

No. 17-610

In The
Supreme Court of the United States

◆

A.R. THANE RITCHIE, RITCHIE RISK-LINKED
STRATEGIES, LLC, RITCHIE PARTNERS, LLC,
RITCHIE CAPITAL MANAGEMENT, LLC,

Petitioners,

v.

HUIZENGA MANAGERS FUND, LLC,

Respondent.

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**On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois**

◆

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

◆

December 7, 2017

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QUESTION PRESENTED

After the state trial court entered judgment against Petitioners for violation of the Delaware Securities Act (“DSA”), Petitioners filed a motion to vacate, arguing for the first time that the DSA was inapplicable due to lack of a territorial “nexus.” The court denied the motion. Petitioners appealed the judgment but did not preserve the “nexus” argument. The appellate court ruled in favor of Respondent, and the state Supreme Court denied leave to appeal.

Petitioners never presented any argument to the trial court or appellate court concerning the Full Faith and Credit Clause of the U.S. Constitution.

The question presented is: Whether a state appellate court violates the Full Faith and Credit Clause of the U.S. Constitution by applying another state’s blue sky law, if the defendant:

- (i) did not object to the application of the blue sky law prior to the trial court’s judgment;
- (ii) failed to preserve any objection to the application of the blue sky law during the appellate court proceedings; and
- (iii) failed to present any argument concerning the Full Faith and Credit Clause of the U.S. Constitution during either the trial court or appellate court proceedings.

**RULE 29.6 CORPORATE
DISCLOSURE STATEMENT**

Pursuant to this Court's Rule 29.6, Respondent Huizenga Managers Fund, LLC states that it has no parent company and no publicly held company owns more than 10% of Huizenga Managers Fund, LLC's stock.

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JURISDICTION

Respondent disputes Petitioners' assertion that this Court has jurisdiction under 28 U.S.C. §1257(a).

The Supreme Court of Illinois declined review of the December 29, 2016 decision by the Appellate Court of Illinois. Therefore, the Appellate Court of Illinois is the "highest court of a State in which a decision could be had" under 28 U.S.C. §1257(a). Petitioners never presented any claim under the Full Faith and Credit Clause of the U.S. Constitution to the Appellate Court of Illinois, and that court never addressed the issue.

Additionally, because Petitioners repeatedly waived the DSA "nexus" argument upon which their new federal Full Faith and Credit claim rests, the Appellate Court of Illinois' decision rests on independent and adequate state law grounds. Accordingly, this Court lacks jurisdiction.

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STATEMENT OF THE CASE

The Statement of the Case contained in the Petition for a Writ of Certiorari inaccurately characterizes both the factual and legal findings in the Illinois Circuit Court's January 27, 2015 opinion (App. 42-164a) and the Illinois Appellate Court's December 29, 2016 opinion (App. 1-38a). For example, Petitioners assert, without any citation to the record, that, "[a]ll activities and events related to the transaction occurred outside Delaware. . . ." Pet. at 23. As explained below, however,

neither the Illinois Circuit Court nor the Illinois Appellate Court made any such finding, because the Petitioners had agreed that the DSA applied to the case, which negated the need for any discovery or presentation of evidence on the issue.

A full and complete understanding of the Illinois courts' findings can only be obtained by reviewing their opinions in full. However, for purposes of the Petition for a Writ of Certiorari, Respondent summarizes the relevant factual background, procedural history, and court findings below.

I. Factual Background

The Petitioners are (i) A.R. Thane Ritchie, (ii) Ritchie Risk-Linked Strategies, LLC (the "Fund"), (iii) Ritchie Partners, LLC, and (iv) Ritchie Capital Management, LLC (collectively, "Ritchie"). The Respondent is Huizenga Managers Fund, LLC ("Huizenga").

In August 2005, Huizenga made a \$6 million investment in the Fund (the "First Investment"), and in October 2005, Huizenga made an additional \$4.67 million investment in the Fund (the "Second Investment"). (R. V.13 C-003030-32; App. 66-69a).

II. The Illinois Trial Court Proceedings

In April 2007, Huizenga sued Ritchie in the Circuit Court of Cook County, Illinois, alleging Ritchie sold Huizenga securities in violation of both the DSA

and the Illinois Securities Law (“ISL”). (R. V.1 C-000001-185).

In June 2007, Ritchie filed a motion to dismiss, asking the court to dismiss Huizenga’s ISL claims, because “the Subscription Agreement that [Huizenga] executed when it invested in the Fund clearly states that Delaware law would govern the parties’ relationship.” (R. V.1 C-000191). At oral argument, Ritchie’s counsel further argued for the dismissal of the ISL claims by telling the court, “there are many, many cases that we can cite to you and it is in our brief where Illinois Courts applied Delaware securities laws.” (R. V.17 000007). Ritchie did not argue for the dismissal of Huizenga’s DSA claims based on any alleged lack of a “nexus” with Delaware. The trial court dismissed Huizenga’s ISL claims with prejudice, and the case proceeded on the DSA claims. (R. V.3 C-000585-86). Ritchie later told the Supreme Court of Illinois that during the trial court proceedings, Ritchie “had every reason to believe that the DSA . . . applied to this dispute.”¹

More than 7 years later – after a 26-day bench trial that included 21 witnesses and thousands of exhibits (R. V.13 C-003020; App. 42a) – the trial court entered judgment in favor of Huizenga on its DSA claims with respect to the Second Investment. The trial court

¹ Ritchie’s proposed Reply to Huizenga’s Answer Opposing the Petition for Leave to Appeal at 1, Case No. 121989 (Ill. Sup. Ct.) (filed April 5, 2017).

entered judgment in favor of Ritchie with respect to the First Investment. (R. V.13 C-003072; App. 163-64a).

Ritchie filed a motion to vacate judgment, or in the alternative for a rehearing, with the trial court. (R. V.13 C-003073-74). In its supporting memorandum, Ritchie reversed its pre-judgment position and argued that the court had “erred in applying the DSA – rather than the [ISL]. . . .” (R. V.13 C-003087). For the first time, Ritchie argued that the requisite “nexus” to impose liability under the DSA did not exist, stating:

Delaware law is clear that a court has subject matter jurisdiction to apply the DSA only “where there is a sufficient nexus between Delaware and the transaction at issue.” Delaware courts have recently re-affirmed that incorporation in Delaware and a choice of law provision in favor of Delaware are not sufficient to impose liability under the DSA. . . . Accordingly, this Court lacked subject matter jurisdiction to impose liability against defendants under the DSA.

(R. V.13 C-003087-88) (citations omitted).² Ritchie did not include any argument in its motion to vacate based on the Full Faith and Credit Clause of the U.S. Constitution.

In its opposition to Ritchie’s motion to vacate, Huizenga explained that the Illinois trial court

² Ritchie cited *Eurofins Panlabs, Inc. v. Ricerca Biosciences, Inc.*, No. 8431-VCN, 2014 WL 2457515 (Del. Ch. May 30, 2014) and *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977) in support of this argument.

indisputably had subject matter jurisdiction pursuant to the Illinois Constitution. (R. V.14 C-003271-72). Huizenga also explained:

Defendants . . . convinced the Court 8 years ago to apply the DSA based upon the Delaware “nexus,” but now they suddenly argue that the Court should vacate their DSA liability for lack of proof of that same “nexus.” The law prevents reversing course post-trial to try to escape liability imposed under the law they insisted applied.

(R. V.14 C-003268) (citation omitted).

In Ritchie’s reply in support of the motion to vacate, it conceded the subject matter jurisdiction issue, stating, “Defendants do not contend that this Court lacked subject matter jurisdiction to adjudicate this lawsuit.” (R. V.14 C-003398). However, Ritchie continued to press its new argument that the trial court erred in applying the DSA due to lack of a sufficient “nexus.” (R. V.29 003396-400).

The trial court denied the motion to vacate on June 17, 2015, and in doing so, explained:

What [parties] can’t do, in fairness, is to pick one set of law and then, if that turns out to be uncomfortable, say, “Oh, we never meant it. Sorry. We have to go back and do it over again,” which is a little bit what the Defendants’ position here seems like.

(R. V.29 003015).

III. The Illinois Appellate Court Proceedings

Ritchie appealed to the Appellate Court of Illinois, and filed its Initial Brief on February 18, 2016. In that brief, Ritchie abandoned its argument that the requisite “nexus” to impose liability under the DSA did not exist. Ritchie also did not present any argument based on the Full Faith and Credit Clause of the U.S. Constitution.

Huizenga filed a Cross-Appeal Brief on April 22, 2016, asking the Appellate Court of Illinois to reverse the trial court’s judgment in favor of Ritchie on the DSA claims related to the First Investment. Because Ritchie in its Initial Brief abandoned the argument from the motion to vacate that the trial court “erred in applying the DSA – rather than the [ISL],” (R. V.13 C-003087), Huizenga did not request reversal of the trial court’s dismissal of its ISL claims. If Ritchie had argued in its Initial Brief that the trial court “erred in applying the DSA – rather than the [ISL],” Huizenga would have argued in its Cross-Appeal Brief that the trial court erred in dismissing its ISL claims with prejudice. Huizenga had expressly preserved this issue before the trial court for purposes of appeal. (R. V.16 C-003827).

Ritchie filed its Reply Brief on May 27, 2016, and attempted to revive its “nexus” argument in a single sentence, stating, “Recent Delaware caselaw explains that the DSA should not even be applied to securities transactions that are not connected to Delaware, such

as the sale of securities in this case.”³ Ritchie did not present any argument based on the Full Faith and Credit Clause of the U.S. Constitution.

On September 30, 2016, the Delaware Supreme Court entered its decision in *A&R Logistics Holdings, Inc. v. FdG Logistics LLC*, 148 A.3d 1171 (Table) (Del. 2016), in which it affirmed the Chancery Court’s decision reported at 131 A.3d 842. The order states, in its entirety:

This 30th day of September 2016, it appears to the Court that the judgment of the Court of Chancery should be affirmed on the basis of and for the reasons assigned in its well-reasoned decision dated February 23, 2016.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery is hereby AFFIRMED.

Two months later, on November 30, 2016, Ritchie and Huizenga presented oral argument before the Appellate Court of Illinois. During that argument, Ritchie’s attorney never mentioned the “nexus” argument, the *A&R Logistics* case, or the Full Faith and Credit Clause of the U.S. Constitution.⁴ However,

³ Ritchie’s Reply and Response Brief at 9-10, Case No. 15-2733 (Ill. App. Ct.) (filed May 27, 2016). Ritchie cited *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842 (Del. Ch. 2016) as support for its statement, but provided no explanation or analysis.

⁴ The Appellate Court of Illinois posts audio recordings of oral arguments on its website. The recording for the argument between Huizenga and Ritchie is available at: <http://multimedia>.

Huizenga’s attorney preemptively raised the “nexus” issue – explaining that Ritchie argued to the trial court that the DSA applied and Ritchie repeatedly waived any argument that the DSA did not apply. Ritchie’s attorney did not respond to these points in his rebuttal argument.⁵

On December 29, 2016, the Appellate Court of Illinois entered an order affirming the trial court’s judgment in favor of Huizenga on the Second Investment. Additionally, on Huizenga’s cross-appeal, the Appellate Court ruled that, “judgment should be entered in Huizenga’s favor on the [First Investment] in the amount of \$6 million,” and remanded to the trial court “to calculate any prejudgment interest it sees fit.” (App. 38a). The Appellate Court did not address the DSA “nexus” argument (which Ritchie had not raised in its Initial Brief or at oral argument, and mentioned in one sentence in its Reply Brief), or the Full Faith and Credit Clause of the U.S. Constitution (which Ritchie had never raised).

The Appellate Court filed the order pursuant to Illinois Supreme Court Rule 23, which means that it “is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res*

illinois.gov/court/AppellateCourt/Audio/2016/1st/113016_1-15-2733.mp3 (last visited Nov. 18, 2017).

Ritchie’s opening argument begins at approximately 1:00, and Huizenga’s argument begins at approximately 28:40. Ritchie’s rebuttal argument begins at approximately 58:35, and Huizenga’s rebuttal argument begins at approximately 67:05.

⁵ *Id.* at 57:00-58:25.

judicata, collateral estoppel or law of the case.” Ill. Sup. Ct. R. 23(e)(1).

On January 19, 2017, Ritchie filed a Petition for Rehearing, claiming that there were “two issues that were overlooked or misapprehended in [the Appellate] Court’s December 29, 2016 Opinion.”⁶ Neither of these issues involved the DSA “nexus” argument or the Full Faith and Credit Clause of the U.S. Constitution. Nor did Ritchie raise the Delaware Supreme Court’s decision in *A&R Logistics*, which had issued more than three and a half months before.

On February 2, 2017, the Appellate Court denied Ritchie’s Petition for Rehearing. (App. 39-40a). That same day, Ritchie filed a motion for leave to submit supplemental authority in support of its Petition for Rehearing, seeking to raise the Delaware Supreme Court’s four-month-old decision in *A&R Logistics* for the first time. Ritchie’s motion did not include any argument based on the Full Faith and Credit Clause of the U.S. Constitution.⁷

Huizenga filed an opposition to Ritchie’s motion on February 7, 2017, explaining that the motion was “an untimely and improper attempt to submit

⁶ Ritchie’s Petition for Rehearing at 1, Case No. 15-2733 (Ill. App. Ct.) (filed Jan. 19, 2017).

⁷ See Ritchie’s Motion for Leave to Submit Supplemental Authority in Support of Their Petition for Rehearing, Case No. 15-2733 (Ill. App. Ct.) (filed Feb. 2, 2017). Ritchie now insists that it filed the motion *before* the Appellate Court entered its order that same day, but Ritchie cannot point to any record evidence to support that claim. See Pet. at 29 n.5.

authority and argument on a point [Ritchie] waived in both the trial court and in this Court by failing to properly raise it in this appeal.”⁸ The Appellate Court denied Ritchie’s motion on February 16, 2017. (App. 41a).

IV. The Illinois Supreme Court Denies Review

On March 8, 2017, Ritchie filed a Petition for Appeal as a Matter of Right, or in the Alternative, Leave to Appeal, with the Supreme Court of Illinois. Ritchie argued in its petition that, “[t]he Appellate Court’s failure to follow the Delaware Supreme Court decision [in *A&R Logistics*] when it was brought to the Appellate Court’s attention violates the U.S. Constitution’s Full Faith and Credit Clause and requires reversal of the Appellate Court’s holdings.”⁹

On March 29, 2017, Huizenga filed an answer opposing Ritchie’s petition, explaining that “the reason why the Appellate Court’s order is silent on the nexus requirement is because the [Ritchie parties] did not raise the issue in their opening brief or cross-appeal response brief – or, indeed, at any point before the Appellate Court resolved the appeal.”¹⁰ With regard to

⁸ Huizenga’s Opposition to Ritchie’s Motion for Leave to Submit Supplemental Authority at 3-4, Case No. 15-2733 (Ill. App. Ct.) (filed Feb. 7, 2017).

⁹ Ritchie’s Petition for Appeal as a Matter of Right, or in the Alternative, Leave to Appeal at 1, Case No. 121989 (Ill. Sup. Ct.) (filed March 8, 2017).

¹⁰ Huizenga’s Answer Opposing Ritchie’s Petition for Appeal at 3, Case No. 121989 (Ill. Sup. Ct.) (filed March 29, 2017).

Ritchie’s motion for leave to submit supplemental authority – which the Appellate Court had denied – Huizenga explained that the Ritchie parties had not cited “any authority that would allow them to use a post-decision motion to press new arguments they had failed to raise previously to the Appellate Court,” or “any authority that would allow them to undo at this late hour their prior representation to the trial court that the nexus requirement was satisfied.”¹¹ On May 24, 2017, the Supreme Court of Illinois denied Ritchie’s petition. (App. 165a).

V. Current Proceedings in the Delaware Trial Court and Illinois Appellate Court

The same day that the Illinois Supreme Court denied Ritchie’s petition, Ritchie filed a new lawsuit against Huizenga in the Superior Court of the State of Delaware, demanding that Huizenga be required to reimburse Ritchie for the judgment against Ritchie in the Illinois action.¹² Ritchie told the Delaware Superior Court it had “put the decisions of the Delaware courts in [A&R] *Logistics* before the Illinois Appellate and Supreme Courts, but they simply ignored them,” and asked the Delaware court to “remedy” the Illinois courts’ decisions.¹³ Huizenga filed a motion to dismiss

¹¹ *Id.* at 5-6.

¹² See Complaint for Declaratory Judgment, Case No. N17C-05-598 MMJ (Del. Super. Ct.) (filed May 24, 2017).

¹³ Ritchie’s Answering Brief in Opposition to Huizenga’s Motion to Dismiss or Stay at 3, 25, Case No. N17C-05-598 MMJ (Del. Super. Ct.) (filed Aug. 30, 2017).

or stay on July 31, 2017, and the parties are currently awaiting the court’s decision.

In October 2017, the Illinois trial court entered judgment in favor of Huizenga on the First Investment, as well as prejudgment interest, “pursuant to what [the] Court finds to be the direction of the Appellate Court. . . .”¹⁴ On November 9, 2017, Ritchie filed Notices of Appeal, indicating an intent to appeal this judgment to the Appellate Court of Illinois. Ritchie has not yet filed its initial appellate brief.



REASONS FOR DENYING THE PETITION

I. Ritchie did not properly present its federal Full Faith & Credit claim to the Illinois courts

A. Ritchie should have requested a writ of certiorari to the Illinois Appellate Court, not the Illinois Supreme Court

Although Ritchie asks this court for a “writ of certiorari to review the judgment of the Supreme Court of Illinois,” Pet. at 1, the Supreme Court of Illinois never entered any judgment in this case. Instead, that court merely denied review of the Illinois Appellate Court’s December 29, 2016 opinion, without comment. Therefore, the Illinois Appellate Court is the “highest court of a State in which a decision could be had” under 28 U.S.C. §1257(a), and Ritchie should have requested a

¹⁴ Oct. 19, 2017 Order, Case No. 07-CH-09626 (Ill. Cir. Ct.).

writ of certiorari to that court instead. *See, e.g., Sullivan v. State of Texas*, 207 U.S. 416, 422 (1908) (“By the action of the supreme court of the state [denying review] the judgment of the court of civil appeals became the judgment of the highest court in the state to which the case could be taken, and hence the writ of error properly ran to that court.”); *Huber v. N.J. Dep’t of Envtl. Prot.*, 562 U.S. 1302 (2011) (denying petition for writ of certiorari to New Jersey appellate court, where New Jersey Supreme Court denied review).¹⁵

B. Ritchie did not properly present its federal Full Faith & Credit claim to the Illinois Appellate Court

Because any writ of certiorari in this case would issue to the Illinois Appellate Court, Ritchie must show that it properly presented its federal Full Faith and Credit claim to the Illinois Appellate Court. As this Court explained in *Adams v. Robertson*, 520 U.S. 83 (1997):

With “very rare exceptions,” we have adhered to the rule in reviewing State court judgments under 28 U.S.C. §1257 that we will not consider a petitioner’s federal claim unless it was either addressed by, or properly presented to,

¹⁵ *See also* S. SHAPIRO, K. GELLER, T. BISHOP, E. HARTNETT & D. HIMMELFARB, *SUPREME COURT PRACTICE*, §3.13, p. 179 (10th ed. 2013) (“Should the higher court decline to exercise its authority, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under §1257. . . .”).

the state court that rendered the decision we have been asked to review.

Id. at 86 (citations omitted; emphasis added); *see also Clark v. Arizona*, 548 U.S. 735, 765 (2006) (“because a due process challenge . . . was, by our measure, neither pressed nor passed upon in the Arizona Court of Appeals, we do not consider it”).

Ritchie cannot satisfy this burden. Indeed, the record shows that Ritchie never presented any argument to the Illinois Appellate Court concerning the federal Full Faith and Credit Clause, either in briefs or at oral argument.¹⁶ Ritchie’s petition in this case confirms that fact. In contravention of this Court’s Rule 14.1(g)(i), Ritchie’s petition does not include any “specific reference to the places *in the record*” showing Ritchie timely raised its federal Full Faith and Credit Clause claim – because none exist.

Notably, by the time the parties presented oral argument to the Illinois Appellate Court, the Delaware Supreme Court’s decision in *A&R Logistics* – the linchpin for Ritchie’s federal Full Faith and Credit argument here – had been publicly available for two months. Despite this fact, Ritchie’s attorney never mentioned the *A&R Logistics* decision, the DSA “nexus” argument, or the federal Full Faith and Credit Clause at oral

¹⁶ The Illinois Appellate Court did not address the federal Full Faith and Credit Clause in its opinion (nor did the Supreme Court of Illinois in denying review), which creates an assumption that Ritchie failed to properly present the issue. Ritchie bears the burden of overcoming this assumption. *See Adams*, 520 U.S. at 86-87.

argument. Moreover, when Ritchie filed its Petition for Rehearing another two months later, it once again chose to ignore the *A&R Logistics* decision, the DSA “nexus” argument, and the federal Full Faith and Credit Clause.

Even in Ritchie’s motion for leave to submit supplemental authority in support of the Petition for Rehearing – in which Ritchie argued that the *A&R Logistics* decision required reversal of the Illinois trial court’s judgment – Ritchie still never mentioned the federal Full Faith and Credit Clause, much less argued that it controlled the outcome of the case.¹⁷

* * *

Having failed to present any argument regarding the federal Full Faith and Credit Clause to the Illinois Appellate Court, Ritchie cannot ask this Court to review the Illinois Appellate Court’s decision for violation of the Full Faith and Credit Clause now. *See, e.g., Webb v. Webb*, 451 U.S. 493, 496 (1981) (writ dismissed for want of jurisdiction; “Although petitioner did use the phrase ‘full faith and credit’ at several points in the proceedings below, nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution”). Accordingly, Ritchie’s petition should be denied.

¹⁷ Furthermore, Ritchie waited until the same day that the Illinois Appellate Court denied its Petition for Rehearing to file this motion for leave to submit supplemental authority in support of the petition.

II. Ritchie violated Illinois procedural law, which constitutes independent state law grounds for the judgment

Even if Ritchie had presented a federal Full Faith and Credit claim to the Illinois Appellate Court, this Court would still lack jurisdiction, because there remain independent and adequate state law grounds for the Illinois Appellate Court’s decision. Specifically, Ritchie violated Illinois procedural law by failing to raise and preserve the DSA “nexus” argument upon which its Full Faith and Credit claim rests. *See Durley v. Mayo*, 351 U.S. 277, 281 (1956) (“where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it”).¹⁸

A. Ritchie waived its DSA “nexus” argument before the Illinois trial court

Ritchie first waived the DSA “nexus” argument at the trial court level. In 2007, Ritchie moved to dismiss

¹⁸ Without citing any supporting authority, Ritchie asserts that a violation of Illinois procedural rules “is no basis for this Court to deny certiorari. . . .” Pet. at 24. Ritchie’s assertion flatly contradicts this Court’s prior rulings. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 729 (1991). (“This rule applies whether the state law ground is substantive or procedural.”); *Adams*, 520 U.S. at 87-88 (“Petitioners have done nothing to demonstrate that they complied with the applicable state rules for raising their [federal claim] . . . or to explain why the failure to comply with those rules would not be an adequate and independent ground for the state court to disregard that claim.”).

Huizenga’s ISL claims by telling the trial court, “there are many, many cases that we can cite to you and it is in our brief where Illinois Courts applied Delaware securities laws.” (R. V.17 000007). The trial court then dismissed Huizenga’s ISL claims with prejudice, and the case proceeded on Huizenga’s DSA claims (to which Ritchie had not objected based on any alleged lack of a “nexus”).

Seven years later, *after* the trial court entered a judgment finding Ritchie liable for violating Delaware securities laws, Ritchie suddenly reversed course and told the trial court that it had “erred in applying the DSA – rather than the [ISL]. . . .” (R. V.13 C-003087). Specifically, Ritchie raised its DSA “nexus” argument for the first time, claiming:

Delaware law is clear that a court has subject matter jurisdiction to apply the DSA only “where there is a sufficient nexus between Delaware and the transaction at issue.” Delaware courts have recently re-affirmed that incorporation in Delaware and a choice of law provision in favor of Delaware are not sufficient to impose liability under the DSA. . . . Accordingly, this Court lacked subject matter jurisdiction to impose liability against defendants under the DSA.

(R. V.13 C-003087-88) (citations omitted).

Under Illinois law however, “a party waives his right to complain of an error where to do so is inconsistent with the position taken by the party in an earlier court proceeding.” *Auton v. Logan Landfill, Inc.*,

475 N.E.2d 817, 818 (Ill. 1984).¹⁹ The Illinois trial court was therefore completely justified in rejecting Ritchie’s post-judgment argument that the DSA was somehow inapplicable and the trial court should have applied the ISL instead.²⁰

Ritchie also never argued to the trial court that the Full Faith and Credit Clause of the U.S. Constitution was implicated in any way, and therefore, waived that argument under Illinois law. See *Hulbert v. Chicago*, 202 U.S. 275 (1906) (case dismissed for want of jurisdiction where party failed to raise Constitutional issue before Illinois trial court).

¹⁹ See also *McMath v. Katholi*, 730 N.E.2d 1, 4 (Ill. 2000) (“After inviting the trial court to rule on the admissibility of the evidence based on Rule 220, plaintiff is precluded from complaining now that the circuit court’s ruling was erroneous based on some other evidentiary rule.”); *Boumenot v. N. Cmty. Bank*, 590 N.E.2d 126, 132 (Ill. App. Ct. 1991) (“It was not until his Motion to Vacate, Reconsider, or Modify the trial court’s judgment order that plaintiff first asserted his right to a homestead exemption. . . . However, it was improper for plaintiff to be silent as to this issue throughout the trial but assert his right to this exemption for the first time in a motion for reconsideration.”).

²⁰ Moreover, under Illinois law, “[w]here an issue is first raised in a post-trial motion, the reviewing court need only determine whether the trial court abused its discretion in denying the motion.” *In re Estate of Wernick*, 530 N.E.2d 1127, 1130 (Ill. App. Ct. 1988). Ritchie never argued on appeal that the Illinois trial court had abused its discretion in rejecting its DSA “nexus” argument in the motion to vacate.

B. Ritchie waived its DSA “nexus” argument before the Illinois Appellate Court

Ritchie then proceeded to waive the DSA “nexus” argument again by abandoning it on appeal. Ritchie failed to raise this argument in its Initial Brief before the Illinois Appellate Court, and under Illinois Supreme Court Rule 341(h)(7), “[p]oints not argued [in the Initial Brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.”

Even after the Delaware Supreme Court issued its decision in *A&R Logistics* – which Ritchie incorrectly claims “changed Delaware law” (more on that below) – Ritchie still failed to raise the “nexus” argument on appeal. At oral argument before the Illinois Appellate Court, which took place two months after the *A&R Logistics* decision was published, Ritchie’s attorney never mentioned *A&R Logistics* or the “nexus” issue. Moreover, when Huizenga’s attorney preemptively raised the issue, explaining that Ritchie argued to the trial court that the DSA applied and repeatedly waived any argument that the DSA did not apply, Ritchie’s attorney chose not to respond to these points in his rebuttal argument.

Nor did Ritchie raise the “nexus” argument in its Petition for Rehearing, which it filed three and a half months after the *A&R Logistics* decision was published. In that petition, Ritchie purported to identify just “two issues that were overlooked or misapprehended in [the Appellate] Court’s December 29, 2016

Opinion,” neither of which involved the “nexus” argument.²¹

It was not until the same day that the Illinois Appellate Court denied the Petition for Rehearing, that Ritchie filed a motion to submit supplemental authority, seeking to raise for the first time the four-month-old *A&R Logistics* decision in support of the same DSA “nexus” argument it had abandoned after the trial court denied the motion to vacate 19 months earlier.

Additionally, the Illinois Supreme Court’s denial of Ritchie’s Petition for Appeal is effectively confirmation from that court that Ritchie failed to comply with Illinois procedural law. Under Illinois Supreme Court Rule 317, “Appeals from the Appellate Court shall lie to the Supreme Court *as a matter of right* in cases in which . . . a question under the Constitution of the United States . . . arises for the first time in and as a result of the action of the Appellate Court.” (emphasis added). If Ritchie had properly presented and preserved its arguments regarding the DSA “nexus” issue and the federal Full Faith & Credit Clause to the Illinois trial and appellate courts, then the Illinois Supreme Court would have granted its Petition for Appeal as a matter of right. The court denied that petition, because instead of properly presenting and preserving its arguments, Ritchie had waived the DSA

²¹ See Ritchie’s Petition for Rehearing at 1, Case No. 15-2733 (Ill. App. Ct.) (filed Jan. 19, 2017).

“nexus” argument and never raised any argument concerning the U.S. Constitution.

* * *

Ritchie waived its DSA “nexus” argument in the trial court and it waived the argument in the appellate court. Ritchie had ample opportunity to address the supposed implications of the *A&R Logistics* decision – both at oral argument and in the Petition for Rehearing – and it chose not to do so. Under Illinois law therefore, Ritchie waived its DSA “nexus” argument, and its petition for a writ of certiorari in this case should be denied.

III. The Delaware Supreme Court’s decision in *A&R Logistics* does not excuse Ritchie’s waiver of the DSA “nexus” argument

Ritchie tries to explain away its waiver of the DSA “nexus” argument, by claiming that Delaware law suddenly changed mid-appeal. Ritchie argues that regardless of its failure to raise the DSA “nexus” argument in its Initial Brief before the Illinois Appellate Court, (i) “when the Delaware Supreme Court issued its *A&R Logistics* decision, it changed Delaware law,” and (ii) “the Illinois Appellate Court was bound to follow that change.” Pet. at 13. Both claims are wrong.

A. The *A&R Logistics* decision did not change Delaware law

First, the *A&R Logistics* decision did not “change Delaware law.” This can be proved solely by reference to Ritchie’s own judicial admissions. In the petition, Ritchie represents that in *A&R Logistics* the court “changed Delaware law,” by holding that “the DSA does *not* apply to a securities transaction when the only connections to Delaware are a contract containing a Delaware choice-of-law provision and the fact that the parties are incorporated in Delaware.” Pet. at 12. Ritchie now asserts that until the September 2016 *A&R Logistics* decision, “the effect of a choice-of-law provision on the applicability of the DSA was unsettled. . . .” *Id.* at 20.

That is not what Ritchie told the Illinois courts. When Ritchie filed its post-judgment motion to vacate with the Illinois trial court in February 2015 – 19 months before the *A&R Logistics* decision – Ritchie claimed that the eventual *A&R Logistics* holding was already “clear” Delaware law that had been “recently re-affirmed.” Specifically, Ritchie claimed:

Delaware law is clear that a court has subject matter jurisdiction to apply the DSA only “where there is a sufficient nexus between Delaware and the transaction at issue.” *Delaware courts have recently re-affirmed that incorporation in Delaware and a choice of law provision in favor of Delaware are not sufficient to impose liability under the DSA. . . .* Accordingly, this Court lacked subject matter

jurisdiction to impose liability against defendants under the DSA.

(R. V.13 C-003087-88) (citations omitted; emphasis added).

By Ritchie’s own admission then, any claim that the *A&R Logistics* decision represented some sea change in Delaware law is simply not true. Ritchie argued to the Illinois trial court that the forthcoming holding of *A&R Logistics* was already “clear” Delaware law. As explained above, after the trial court rejected that argument – no doubt because Ritchie waited until after judgment to assert it – Ritchie immediately abandoned the argument on appeal.

B. The U.S. Constitution does not require state courts to give retroactive effect to state court decisions

Second, even if *A&R Logistics* represented a clear change in Delaware law, the U.S. Constitution would not require the Illinois courts to give the decision retroactive effect for all cases pending on appeal. Ritchie argues the opposite, claiming that in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993) this Court held that “when courts establish a rule, their holdings must be ‘given full retroactive effect in all cases still open on direct review.’” Pet. at 13.

The *Harper* decision is not so broad. It only discussed the retroactive effect of *this Court's decisions*.²² *Harper* does not comment on whether state courts are required to give retroactive effect to state court decisions “in all cases still open on direct review,” as Ritchie contends. In fact, this Court has previously indicated that the U.S. Constitution does not speak to that issue. For example, in *Great Northern Railway Company v. Sunburst Oil & Refining Company*, 287 U.S. 358, 364 (1932), this Court stated, “This is a case where a [state] court has refused to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal. We think the Federal Constitution has no voice upon the subject.”

Ritchie cites just one other case on the issue, *Ostergren v. Forest Preserve District of Will County*, 471 N.E.2d 191 (Ill. 1984), claiming it shows, “Illinois law is clear that any ‘change in law will be given effect while a case is on direct review.’” Pet. at 26. Once again, Ritchie’s representation of the case is inaccurate.

The portion of *Ostergren* that Ritchie quotes is actually from the *dissenting* opinion in the case – a fact that Ritchie mistakenly fails to disclose. In fact, the majority opinion in *Ostergren* declined to give

²² See *Harper*, 509 U.S. at 97 (“When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.”).

retroactive effect to a statutory amendment. The truth is that both Illinois and Delaware courts may decline to give decisions retroactive effect, depending on the circumstances. *See Exelon Corp. v. Dep’t of Revenue*, 917 N.E.2d 899, 911-12 (Ill. 2009); *General Motors Corp. v. New Castle Cty.*, 701 A.2d 819, 822 (Del. 1997). Ritchie does not argue that the circumstances allowing Illinois courts to deny retroactive effect are absent here.

* * *

By Ritchie’s own admission, the *A&R Logistics* decision did not represent a change in Delaware law – much less a change sufficient to excuse its waiver of the DSA “nexus” argument. Moreover, even if *A&R Logistics* did constitute a change in Delaware law, Ritchie’s assertion that the Illinois courts would be bound by the U.S. Constitution to give that decision retroactive effect for all cases pending on appeal is inaccurate.

IV. This case is not important enough to warrant review, particularly while state court proceedings remain pending

A. The Illinois Appellate Court’s decision is non-precedential

The Illinois Appellate Court’s December 29, 2016 order was entered pursuant to Illinois Supreme Court Rule 23, which means that it “is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral

estoppel or law of the case.” Ill. Sup. Ct. R. 23(e)(1). In other words, the Illinois Appellate Court’s decision will not have any impact on anyone other than the litigants in the various lawsuits involving Huizenga and Ritchie. Indeed, although the opinion was published nearly one year ago, a Westlaw search reveals that it has not been cited as authority by a single court in the entire United States. This case simply is not important enough to the public to merit this Court’s review. See *Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393 (1923) (“it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties. . . .”).

B. The pending cases in Delaware and Illinois weigh against review

Ritchie is currently pursuing a lawsuit in the Delaware Superior Court, in which it alleges Huizenga is required to indemnify Ritchie for, among other things, any judgment Ritchie is ultimately required to pay Huizenga in the Illinois action. Ritchie’s argument is baseless, and Huizenga filed a motion to dismiss, which is currently awaiting the court’s decision. However, at least according to Ritchie, there is a chance that the entire Illinois judgment will be rendered moot by its Delaware lawsuit.

Moreover, Ritchie just recently filed notices of appeal of the Illinois trial court’s October 2017 entry of

judgment and prejudgment interest on the First Investment. Assuming Ritchie follows through with its appeal, that means Huizenga and Ritchie will spend the foreseeable future litigating a portion of this same dispute before the Appellate Court of Illinois once again.

* * *

Simply put, there is no compelling reason for this Court to undertake a review of a non-precedential decision by the Illinois Appellate Court, particularly when there are pending actions on related issues in both the Delaware and Illinois state courts.

◆

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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