of the defendants' revenue and profits. It requests a trial in Calgary, Alberta. The claim says nothing about limiting the conduct challenged, the damages suffered, or the relief sought solely to Canada.[20]

Seven months later, DIRTT, Inc., the subsidiary of DIRTT, Ltd., filed suit in this court.[21] The Complaint states that DIRTT, Inc., which is described as a Colorado company with headquarters and its principal place of business in Calgary, "operates in Canada, the United States and other jurisdictions around the world."[22] In the Complaint, DIRTT, Inc. does not say that it is a subsidiary of DIRTT, Ltd., that DIRTT, Ltd. already has filed a related suit in Calgary, that the trade secrets at issue belong to DIRTT, Ltd., or even mention DIRTT, Ltd. at all.[23] The Complaint's background section starts by stating:

> Since his difficult departure from DIRTT in September 2018, Mr. Smed and those acting

20. *See generally*, Canadian Statement of Claim.

21. Verified Complaint, ECF No. 2.

22. *Id.* at ¶¶ 1-2.

23. *See generally* Verified Complaint.

> in concert with him, including the newly-formed Falk entities, have engaged in an ongoing attempt to replicate DIRTT's business, products and business model through improper means, including but not limited to utilizing DIRTT confidential information and trade secrets to identify and approach customers and potential customers, utilizing pricing and margin information to undercut DIRTT's quotes, and utilizing DIRTT's patented and trade secret technology to gain an unfair advantage in product offerings.[24]

The Complaint then goes on to allege further detail about Smed's additional and related alleged misconduct and discuss Defendants Lance and Kristy Henderson's misconduct in misappropriating confidential information, setting up Falk Mountain States to compete with DIRTT, Inc., and contacting "at least one prospective customer of DIRTT."[25] The Complaint also alleges misconduct by various non-parties elsewhere in the United States and Canada.[26]

Subsequently, Falkbuilt, Ltd. counterclaimed for defamation and intentional interference with economic relations.[27] DIRTT, Inc. then moved to dismiss the

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24. *Id.* at ¶ 26.

25. *Id.* at ¶¶ 29-64.

26. *Id.* at ¶¶ 65-83.

27. Falkbuilt, Ltd.'s Answer to Verified Complaint and

counterclaim on the grounds of *forum non conveniens*, arguing that the counterclaim should be litigated in Canada.[28] The court granted the motion.[29] The Falkbuilt Defendants also moved to dismiss the entire action on the grounds of *forum non conveniens*, in favor of the first-filed action in Calgary.[30] The court granted that motion in part, keeping the part of the action that involved the Utah defendants, who had not joined in the motion.[31]

Plaintiffs later filed a notice appealing the order on the Falkbuilt Defendants' motion to dismiss.[32] That appeal is currently pending before the Tenth Circuit.

On September 9, 2021, Plaintiffs also filed this Motion seeking relief under Rule 60(b).[33]

Counterclaim at 29-48, ECF No. 42, filed February 5, 2020; Falkbuilt, Ltd.'s First Amended Counterclaim, ECF No. 62, filed March 18, 2020.

28. Plaintiff's Motion to Dismiss First Amended Counterclaim, ECF No. 63, filed April 1, 2020.

29. *See* Order dated March 30, 2021, ECF Nos. 156; Transcript of Hearing on Motion to Dismiss held on 03/30/21, ECF No. 157.

30. Motion to Dismiss, ECF No. 134, filed November 19, 2020.

31. Order dated May 21, 2021, ECF No. 164; Transcript of Motion Hearing held on 05/19/21, ECF No. 166.

32. Notice of Appeal, ECF No. 171, filed June 16, 2021.

33. Motion at 1, ECF No. 201.

Appendix B

LEGAL STANDARD

Federal Rule of Civil Procedure 60(b) provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding" under certain circumstances.[34] Plaintiffs rely on two provisions of Rule 60(b). First, under Rule 60(b)(2), relief may be granted where there is "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)."[35] Second, under Rule 60(b)(6), relief may also be appropriate for "any other reason that justifies relief."[36]

As a "general matter the filing of a notice of appeal is an event of jurisdictional significance that confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."[37] But the rule in civil cases "is that after an appeal has been taken the district court retains jurisdiction to consider and deny a Rule 60(b) motion on the merits."[38] The court also is permitted to enter an

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34. Fed. R. Civ. P. 60(b).

35. Fed. R. Civ. P. 60(b)(2).

36. Fed. R. Civ. P. 60(b)(6).

37. *Burgess v. Daniels*, 576 Fed. App'x 809, 813 (10th Cir. 2014) (cleaned up) (quoting *United States v. Battles*, 745 F.3d 436 (10th Cir. 2014)).

38. *Burgess*, 576 Fed. App'x at 813 ("Accordingly, although the district court here lacked jurisdiction to *grant* Mr. Burgess's Rule 60(b) motion, it was not in fact precluded from considering and *denying* the motion on its merits.").

order indicating that it would grant the 60(b) motion on remand, in which case the court of appeals would decide whether to remand the case back to the district court so that it may do so.[39]

DISCUSSION

I. Plaintiffs Have Not Satisfied the Rule 60(b)(2) Standard.

A. The Rule 60(b)(2) Requirements

Plaintiffs submitted eleven new email chains in support of their motion. To meet the Rule 60(b)(2) standard, Plaintiffs must show that (1) the emails were newly discovered; (2) they were diligent in discovering the new evidence; (3) the newly discovered evidence "could not be merely cumulative or impeaching," (4) the newly discovered evidence is material; and (5) the newly discovered evidence would probably produce a different result.[40]

The court assumes, without deciding, that Plaintiffs have met the requirements of the first four factors. The fifth factor requires Plaintiffs to show that the newly discovered evidence would "probably produce a different result."[41]

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39. Fed R. Civ. P. 62.1.

40. *See Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 727 (10th Cir. 1993) (referring to the standard for new evidence post trial); *see also Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1290 (10th Cir. 2005).

41. *Lyons*, 994 F.2d at 727.

B. The Eleven Emails at Issue

The emails chains are summarized as follows:

- 1/29/19 email from Tony Howells at Everlast Capital Partners to Mogens Smed pitching Utah as a production site. Howells' email indicates that Smed showed "little interest" in Salt Lake City a week earlier, states that Smed may be "more receptive" now, but that Smed should let Howells know if "this is still a non-starter." No response from Smed is included. Howells then forwards the email to Henderson and the two discuss meeting.[42]

- 2/14/19 email from Henderson to Smed forwarding an idea for using "Falk-Tech." Materials attached to the email state that Henderson did "a quick beta-test." Henderson begins the email with "PLEASE read this idea" and ends with "This is a good idea - Consider it!" Smed responds "This is great Lance."[43]

- 2/17/19 email from Henderson to Smed stating "Had a few ideas I wanted to throw out—some are better than others—so please read them all" followed by various ideas observations, and information, including a

42. Exhibit D, ECF No. 201-3.

43. Exhibit E, ECF No. 201-4.

construction budget for a different company that Henderson says shows "SLC [Salt Lake City] construction costs." Smed forwards the email to a group email and says, "Some very interesting ideas."[44]

- 2/18/19 email chain between Henderson and Joe Dallimore regarding developing a business plan for a company called NuCo or Take-1. The email references a "Sept 1 launch day," recounts a conversation with Smed about the plan, and states that "Smed will be coming to SLC in two weeks and we will sit down again."[45] Subsequent emails discuss Henderson and Dallimore scheduling a meeting for the two of them.[46]

- Exhibit G is a duplicate of the foregoing email chain except that it does not include the full chain.[47]

- 2/21/19 email from Henderson to Smed regarding various ideas Henderson had about building a "web app." Henderson says "Sorry this is such a long introduction—I'm excited to hear back. If there is no Falk

44. Exhibit B, ECF No. 201-1.

45. Exhibit F, ECF No. 201-5.

46. *Id.*

47. Exhibit G, ECF No. 201-6.

interest, I'd like to present this concept to some friends of mine who I believe would run with the idea to develop[] the platform at which point we could look at it again and consider using the service merely as a client."[48] Henderson also references a prior construction project "in Salt Lake City (home of future Falk manufacturing ;-)."[49] No response from Smed is included.

- 4/2/19 email chain in which Smed asks a Falkbuilt employee to book the Hendersons flights to Calgary.[50] Subsequent emails between the Hendersons and the Falkbuilt employee show the flight plans.[51]

- 4/10/19 email from Smed to an email group stating that "Falk will have absolutely the most compelling folding wall offering in the industry" and "will be using components from proven folding wall manufacturers and adapting them to our own criteria."[52]

- 5/20/19 email from Scott Wilcox at Interior Solutions to Mogens Smed about "a

48. Exhibit H, ECF No. 201-7.

49. *Id.*

50. Exhibit J, ECF No. 201-9.

51. *Id.*

52. Exhibit I, ECF No. 201-8.

significant opportunity with a company called Mohave Narrows."[53] There is no information about what the "opportunity" is. Wilcox tells Smed "we may be able to help Falkbuilt with the Mojave Narrows opportunity until you get your Utah group set up."

- 7/17/2019 email from Henderson to Barrie Loberg at Falkbuilt, stating that Henderson recently put in his notice with DIRTT, that he is in Calgary, that he has a company set up with logistics in process, that "4 projects looking good after we launch" and that he "[c]ouldn't be more excited about what you and Mogens have put together!"[54]

- 7/23/19 email chain between Henderson and a Falkbuilt employee describing Henderson's efforts on various business startup logistics like insurance, phone, expenses, accounting, software, healthcare, etc.[55]

For purposes of this motion only, the court finds that the foregoing eleven emails selected by Plaintiffs from the Utah Defendants show or suggest the following. In

53. Exhibit L, ECF No. 201-11.

54. Exhibit K, ECF No. 201-10.

55. Exhibit C, ECF No. 201-2.

the first half of 2019, Smed and Henderson are discussing and planning on Henderson starting a Falkbuilt affiliate in Utah. These discussions occur during a 5-6-month period before Henderson leaves DIRTT. Henderson has many business ideas which he shares with Smed during this period. Smed also shares an idea or strategy with Henderson and others in a group email. Smed likely came to Utah at least once, and Henderson went to Calgary at least twice. Henderson and others wanted Falkbuilt to manufacture in Utah, but the emails do not show that Smed accepted that suggestion or that Falkbuilt manufacturing occurred. By May 20, 2019, no Falkbuilt-related enterprise had been established (third-party offer to Smed to handle business opportunity "until you get your Utah group set up"). By July 17, 2019, a Falkbuilt entity had been "set up" by Henderson, though it appears he still was a DIRTT employee at the time ("put my notice in last Friday"). It does not appear to have yet started actual client work, but the groundwork was being prepared ("4 projects looking good after we launch").

C. Plaintiffs' Interpretation of the Emails

Early in their motion, Plaintiffs highlight three snippets from the court's ruling which they allege the recently produced documents show "were not accurate"[56] :

- "Any theft or misappropriation of DIRTT's confidential information initially occurred in Canada. So this factor favors applying Canadian law." (Dkt. 166 at 70:14-17);

56. Rule 60(b) Motion at 4.

- The focal point for this litigation is Mr. Smed, who resides in Canada and has strong ties to Canada. (*Id.* at 71:18-24); and

- "The parties' relationship *originated* and *ended up* . . . in Canada, and Mr. Smed resides there." (*Id.* at 72:1-4 (emphasis added)).[57]

Plaintiffs do not explain how the eleven emails show that those statements "were not accurate." The first statement—the initial misappropriation of DIRTT, Ltd.'s confidential information by Smed—is not addressed by the emails at all. To the limited extent that the emails touch upon the second and third statements, they support them. In short, the eleven emails that are the subject of this motion do nothing to undercut any of those statements. None of the emails address Smed's alleged initial theft of DIRTT's confidential information. None of the emails

57. The ellipses in Plaintiffs' quote alter the meaning of the full quote. The ruling actually states that "the parties' relationship originated and ended up, both Falkbuilt, Ltd, and DIRTT, Ltd, have their headquarters in Canada, and Mr. Smed resides there." Transcript at 72:1-4, ECF No. 166. Elsewhere in the ruling, the court repeatedly notes that while the parties' relationship began in and is centered in Canada, and the initial alleged misconduct occurred there, the United States was involved as well. *See, e.g.*, Transcript at 67:21-22 ("The first amended complaint alleged or implies economic injury and market confusion in the US and in Canada"); *id.* at 69:9-10 ("The alleged injury occurred across borders."); *id.* at 70:12-14 ("Canada has the stronger claim to being the place where the conduct causing the injury occurred, even though that conduct crosses the border.").

suggest that Smed does not reside in Canada, does not have strong ties there, and is not key to the parties' overarching litigation. And none of the emails suggest that the relationship between the DIRTT and Falkbuilt parties did not originate in Canada, or that DIRTT, Ltd. and Falkbuilt, Ltd. do not have their headquarters in Canada.

Plaintiffs' first discussion of any specific email, as opposed to general statements about the meaning of the emails generally and collectively, occurs in their argument regarding three of the Rule 60(b)(2) factors about (1) the evidence being newly discovered, (2) that Plaintiffs were diligent in seeking it, and (3) that the evidence was not cumulative or impeaching.[58] As noted earlier, the court assumes, without deciding, that these factors are met.[59]

Plaintiffs then turn to "factors four through six" arguing "the newly discovered evidence is not cumulative because it directly contradicts the Falkbuilt Defendants' assertion that "[o]ther than Mr. Henderson there's really

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58. Rule 60(b) Motion at 8-12.

59. Plaintiffs argue in this section that the emails show "Falkbuilt's formation and operational presence in Utah since January 2019 . . . months before Henderson's theft of trade secrets." Rule 60(b) Motion at 9. As discussed *supra* at 6-8, the emails do not show that Falkbuilt was formed and operating in Utah in January 2019, but they do show that Henderson and Smed were preparing for that to occur and that a company was formed in or around July 2019. Henderson's alleged theft of DIRTT's trade secrets is a subject of the still pending case before this court and also is not discussed in the emails in question.

no connection to Utah in this lawsuit."[60] The court notes that there is no factor six—the test has five factors.[61] Also, factors four and five are not, as Plaintiffs initially suggest, about "cumulative" evidence—factor three addresses whether the evidence is merely cumulative. Instead, the fourth and fifth factors are about materiality and whether the newly discovered material evidence would probably produce a different result.[62]

On the substance, Plaintiffs' focus on Falkbuilt's statement that "[o]ther than Mr. Henderson there's really no connection to Utah in this lawsuit" misses the mark.[63] That the prevailing party said it does not mean the court adopted it. Instead, the court found as follows:

> DIRTT has alleged market confusion and injury which transcend any single place. While Utah has some connection to this claim and certainly has connection to the claims against the Hendersons and Falk Mountain States, [by] contrast, Albertans are more connected to both sides for the many reasons previously stated.

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60. Rule 60(b) Motion at 12.

61. *See Zurich N. Am.*, 426 F.3d at 1290 (listing five factors).

62. *Id.*

63. The broader argument in which counsel's quote appears is about what a Utah jury would think about why they were being called to decide a case where the two parent corporations are Canadian, whereas Albertans would understand why they were being called upon to decide the larger case. *See* Transcript at 15:19-25-16:1-13.

> Moreover, DIRTT will still be able to proceed with its claims against the Henderson and Falk Mountain States, which are more directly tied to Utah.[64]

Next, after providing their summary of most of the emails,[65] Plaintiffs explain what they think they show. Plaintiffs claim that the emails show that "the parties' relationship was not localized within Canada as Falkbuilt originally represented, but included business strategy, finances and product testing in Utah, and that as part of the TTIMIT group national rollout, Utah was central to Falkbuilt's creation."[66]

Unpacking these claims, once again, the court notes that just because the prevailing party asserted something[67] does not mean that the court based its ruling on it. The court did not find that the parties' relationship was limited or "localized" within Canada. Instead, in evaluating the

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64. Transcript at 75:18-25.

65. Rule 60(b) Motion at 12-16.

66. *Id.* at 16.

67. Plaintiffs provide no cite to the record for this statement. The court will not address other examples of Plaintiffs asserting the court's adoption of Defendants' statements, other than to note that it happens multiple times in Plaintiffs' briefing. *See, e.g.*, Plaintiffs' Reply Brief in Support of Motion for Relief from Judgment Pursuant to Fed. R. Civ. Proc. 60(b) at 10 ("The Falkbuilt Defendants' counsel said it was much 'much ado about nothing,' and the Court agreed."). Plaintiffs' counsel is cautioned to use care that rhetorical flourish does not further undermine accuracy.

fourth Restatement Section 145 factor—the center of the parties' relationship—the court found that Canada had the better claim because the two parent companies are headquartered there, Smed, the former founder and CEO of one Canadian company and the founder and current CEO of the other, is a Canadian resident, and Smed also is alleged to have stolen alleged trade secrets owned by the Canadian company.[68]

Regarding "business strategy, finances[,] and product testing in Utah,"[69] the emails show the following. Henderson had lots of ideas he wanted to share with Smed. Smed offered brief replies to those emails. Smed also shared his own idea or strategy with an email group which included Henderson. Henderson, in support of one of Henderson's ideas, performed some kind of "beta test" he wanted Smed to know about. The email does not suggest that Smed asked for it; to the contrary, Henderson tells Smed "PLEASE read this idea" and "This is a good idea – Consider it!", strongly suggesting that both the idea and the test previously were unknown to Smed.[70] Plaintiffs' "finances" statement is an apparent reference to a pitch email from Tony Howells at Everlast Capital Partners. As noted earlier, Howells' email indicates that Smed showed "little interest" in Salt Lake City a week earlier, states that Smed may be "more receptive" now, but that Smed

68. Transcript at 71-72, ECF No. 166.

69. Rule 60(b) Motion at 16.

70. ECF No. 201-4.

should let Howells know if "this is still a non-starter."[71] The fairest reading is that Howells is pitching Smed, not the other way around, and that Smed apparently is not much interested.

As noted earlier, the emails, taken together, certainly show that Henderson and Smed are anticipating that Henderson would join Falkbuilt at some point, all while Henderson was working for DIRTT, Inc. Both sides are sharing ideas and getting ready for the endeavor. This certainly will be relevant in the case still before the court involving the Hendersons and Falk Mountain States. But these emails do not establish that Falkbuilt and Smed are requesting or directing product testing in Utah, seeking financing, or executing any actual business operations at the time of the emails.

Regarding the claim that the emails show that "Utah was central to Falkbuilt's creation,"[72] the emails do not even reference Falkbuilt's "creation," much less contain any information showing that Utah was "central" to it. Additionally, Plaintiffs' filing in the Calgary court show that Falkbuilt's creation predates all of the emails in question.[73]

Plaintiffs then contend that the emails show that the "subsequent disclosure and use of DIRTT trade secrets—

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71. ECF No. 201-3.

72. Rule 60(b) Motion at 16.

73. Falkbuilt Ltd. was incorporated on October 26, 2018. Canadian Statement of Claim at ¶ 3, ECF No. 134-1; *see also* Canadian Amended Amended Amended Statement of Claim at ¶ 6, ECF NO. 207-3. The earliest email at issue here is three months later.

clearly commenced with Falkbuilt's plans of establishing a Utah presence and culminated with Falkbuilt's unlawful competition with DIRTT there, including Smed's personal presence there."[74] The emails do not do that. The emails say nothing about the taking or use of DIRTT's trade secrets, much less link any DIRTT trade secrets with establishing a Utah presence.

Plaintiffs also note that the emails show "Falkbuilt's and Smed's activities extended beyond Canada, involving Utah and other U.S. markets from the beginning of the Falkbuilt enterprise."[75] As already discussed, the *forum non conveniens* analysis recognized that the case was transnational, starting in Canada with Canadian parent companies and a common Canadian founder and then spilling over into the United States,[76] so that is not new. The claim that Utah was involved "from the beginning of the Falkbuilt enterprise" is not supported by the emails, which postdate Falkbuilt's founding.

Finally, Plaintiffs note that Henderson stated in an email that he has "4 projects looking good after we launch."[77] Once again, this is fair game in the action that still is pending before this court against Hendersons and Falk Mountain States.[78]

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74. *Id.* at 17 (footnote omitted).

75. *Id.*

76. *See supra* at 9 n.57; *infra* at 20.

77. Exhibit K, ECF No. 201-10.

78. Plaintiffs make a number of other factual assertions, characterizations, and interpretations of the emails and facts in their

D. The *Forum Non Conveniens* Analysis

To analyze whether these emails would probably produce a different result, it is helpful to provide a summary of the court's analysis and reasoning in granting the dismissal based on *forum non conveniens*.[79]

"The doctrine of *forum non conveniens* permits a court to dismiss a case when an adequate alternative forum exists in a different judicial system and there is no mechanism by which the case may be transferred."[80] And "*forum non conveniens* is proper when an adequate alternative forum is available and public- and private-interest factors weigh in favor of dismissal."[81] The Supreme Court has stated that "the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, [and] a foreign plaintiff's choice deserves less deference."[82]

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briefing without citing any specific email or record evidence. Because those claims are made with no reference to any email or specific part of the record, they are not discussed further here.

79. The entire opinion is located at ECF No. 166, 58-80 and ECF No. 164.

80. *Kelvion, Inc. v. PetroChina Canada Ltd.*, 918 F.3d 1088, 1091 (10th Cir. 2019).

81. *Kelvion*, 918 F.3d at 1091 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)).

82. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981).

Appendix B

Dismissal under *forum non conveniens* must meet two threshold requirements.[83] "First there must be an 'adequate alternative forum where the defendant is amenable to process.' Second, 'the court must confirm that foreign law is applicable,' because *forum non conveniens* is improper if foreign law is not applicable and domestic law controls."[84] And if both requirements are met, then "the court weighs the private and public interests to determine whether to dismiss."[85]

As to the first requirement, the court noted the similarities between the Canadian and United States actions.[86] Plaintiffs' pleadings in both actions "indicate that both courts may address the same alleged wrongful conduct and ultimately may grant substantive relief."[87] The court concluded that "[t]he Canadian court in which DIRTT, Ltd., has already filed a related lawsuit is an available and adequate forum for the claims against defendants Falkbuilt, Ltd.; Falkbuilt, Inc.; and Mr. Smed."[88]

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83. *Archangel Diamond Corp. Liquidating Trust v. Lukoil*, 812 F.3d 799, 804 (10th Cir. 2016).

84. *Archangel Diamond*, 812 F.3d at 804 (internal citations omitted).

85. *Archangel Diamond*, 812 F.3d at 804.

86. Transcript at 60-62, ECF No. 166.

87. *Id.* at 62:17-19.

88. *Id.* at 66:12-15.

As to the second threshold requirement, the court found that foreign law is applicable and domestic law does not control the claims against those three defendants.[89] Part of this analysis required the court to apply Utah's choice of law rules and the most significant relationship test from Section 145 of the Restatement Second of Conflict of Laws.[90] This test involves four factors: (1) "the place where the injury occurred;" (2) "the place where the conduct causing the injury occurred;" (3) "the domicil, residence, nationality, place of incorporation and place of business of the parties;" and (4) "the place where the relationship, if any, between the parties is centered."[91]

First as to the place of injury, the court discussed that Plaintiffs allege that the Falkbuilt Defendants stole confidential information from a Canadian company, and the First Amended Complaint "does not explicitly limit the injury or damages sought to the United States and contains numerous statements that are broad regarding the damages and the injury."[92] The court also noted the confusion in the Amended Complaint referring to DIRTT, Ltd. and DIRTT, Inc. collectively.[93] Plaintiffs argued these entities are "totally separate" and "are operating on other

89. *Id.* at 66-72.

90. *Id.* at 67.

91. Restatement (Second) of Conflicts of Law: The General Principle § 145 (1971); *see also* Transcript at 67-72.

92. Transcript at 67:13-15.

93. *Id.* at 68.

sides of the border"[94] and yet they are continually referred to collectively.[95] Ultimately the court did not weigh the first factor in favor of applying Canadian law or domestic law as the injuries were "not limited to those two in those areas."[96]

Next, regarding the place where the conduct causing injury occurred, the court noted what was presented to the court, while involving the United States, "primarily point[ed] to Canada."[97] While additional conduct extended beyond Canada, Canada had the "stronger claim" because "any theft or misappropriation of DIRTT's confidential information initially occurred in Canada" and this favored applying Canadian law.[98] As to the third factor, the court looked at the domicile, residence, nationality, place of incorporation, and place of business of the parties.[99] Both businesses conduct business internationally. Both Falkbuilt, Ltd. and DIRTT, Ltd. are incorporated in Calgary, Alberta and have their headquarters and principal places of business in Calgary.[100]

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94. The issue of Plaintiffs' varying representations about DIRTT, Inc. is discussed *infra* at 21-25.

95. Transcript at 68-69.

96. *Id.* at 69:11-14.

97. *Id.* at 69:24-25.

98. *Id.* at 70:10-17.

99. *Id.* at 70-71.

100. *Id.* at 70-71.

In its analysis, the court further noted that if the case against the Falkbuilt Defendants moved to Canada, the case here could still proceed with the "narrow Utah focus" against the Hendersons and Falk Mountain States Defendants.[101] Furthermore, Smed is a citizen and resident of Canada and is at the center of Plaintiffs' claims, "solidifying this factor in favor of applying Canadian law."[102] As to the fourth factor, the court analyzed the place where the relationship between the parties is centered.[103] The relationship between the two parent companies, DIRTT, Ltd. and Falkbuilt, Ltd., as well as their common founder and leader, Mogens Smed, originated in and continues in Canada.[104] Both DIRTT, Ltd. and Falkbuilt, Ltd. are Canadian companies, and the fourth factor "supports the applicability of Canadian law."[105]

The court then addressed the relevant private interest factors:

> (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for compelling attendance of witnesses; (3) cost of obtaining attendance of willing non-party witnesses; (4) possibility of a view of

101. *Id.* at 71:14-17.

102. *Id.* at 71:18-20.

103. *Id.* at 71-72.

104. *Id.* at 72.

105. *Id.* at 72:11-13.

> the premises, if appropriate; and (5) all other practical problems that make trial of the case easy, expeditious, and inexpensive.[106]

Applying these factors, the court noted that both Falkbuilt, Ltd. and DIRTT, Ltd. have their principal places of business in Calgary.[107] Additionally, Plaintiffs have alleged that over 50 employees have joined Falkbuilt and Smed.[108] Witnesses will be needed from the parties' principal places of business in Canada.[109] Discovery can more easily be obtained in Canada as to the Canadian defendants and any nonparty employees in the United States can be compelled to produce documents or testify in Canada.[110] A review of the premises would also be better suited in a Canadian forum.[111] And lastly, the practical problems weighed in favor of dismissal because of "the parties' business presence in Canada, their history there and misappropriation of confidential information in Canada, all of that certainly started there allegedly."[112] Most notably, the alleged wrongful conduct began in

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106. *Archangel Diamond*, 812 F.3d at 806 (citation omitted).

107. Transcript at 73:12-15.

108. *Id.* at 73:16-18 (citing First Amended Complaint at ¶ 39).

109. *Id.* at 73.

110. *Id.* at 74.

111. *Id.* at 74.

112. *Id.* at 74:20-23.

Canada and spread from there.[113] In all, the private interests firmly weighed in favor of dismissal.[114]

The court also considered the relevant public interest factors:

> (1) administrative difficulties of the courts with congested dockets which can be caused by cases not being filed at their place of origin; (2) the burden of jury duty on members of a community with no connection to the litigation; (3) the local interest in having localized controversies decided at home; and (4) the appropriateness of having diversity cases tried in a forum that is familiar with the governing law.[115]

The court noted the first factor "really doesn't play any role because there is insufficient information about comparative court congestion."[116] The second favor "somewhat" favored dismissal.[117] The court noted that Utah has a connection to the claims against the

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113. *Id.* at 75.

114. *Id.* at 75.

115. *Archangel Diamond*, 812 F.3d at 808 (citation omitted).

116. Transcript at 75:13-14. However, it must be noted that when DIRTT, Inc. was seeking a *forum non conveniens* dismissal of the Falkbuilt Defendants' counterclaim, it argued that U.S. federal courts are more congested than their Albertan counterparts. *See* ECF No. 63 at 13 n.1.

117. *Id.* at 75:17.

Hendersons and Falk Mountain States Defendants, but Albertans "are more connected to both sides [DIRTT, Ltd. and Falkbuilt, Ltd.] for the many reasons previously stated."[118] The claims against the Hendersons and Falk Mountain States were more directly tied to Utah, so that case would be able to proceed before the court.[119] As to the third factor, the court discussed that both companies conduct business internationally and "the interest in deciding the controversy is not entirely localized."[120] However, the court determined that Plaintiffs' allegations "primarily center around confidential information and trade secrets owned by a Canadian company," specifically DIRTT, Ltd.[121] While Plaintiffs allege dissemination of the confidential information, Alberta "has a much stronger local interest in the broad dispute between DIRTT and Falkbuilt."[122] Lastly, the fourth factor weighed most heavily in favor of dismissal.[123] The court determined that the alleged wrongdoing and relief between the Utah and

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118. *Id.* at 75:19-23.

119. *Id.* at 75.

120. *Id.* at 76:4-5.

121. *Id.* at 76; *see also id.* at 67 (noting that DIRTT, Ltd, is the owner of the trade secret information at issue and licenses to subsidiary or related company DIRTT, Inc.); Amended Complaint at ¶ 2 ("DIRTT Ltd. is the licensor of the trade secrets at issue in this case.").

122. Transcript at 76:10-13.

123. *Id.* at 76:17-18.

Canadian actions is "substantially similar."[124] The trade secrets at issue are trade secrets owned by a Canadian company.[125] The Canadian action was initiated first, the Canadian court is "already familiar with the parent companies," and Canadian law is applicable to the claims alleged in the First Amended Complaint.[126]

The court summarized its conclusions:

> [T]his dispute primarily involves Canadian actors together with others and their alleged actions in Canada with additional actions and effects outside of Canada, including the United States and perhaps elsewhere. Mr. Smed is at the very center of this action. He is a Canadian citizen; he's a former executive of DIRTT, Ltd, the head executive in fact, which is DIRTT, Inc.'s parent company in Canada and is the founder of Falkbuilt in Canada. He gained information about DIRTT operations while employed in Canada. He left DIRTT and started Falkbuilt, Ltd, in Canada. DIRTT claims that Mr. Smed masterminded this theft of DIRTT's confidential information and engaged in other wrongdoing, such as luring away Canadian DIRTT employees and utilizing DIRTT's information to unfairly compete

124. *Id.* at 76:22-23.

125. *Id.* at 76:24-25.

126. *Id.* at 77:1-8.

> against DIRTT. While DIRTT and Falkbuilt have expanded their operations across the border into the US, the dispute originated in Canada when Mr. Smed left DIRTT, Ltd., in Canada.[127]

In contrast to interpreting the eleven emails in question, Plaintiffs spend very little time in their briefing analyzing the *forum non conveniens* factors. Plaintiffs assert that the "New Correspondence swings the first through the fourth Section 145 factors decidedly in DIRTT's favor."[128] This is not followed by any significant analysis of those factors and how they would probably have changed the court's Section 145 analysis.[129]

Plaintiffs then argue that the emails "materially impact[] the extent of local interest for a Utah court and potential jury" because Henderson had "at least four local projects ready for 'launch'," "Henderson reached out to at least 60 contacts," and the case involves "business wrongs in Utah resulting in injury and harm to a Utah business, and Utah played a significant role in a company's national rollout."[130]

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127. *Id.* at 77:16-78:7.

128. Rule 60(b) Motion at 18.

129. *Id.* at 18-19. It is preceded by Plaintiffs' argument about "physical acts of 'misappropriation'" and "subsequent disclosure and use of DIRTT trade secrets" but, as noted previously, the emails do not discuss Smed's or Henderson's alleged taking of DIRTT trade secrets or show how they used them.

130. *Id.* at 18.

Local interest and the burden of jury duty are two of the five public interest factors. Henderson and Falk Mountain States' alleged misconduct will be front and center in the case still pending before this court, including at trial. The claim that Henderson reached out to at least 60 contacts is not addressed by the eleven emails here. The argument that the case involves "harm to a Utah business" is not addressed by the emails or supported by the record: DIRTT, Ltd. was formed in Canada and has its principal place of business in Canada; DIRTT, Inc. was formed in Colorado and either has its principal place of business in Canada or in Georgia and Arizona, depending on which of Plaintiffs' filings are credited.[131] The contention that "Utah played a significant role in a company's national rollout"[132] is not demonstrated by the emails. Smed, a Canadian, and Falkbuilt, Ltd., a Canadian company, apparently are operating in various states, including Utah, through a network of affiliates (much like DIRTT, Ltd.), but that does not put Utah at the center of the dispute.

E. The Mysterious Case of DIRTT, Inc.

Throughout the litigation between DIRTT and Falkbuilt, Plaintiffs have made various different representations about DIRTT, Inc.'s headquarters, principal place of business, and operations. Some of these statements conflict with each other.

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131. *See infra* at 21-25.

132. *Id.*

Appendix B

On December 11, 2019, DIRTT, Inc., the only original plaintiff in this case, filed a Verified Complaint.[133] The Complaint alleged that DIRTT, Inc. is "a Colorado company, with its headquarters and principal place of business in Calgary, Alberta, Canada."[134] It further alleged that it "operates in Canada, the United States, and other jurisdictions around the world."[135] Nowhere in the Complaint is there any acknowledgement that DIRTT, Inc. has a parent company in Calgary, that the parent company is the owner of the trade secrets at issue, or that the parent company had previously filed related, ongoing litigation in Canada.

Attached to the Complaint was Defendant Henderson's employment offer with "DIRTT Environmental Solutions" with an address in Calgary, Alberta, Canada.[136] The letter is signed by Jason Robinson for "DIRTT Environmental Solutions, Inc."[137] Also attached as an exhibit to the Complaint was DIRTT, Inc.'s Regional Partner Agreement.[138] The address for DIRTT, Inc. is listed as Calgary, Alberta, Canada and is the same address as the offer of employment.[139]

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133. Verified Complaint, ECF No. 2.

134. *Id.* at ¶ 1.

135. *Id.* at ¶ 2.

136. 05/21/2009 Letter at 1, ECF No. 2-1.

137. *Id.* at 2.

138. DIRTT Regional Partner Agreement, ECF No. 2-4.

139. *Id.* at 1.

Appendix B

On April 1, 2020, DIRTT, Inc., still the only plaintiff at the time, filed a motion to dismiss Falkbuilt's First Amended Counterclaim on the grounds of *forum non conveniens*.[140] In its motion, DIRTT, Inc. made numerous statements that it was located in Canada, conducts business in Canada, and had employees in Canada. For example, on the first page of the motion, DIRTT, Inc. argued that "both DIRTT and Falkbuilt are located in Canada."[141] Later, DIRTT, Inc. argued, "That alternate forum is Calgary, Alberta, Canada, where DIRTT is amenable to service of process."[142] On the same page, DIRTT, Inc. noted that "the likely sources of proof are located in Canada, as both DIRTT and Falkbuilt are headquartered and do business there, with critical witnesses and documents located in Canada."[143] On the next page, DIRTT, Inc. argued that "[d]ocuments relevant to the parties' arguments will be located on the companies' servers in those Canadian locations, and any physical documents or other evidence will also most likely be found in Canada...A number of Falkbuilt employees could foreseeably be called as witnesses, in addition to the Company's founder, Mogens Smed. DIRTT employees could also likely be called. All of these individuals reside and work in Canada."[144] The court granted Plaintiff's motion to dismiss so that the claim could be heard in Canada.[145]

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140. DIRTT, Inc.'s Motion to Dismiss (DIRTT Motion to Dismiss), ECF No. 63, filed April 1, 2020.

141. *Id.* at 1

142. *Id.* at 11.

143. *Id.* at 11.

144. *Id.* at 12.

145. *See* ECF Nos. 156, 157.

Appendix B

On October 20, 2020, DIRTT, Inc. filed a First Amended Complaint, adding DIRTT, Ltd. as a plaintiff.[146] There, Plaintiffs renewed their representation from their original Complaint that "DIRTT, Inc. is a Colorado company," but dropped the original Complaint's averment that DIRTT, Inc. had its "headquarters and principal place of business in Calgary, Alberta, Canada,"[147] alleging now instead that it had "principal places of business in Savannah, Georgia and Phoenix, Arizona."[148] On November 19, 2020, the Falkbuilt Defendants moved to dismiss the First Amended Complaint.[149]

On December 17, 2020, Plaintiffs opposed the Falkbuilt Defendants' motion to dismiss.[150] In that pleading, Plaintiffs argued that DIRTT, Inc. is a "Colorado company operating in the U.S."[151] It also alleged that "DIRTT, Inc. is a U.S. plaintiff."[152] And, Plaintiffs argued that "DIRTT, Inc. only operates in the U.S. and has no factory in Canada."[153]

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146. First Amended Complaint, ECF No. 117, filed October 20, 2020.

147. Verified Complaint at ¶ 1.

148. First Amended Complaint at ¶ 1.

149. Motion to Dismiss, ECF No. 134.

150. Plaintiffs' Opposition to Motion to Dismiss First Amended Complaint as to Falkbuilt, Ltd., Falkbuilt, Inc., and Mogens Smed (Plaintiffs' Opposition), EF No. 139, filed December 17, 2020.

151. Plaintiffs' Opposition at 5.

152. Plaintiffs' Opposition at 17.

153. *Id.* at 22.

On May 19, 2021, the court held a hearing on the Falkbuilt Defendants' motion to dismiss.[154] At the hearing, Plaintiffs' counsel made various statements regarding DIRTT, Inc.'s status. He stated that "DIRTT, Inc. is only operating in the US. It has no employees outside of the US. It has no sales outside of the US. It has a US incorporation."[155] He stated there was "no overlap" between DIRTT, Inc. and DIRTT, Ltd,[156] DIRTT, Inc. is a "US only company" and does not operate in Canada.[157] Later, counsel again reaffirmed that DIRTT, Inc. is a "US company that operates only in the US."[158] Plaintiffs' counsel also represented that DIRTT, Ltd. does not "operate at all in the US" and "there are no allegations of DIRTT, Ltd. doing anything in the United States."[159] Lastly, counsel made clear that "DIRTT, Inc. does no business in Canada. That's done for tax reasons. It's a very strict line. There's no blending between the two."[160]

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154. *See* Transcript of Motion to Dismiss Hearing, ECF No. 166.

155. *Id.* at 17:22-24.

156. *Id.* at 18:2-3.

157. *Id.* at 18:4-8.

158. *Id.* at 29:11-12; *see also id.* at 30:3-4 ("[T]he only way we can protect those trade secrets which are in the US where the company only operates."); *id.* at 30:16 ("We've alleged very clearly that there are third parties in the US that are critical to this dispute and that we need injunctive relief to protect our US-only business.").

159. *Id.* at 34:13-14, 17-18.

160. *Id.* at 38:2-4.

On September 30, 2021, the Falkbuilt Defendants filed an opposition to Plaintiffs' Rule 60(b) motion.[161] Attached to the opposition was a Consent Order from the Canadian action, permitting the plaintiff in that action, DIRTT, Ltd., to file an Amended Amended Amended Statement of Claim.[162] The Amended Amended Amended Statement of Claim added DIRTT, Inc. as a plaintiff in the Canadian action.[163] DIRTT, Inc. is listed as "an affiliate of DIRTT, Ltd. incorporated under the laws of the States of Colorado, with its principal offices located in Calgary, Alberta,"[164] not Georgia or Arizona.

In summary, Plaintiffs have made varying representations over the course of this litigation about DIRTT, Inc. Originally, DIRTT, Inc. told the court that its headquarters and principal place of business were in Calgary. DIRTT, Inc. also said that operates in Canada, the United States, and other jurisdictions around the world. Similarly, in support of its effort to dismiss a counterclaim against it, DIRTT, Inc. made numerous statements about how it and Falkbuilt do business in Canada, are "located" and "headquartered" there, and about the critical witnesses and documents that would be found there. Several months after DIRTT, Inc.'s *forum*

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161. Opposition to Motion for Relief from Judgment Pursuant to Fed. R. Civ. Proc. 60(b), ECF No. 207, filed September 30, 2021.

162. 08/31/21 Consent Order, ECF No. 207-3.

163. *Id.* at 1; Amended Amended Amended Statement of Claim at ¶ 2.

164. Amended Amended Amended Statement of Claim at ¶ 2.

non conveniens motion was fully briefed, Plaintiffs filed an Amended Complaint changing DIRTT, Inc's principal place of business from Calgary to Arizona and Georgia. At the hearing on the Falkbuilt Defendants' *forum non conveniens* motion, Plaintiffs' counsel said that there is "no overlap" and "no blending" between DIRTT, Ltd. and DIRTT, Inc. "for tax purposes." Counsel also said that DIRTT, Inc. is a "US only company." Yet despite all this, the most recent filing in the Calgary court states DIRTT, Inc. has "its principal offices located in Calgary, Alberta."

Whatever the reality actually is, and however Plaintiffs have chosen to organize themselves for tax or other purposes, Plaintiffs' filings and representations regarding DIRTT, Inc. have been many and varied. And some of them seem to have varied based on whether DIRTT is seeking a *forum non conveniens* order or defending against one.

. . . .

Based on all of the foregoing, Plaintiffs have failed to meet the Rule 60(b)(2) standard. The emails they cite add little to the court's previous analysis that the relevant factors weigh in favor of the Falkbuilt Defendants being dismissed in favor of the first-filed case in Calgary. To prevail on its 60(b)(2) motion, Plaintiffs needed to show that the newly discovered emails would probably have changed the *forum non conveniens* result. These eleven emails would not have produced a different result. Also, the numerous conflicting representations Plaintiffs have made about DIRTT, Inc., while not key to the court's

analysis, are not helpful. Accordingly, Plaintiffs have not met their burden under Rule 60(b)(2).

II. Plaintiffs Have Not Satisfied the Rule 60(b)(6) Standard.

Rule 60(b)(6) relief is "available only in 'extraordinary circumstances'"[165] and "only when necessary to accomplish justice."[166] "In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'"[167]

Plaintiffs first argue the "plain inequity of forcing a U.S. company to seek redress for misconduct and harm that demonstrably occurred within this forum against a local competitor in a foreign, inconvenient forum."[168] This is not the case. Plaintiffs still have a suit before this court against the "local competitors" (Falk Mountain States and the Hendersons) for the local injury. The court's *forum*

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165. *Buck v. Davis*, --- U.S. --- , 580 U.S. 100, 137 S.Ct. 759, 777, 197 L. Ed. 2d 1 (2017) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005)).

166. *United States v. Elwood*, 757 Fed. App'x 731, 734 (10th Cir. 2018) (quoting *Cashner v. Freedom Stores*, 98 F.3d 572, 579 (10th Cir. 1996)).

167. *Id.* at 778 (citation omitted).

168. Rule 60(b)Motion at 19, ECF No. 201.

non conveniens order simply has sent the broader suit back to Calgary—the place where the overlapping case was first filed; the place where both parent companies are incorporated and have their headquarters and principal places of business; the place where their common founder and leader resides; and the place where this cross-border dispute has its origins. That one of the Plaintiffs, the subsidiary, was legally incorporated in a neighboring state and does business here certainly is relevant to the *forum non conveniens* analysis, but it is not dispositive, especially when it has made numerous conflicting representations to this court and the Calgary court about its presence in and ties to Canada. Plaintiffs can hardly claim that Calgary is truly foreign or inconvenient for them. There is no equitable argument on this point that justifies relief under Rule 60(b)(6).

Plaintiffs also argue that because the Falkbuilt Defendants have "blocked enforcement" of the Canadian injunction in the United States this court should grant relief under Rule 60(b)(6).[169] The injunction referenced is one which the Plaintiffs and Defendants jointly prepared. Plaintiffs state that the Falkbuilt Defendants have "refused to consent to enforcement of such an order" in a recently-filed Texas action.[170] Plaintiffs' complaint seems to be that the Falkbuilt Defendants did not voluntarily enter the injunction in Texas even though the Falkbuilt Defendants aver that they are bound by and operating

169. *Id.* at 20.

170. *Id.* at 21.

under the terms of the injunction in the Canadian action.[171] And Plaintiffs have not made any allegations, much less provided any evidence, that the Falkbuilt Defendants have violated the injunction either in Canada or in the United States. Plaintiffs provide no case law suggesting that their desire to have the stipulated protective order entered in another court warrants relief under Rule 60(b)(6). On the facts of this case, it does not.

In sum, none of these issues support the "extraordinary circumstances" required under Rule 60(b)(6). As the court detailed in its ruling on the *forum non conveniens* dismissal, Plaintiffs have an adequate remedy against the Falkbuilt Defendants in the Canadian action. While this case has an unusual posture and some of its handling has been curious, this does not amount to grounds to undo the dismissal of the overarching case in favor of Canada.

CONCLUSION

This case was destined to have some complexity in its handling. When the founder and CEO of one company leaves and founds a competitor company, questions regarding the taking and use of trade secrets or other confidential information often arise. The stakes are high for both sides. In this case, Mogens Smed, a Calgary resident, was a founder and longtime CEO of one Calgary company, which he left in favor of founding his own Calgary company. His former Calgary company accused

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171. Opposition at 12-13; *see also* Exhibits 5, 6, 8, ECF Nos. 207-5, 207-6, 207-8.

him of taking with him and using its trade secrets, pilfering employees, and unfairly competing against his former company. It filed suit over it and related conduct in Calgary. The alleged misconduct and injury did not stop at the Canadian border, since these two Calgary companies both have subsidiaries or affiliates through which they operate in the United States and other countries. Seven months after filing in Calgary, DIRTT decided to open a second front in their litigation by filing a case in Utah against Smed and his companies, as well as two Utah residents and their Falkbuilt-affiliated company. DIRTT then filed a successful *forum non conveniens* motion against the Falkbuilt Defendants' counterclaim, sending it back to Canada, where all of this began. And so, the *forum non conveniens* seeds were sown and sprouted.

In a *forum non conveniens* analysis, the court is tasked with deciding where trial would be most convenient, whether there is an adequate alternative forum, whether foreign law is applicable, and what the private and public interest factors suggest. Because this case involved both Canada and the United States, it is understandable why the issue was hotly disputed. But, at bottom, the beginnings of this case are in Calgary, the parent companies are Canadian, and so is the parent companies' common founder and leader. And the trade secrets at the core of this case are owned by the Canadian Plaintiff. So, while there are various other important actors, conduct, and injury involving the United States, Canada has the better claim to the larger dispute.

The DIRTT entities obviously feel very strongly about litigating their claims against the Falkbuilt entities in multiple courts at the same time. This has been demonstrated both in the number and tenor of their multiple filings and in their aggressive characterizations and statements. But, on the facts of this case, covering much of the same underlying conduct in two or three different courts will serve primarily to greatly increase litigation expenses. However, while Plaintiffs' 60(b) motion does not have merit and must be denied, the court recognizes that if the Calgary court unexpectedly and categorically denies discovery into Smed and Falkbuilt's Utah activities, then such discovery in the still pending suit before this court would be warranted. And if any such discovery were to reveal grounds for liability for which Canadian law and the Calgary court could offer no relief, the question of whether Falkbuilt, Ltd. and Inc., as well as Mogens Smed, need to be added back to the case pending before this court then would be live. But that future contingency has not arisen. This court has every confidence that the Calgary court is fully capable of handling the bulk of this cross-border dispute in the first-filed case before it. Should assistance be needed in enforcing the Calgary court's orders or judgments, this court stands ready to assist.

ORDER

For the reasons stated in this Memorandum Decision and Order, Plaintiffs' motion for Rule 60(b) relief is DENIED.

Appendix B

Signed December 14, 2021.

BY THE COURT
/s/ David Barlow
David Barlow
United States District Judge

APPENDIX C — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, FILED JULY 1, 2021

THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

Case No. 1:19-cv-144 DBB-DBP

District Judge David Barlow

Magistrate Judge Dustin B. Pead

DIRTT ENVIRONMENTAL SOLUTIONS, INC.,

Plaintiffs,

v.

LANCE HENDERSON, KRISTY HENDERSON, FALKBUILT LTD., and FALK MOUNTAIN STATES, LLC,

Defendants.

MEMORANDUM DECISION AND ORDER GRANTING [168] MOTION FOR RULE 54(b) CERTIFICATION OF DOCKET NO. 164

Before the court is Plaintiffs' Motion for Rule 54(b) Certification of Docket No. 164 (the Motion).[1] Defendant

1. ECF No. 168. In their motion, Plaintiffs indicate that they also plan to appeal "that portion of the [court's] Order that dissolves the Preliminary Injunction previously granted and entered by the Court." *See* Motion at 2 n.1. The court notes that there is no order dissolving the parties' stipulated preliminary injunction, ECF No. 61, which is the only preliminary injunction in this case. The court did not order the dissolution of the stipulated

Falkbuilt Ltd. has not responded, and the time for filing a response has passed.[2]

Pursuant to Federal Rule of Civil Procedure 54(b), "[w]hen an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Rule 54(b) certification is appropriate only if the judgment at issue is final wand there is no just reason for delay.[3]

The court's dismissal of Plaintiffs' claims against the Falkbuilt Defendants on grounds of forum non conveniens is final. While Plaintiffs are free to bring those claims in the Alberta court where the closely-related litigation is pending, the order does prevent Plaintiffs from refiling those claims in this court. Therefore, this court's

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preliminary injunction in either its oral ruling on May 19, 2021 (ECF No. 166) or its May 21, 2021 Memorandum Decision (ECF No. 164) adopting the oral ruling on May 19 and denying the motion for leave to amend. Instead, the court found that "the parties agree to be bound by the terms of the preliminary injunction and to facilitate entry of the preliminary injunction by the Canadian Court, if Plaintiffs so choose." ECF No. 164.

2. Defendants Lance Henderson, Kristy Henderson, and Falk Mountain State LLC (Henderson Defendants), who were not participants in the motion to dismiss, filed a notice of non-opposition to the motion. ECF No. 174.

3. *Stockman's Water Co., LLC v. Vaca P'ship, L.P.*, 425 F.3d 1263, 1265 (10th Cir. 2005).

determination regarding the claims covered by its order is final.[4]

Also, the court is unaware of any just reason for delay. There is no reason why the dismissal cannot be reviewed now because there are no concerns that an appellate court would have to decide this same issue again "even if there were subsequent appeals."[5] The issue of the court's forum non conveniens dismissal should only arise once in the litigation. Accordingly, the court finds there is no just reason for delay of the requested appeal.

For the reasons stated above, the court hereby GRANTS Plaintiffs' motion.

Signed July 1, 2021.

BY THE COURT

/s/ David Barlow
David Barlow
United States District Judge

4. *See Norwood v. Kirkpatrick*, 349 U.S. 29, 31–32 (1955) ("A dismissal in application of that (forum non conveniens) or any other principle puts an end to the action and hence is final and appealable." (citation omitted)); *accord Ritzen Grp., Inc. v. Jackson Masonry*, LLC, 140 S.Ct. 582, 590 (2020) ("Orders denying a plaintiff the opportunity to seek relief in its preferred forum often qualify as final and immediately appealable, though they leave the plaintiff free to sue elsewhere.").

5. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980).

APPENDIX D — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, FILED MAY 21, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

Case No. 1:19-cv-00144-DBB

District Judge David Barlow

DIRTT ENVIRONMENTAL SOLUTIONS, INC., and DIRTT ENVIRONMENTAL SOLUTIONS, LTD.,

Plaintiffs,

v.

LANCE HENDERSON, KRISTY HENDERSON, FALKBUILT, INC., FALKBUILT LTD., MOGENS SMED, and FALK MOUNTAIN STATES, LLC,

Defendants.

MEMORANDUM DECISION AND ORDER GRANTING [134] MOTION TO DISMISS FIRST AMENDED COMPLAINT AS TO DEFENDANTS FALKBUILT LTD., FALKBUILT INC. AND MOGENS SMED AND DENYING PLAINTIFFS' ORAL MOTION TO AMEND

Before the court is Defendants Falkbuilt, Ltd., Falkbuilt, Inc., and Mogens Smed's Motion to Dismiss First Amended Complaint as to Defendants Falkbuilt, Ltd., Falkbuilt, Inc. and Mogens Smed ("Motion to

Dismiss").[1] Plaintiffs filed a memorandum in opposition and Defendants replied.[2] On May 19, 2021, a hearing on the Motion to Dismiss was held. At that time, the court preliminarily granted the Motion to Dismiss and directed Defendants to file a notice with the court regarding their consent to be bound by the stipulated preliminary injunction and to not object if Plaintiffs seek to have the preliminary injunction entered in the related, ongoing action in Canada.[3] At the conclusion of the hearing, Plaintiffs made an oral motion for leave to amend their complaint to address the court's observations about Plaintiffs' collective pleading and the fact that the complaint did not, despite attorney argument, clearly limit alleged injuries and damages to the United States. The court took the motion under advisement.

The court now denies Plaintiff's motion to amend because it would be futile. Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend its pleadings, after the time for amending as a matter of course, "only with the opposing party's written consent

1. ECF No. 134, filed Nov. 19, 2020. Defendants Lance Henderson, Kristy Henderson, and Falk Mountain States, LLC did not join in the motion or otherwise respond.

2. Opposition to Motion to Dismiss First Amended Complaint as to Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed [Dkt. 134], *ECF No. 139*, filed Dec. 17, 2020; Reply Memorandum in Support of Motion to Dismiss First Amended Complaint as to Falkbuilt Ltd., Falkbuilt, Inc., and Mogens Smed (Dkt. 134), *ECF No. 143*, filed Jan. 15, 2021.

3. Minute Entry for Proceedings held before Judge David Barlow, ECF No. 162, entered May 19, 2021.

or the court's leave."[4] "Although leave to amend shall be freely given when justice so requires, whether leave should be granted is within the trial court's discretion."[5] "A court properly may deny a motion for leave to amend as futile when the proposed amended complaint would be subject to dismissal for any reason[.]"[6] The key facts relevant to the court's forum non conveniens decision cannot be changed. The two competitor parent companies in this matter, DIRTT, Ltd. and Falkbuilt, Ltd., are both Canadian companies with their primary places of business in Alberta, Canada. DIRTT, Ltd. initially filed suit against Falkbuilt, Ltd. in Alberta, Canada, alleging that its former CEO, Mogens Smed, a resident of Alberta, Canada, misappropriated trade secrets and wrongfully recruited DIRTT, Ltd. employees when he founded Falkbuilt, Ltd. in Alberta, Canada. The allegedly wrongful actions spread to the United States, involving multiple other related or otherwise involved entities and individuals.

Plaintiffs have proposed that they file a third complaint to clarify their general treatment of DIRTT, Ltd. and DIRTT, Inc. collectively and to expressly aver that they are seeking no damages outside of the United States. While this could have some effect on the forum non conveniens analysis, its impact would be too limited to change the overall outcome. Canada remains an adequate

4. Fed. R. Civ. P. 15(a).

5. *Las Vegas Ice & Cold Storage Co. v. Far w. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (internal citations omitted).

6. *Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 562 (10th Cir. 1997).

alternative forum, Canadian law is applicable, and the private and public interests favor dismissal.[7] Although the dispute between the parties has grown beyond Canada, the parent companies are in Alberta, the former CEO of one and current founder of the other is in Alberta, the intellectual property at issue is owned by an Alberta entity, and the first wrongful acts allegedly occurred there. Clarifying the roles of DIRTT, Ltd. (an Alberta, Canada company with its principal place of business in Alberta, Canada) and DIRTT, Inc. (originally identified by Plaintiffs as a Colorado company with its principal place of business in Alberta, Canada, but now allegedly a U.S.-only business) would not result in a different forum non conveniens determination. Neither would limiting the claim for injuries to the United States, though that would make the issue a marginally closer decision. The court in Alberta, Canada where DIRTT, Ltd. first initiated litigation, where depositions already are scheduled, and where the two parent companies are located, clearly is the most convenient forum for the broader litigation and any trial between the parties—including Defendants' counterclaims which this court recently dismissed at Plaintiff's request in favor of the Alberta court—no matter what subsequent amendments Plaintiffs might propose in this litigation.

Engaging in a futile exercise simply increases the costs for all involved. Accordingly, the court must deny Plaintiffs' motion for leave to file a third complaint in

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7. *Archangel Diamond Corp. Liquidating Trust v. Lukoil*, 812 F.3d 799, 804-09 (10th Cir. 2016).

this matter, at least for its intended purpose of altering the court's forum non conveniens decision. The case will continue here against Falk Mountain States, LLC, Lance Henderson, and Kristy Henderson—the Utah entity and individuals only. Should Plaintiffs find a need to file an amended complaint against these Utah-based defendants and can show good cause, they may file a timely motion for leave to amend.

ORDER

For the reasons stated on the record at the conclusion of the May 19, 2021 hearing on the motion, Defendants' Motion to Dismiss is GRANTED. Plaintiffs' First Amended Complaint and any claims therein with respect to Defendants Falkbuilt, Ltd., Falkbuilt, Inc., and Mogens Smed are DISMISSED WITHOUT PREJUDICE.

Plaintiffs' oral motion to amend their complaint is DENIED.

Based upon the stipulation of the parties,[8] the parties agree to be bound by the terms of the preliminary injunction and to facilitate entry of the preliminary injunction by the Canadian court, if Plaintiffs so choose.

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8. Defendants filed their notice, confirming their agreement to be bound by the stipulated preliminary injunction. Notice of Consent: (1) To Canadian Jurisdiction by Falkbuilt, Inc., and (2) To Entry of Stipulated Preliminary Injunction in the Court of Queen's Bench, Alberta as to Falkbuilt, Ltd., Falkbuilt, Inc. and Mogens Smed, ECF No. 163, filed May 21, 2021.

Appendix D

Based upon the stipulation of the parties, documents designed as "attorneys-eyes-only" by Plaintiffs and Defendants Falkbuilt, Ltd., Falkbuilt, Inc., and Mogens Smed may be shared with their Canadian counsel, subject to the same confidentiality requirements.

Signed May 21, 2021.

BY THE COURT

/s/ David Barlow
David Barlow
United States District Judge