
IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JURIMEX KOMMERZ TRANSIT)	Appeal from the United
G.M.B.H., JURIMEX KOMMERZ)	States District Court for
TRANSIT AGRAR CONSULTING)	the District of Delaware
PROJEKT KAS, G.M.B.H. and)	
ARGE IPC-JURIMEX,)	
)	
Plaintiffs-Appellants,)	Civil Action No. 00-83-JJF
)	
v.)	
)	
CASE CORPORATION,)	Hon. Joseph J. Farnan, Jr.,
)	<i>Judge, Presiding</i>
Defendant-Appellee.)	

BRIEF OF DEFENDANT-APPELLEE CASE CORPORATION

David C. McBride
John W. Shaw
Dawn M. Jones
Young, Conaway,
Stargatt & Taylor
1000 W St., 17th Fl.
Wilmington, DE 19899
(302) 571-6639

William E. Deitrick
James C. Schroeder
Michelle V. Dohra
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

December 19, 2006

**CORPORATE DISCLOSURE STATEMENT AND
STATEMENT OF FINANCIAL INTEREST**

No: 06-3523

Jurimex Kommerz Transit G.M.B.H., et al.

v.

Case Corporation

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Case Corporation makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

On September 30, 2002, Case Corporation converted to a limited liability company and changed its name to Case, LLC. Case, LLC is now known as CNH America LLC. Case New Holland Inc. is the sole member of CNH America LLC with 100% ownership.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

CNH Global N.V. owns 100% of Case New Holland Inc. CNH Global N.V. is a publicly traded company.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

N/A

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

Dated: December 19, 2006

/s/ James C. Schroeder
(Signature of Counsel or Party)

TABLE OF CONTENTS

	Page
JURISDICTION.....	1
ISSUES	1
STATEMENT OF THE CASE.....	2
A. Nature of the Case and the Course of Proceedings.....	2
B. Disposition Below.....	4
STATEMENT OF FACTS	5
A. Negotiations Concerning The Proposed Golden Grain Deal (April 16, 1999–June 23, 1999).	5
B. Plaintiffs’ Admissions.....	13
C. Testimony From Case Corp.	15
D. The 1998 Volgograd Contract.	16
RELATED CASES	17
STANDARD OF REVIEW	18
SUMMARY OF ARGUMENT	19
ARGUMENT	21
I. Case Corp.’s Subsidiaries Did Not Act As Agents Of Case Corp. In The Proposed Golden Grain Deal.	21
A. There Is No Evidence Of Any Manifestation From Case Corp. To Jurimex That Its Subsidiaries Were Its Agents For The Proposed Golden Grain Deal.	22
B. There Is No Evidence That Case Corp. Granted Its Subsidiaries Actual Authority In The Proposed Golden Grain Deal.	25
C. There Is No Evidence That Case Corp. Caused Jurimex To Believe That The Subsidiaries Had Apparent Authority To Act For Case Corp. In The Proposed Golden Grain Deal.	30
II. The Judgment Can Also Be Affirmed On Alternative Grounds.....	35

TABLE OF CONTENTS
(continued)

	Page
A. There Is No Evidence Of A Contract—No Essential Terms Had Been Agreed Upon.....	36
1. A contract is not enforceable until all parties agree on the essential terms.....	37
2. The parties never reached agreement on any essential term.	41
B. This Case Should Be Dismissed Under The Doctrine Of Forum Non Conveniens.	46
1. The private interest factors all favor dismissal.....	47
2. The public interest factors also overwhelmingly favor dismissal.....	49
III. Plaintiffs Were Not Entitled To Additional Discovery.....	53
CONCLUSION.....	56

TABLE OF AUTHORITIES

Page

Cases

<i>Abiola v. Abubakar</i> , 267 F. Supp. 2d 907 (N.D. Ill. 2003).....	52
<i>American Home Assurance Co. v. TGL Container Lines, Ltd.</i> , 347 F. Supp. 2d 749 (N.D. Cal. 2004)	52
<i>Anderson v. Liberty Lobby</i> , 477 U.S. 242 (1986)	18
<i>Ankerstjerne v. Schlumberger, Ltd.</i> , 155 Fed. Appx. 48 (3d Cir. 2005)	37
<i>Armotek Industries v. Employers Ins. of Wausau</i> , 952 F.2d 756 (3d Cir. 1991).....	36
<i>Banco Nominees, Ltd. v. Iroquois Brands, Ltd.</i> , 748 F. Supp. 1070 (D. Del. 1990)	52
<i>Berkeley Investment Group v. Colkitt</i> , 455 F.3d 195 (3d Cir. 2006)	18
<i>Camiolo v. State Farm Fire & Casualty</i> , 334 F.3d 345 (3d Cir. 2003)	18, 54
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	18
<i>Dawson v. Compagnie des Bauxites de Guinee</i> , 593 F. Supp. 20, 26 (D. Del. 1984) <i>aff'd</i> , 746 F.2d 1466 (3d Cir. 1984)	48, 52
<i>Dierks & Sons Lumber Co. v. Morris</i> , 404 S.W.2d 229 (Mo. Ct. App. 1966)	33
<i>Diesel Power Equip. v. ADDCO, Inc.</i> , 377 F.3d 853 (8th Cir. 2004)	39, 40, 46
<i>Don Kemper Co. v. Beneficial Standard Life Ins. Co.</i> , 404 F.2d 752 (3d Cir. 1968)	28, 33

TABLE OF AUTHORITIES

	Page
<i>E.I. DuPont de Nemours & Co. v. Rhone Poulenc</i> , 269 F.3d 187 (3d Cir. 2001)	26, 27, 31, 32, 55
<i>East Coast Resorts v. Paroni</i> , 1990 Del. Ch. Lexis 204 (Dec. 3, 1990).....	46
<i>Edwards v. Born, Inc.</i> , 792 F.2d 387 (3d Cir. 1986)	22
<i>Ege Int’l Forwarding House v. Case Corp.</i> , 2001 WL 477225 (N.D. Ill. May 7, 2001)	32
<i>Empro Mfg. v. Ball-Co Mfg.</i> , 870 F.2d 423 (7th Cir. 1989)	38
<i>Eton Furniture Co., In re</i> , 286 F.2d 93 (3d Cir. 1961)	34
<i>Finnegan Constr. v. Robino-Ladd Co.</i> , 354 A.2d 142 (Del. Super. 1976)	22
<i>Gilles v. Davis</i> , 427 F.3d 197 (3d Cir. 2005)	18
<i>Gulf Oil Corp. v. Gilbert</i> , 330 U.S. 501 (1947)	49
<i>International Telemeter Corp. v. Teleprompter Corp.</i> , 592 F.2d 49 (2d Cir. 1979)	39
<i>Japan Petroleum Co. v. Ashland Oil</i> , 456 F. Supp. 831 (D. Del. 1978)	28
<i>Knight v. Sharif</i> , 875 F.2d 516 (5th Cir. 1989)	37, 40
<i>Lacey v. Cessna Aircraft</i> , 932 F.2d 170 (3d Cir. 1991)	53
<i>Leeds v. First Allied Connecticut Corp.</i> , 521 A.2d 1095 (Del. Ch. 1986)	38, 39, 40

TABLE OF AUTHORITIES

	Page
<i>Lexington Ins. v. W. Pa. Hosp.</i> , 423 F.3d 318 (3d Cir. 2005)	18
<i>Lony v. E.I. Du Pont de Nemours & Co.</i> , 935 F.2d 604 (3d Cir. 1991)	53
<i>Mason & Dixon Lines v. Glover</i> , 975 F.2d 1298 (7th Cir. 1992)	33, 37
<i>MCI Telecommunications v. Teleconcepts, Inc.</i> , 71 F.3d 1086 (3d Cir. 1995)	18, 19
<i>Murray v. Shipman Koal Co.</i> , 270 F. 740 (3d Cir. 1921)	35
<i>Naghiu v. Inter-Continental Hotels Group</i> , 165 F.R.D. 413 (D. Del. 1996)	51
<i>National Mortgage Warehouse v. Bankers First Mortgage</i> , 190 F. Supp. 2d 774 (D. Md. 2002)	26, 32
<i>Ocean Atl. Dev. Corp. v. Aurora Christian Schools</i> , 322 F.3d 983 (7th Cir. 2003)	37
<i>Orthopedic Bone Screw Prods. Liab. Litig., In re</i> , 246 F.3d 315 (3d Cir. 2001)	19
<i>Pearson v. Component Technology</i> , 247 F.3d 471 (3d Cir. 2001)	21, 28
<i>PFT Roberson, Inc. v. Volvo Trucks N. Am.</i> , 420 F.3d 728 (7th Cir. 2005)	39, 40
<i>Phoenix Canada Oil v. Texaco, Inc.</i> , 842 F.2d 1466 (3d Cir. 1988)	34
<i>Piper Aircraft Co. v. Reyno</i> , 454 U.S. 235 (1981)	47, 48, 50, 51
<i>RBGSC Inv. Corp., In re</i> , 242 B.R. 851 (Bankr. E.D. Pa. 2000)	35

TABLE OF AUTHORITIES

	Page
<i>Rittenhouse Assocs. v. Potts</i> , 1981 WL 15084 (Del. Ch. Apr. 21, 1981)	33
<i>Schering Corp. v. Zeneca, Inc.</i> , 958 F. Supp. 196 (D. Del. 1996), <i>aff'd sub nom. Schering Corp. v. Roussel-UCLAF SA</i> , 104 F.3d 341 (Fed. Cir. 1997)	51
<i>Schoonejongen v. Curtiss-Wright Corp.</i> , 143 F.3d 120 (3d Cir. 1998)	27
<i>Scottish Air Int'l v. British Caledonian Group</i> , 81 F.3d 1224 (2d Cir. 1996)	51
<i>SEI Corp. v. Norton & Co.</i> , 631 F. Supp. 497 (E.D. Pa. 1986).....	34
<i>Sherwood Med. Co. v. IVAC Med. Systems</i> , 1996 WL 700261 (D. Del. Nov. 25, 1996)	49
<i>Smith v. New Castle County Vocational-Technical School Dist.</i> , 574 F. Supp. 813 (D. Del. 1983)	31
<i>Soanes v. B.&O. R.R.</i> , 89 F.R.D. 430, 431-32 (E.D.N.Y. 1981)	28
<i>Telephone & Data Sys. v. Eastex Cellular</i> , 1993 Del. Ch. Lexis 182 (Aug. 27, 1993)	36, 40, 46
<i>Townsend of Arkansas, Inc. v. Millers Mut. Ins.</i> , 823 F. Supp. 233 (D. Del. 1993), <i>aff'd</i> , 26 F.3d 123 (3d Cir. 1994)	51
<i>Tracinda Corp. v. DaimlerChrysler AG</i> , 362 F. Supp. 2d 487 (D. Del. 2005)	34
<i>Union Pac. R.R. v. Greentree Transp. Trucking Co.</i> , 293 F.3d 120 (3d Cir. 2002)	34
<i>United States v. 425,031 Square Feet of Land</i> , 84 F. Supp. 548 (D.N.J. 1949)	31
<i>United States v. Bestfoods</i> , 524 U.S. 51 (1998)	21, 28

TABLE OF AUTHORITIES

	Page
<i>USX Corp. v. Prime Leasing</i> , 988 F.2d 433 (3d Cir. 1993)	37
<i>Verreries de L’Hermitage, S.A. v. Hickory Furniture Co.</i> , 704 F.2d 140 (4th Cir. 1983)	33
<i>Victory Corrugated Container Corp., In re</i> , 183 B.R. 373 (Bankr. D.N.J. 1995)	31
<i>Westerby v. Johns-Manville Corp.</i> , 32 Pa. D. & C. 3d 163 (Pa. Ct. Com. Pl. 1982)	53
<i>Willard C. Beach Air Brush Co. v. General Motors Corp.</i> , 118 F. Supp. 242 (D.N.J. 1953), <i>aff’d</i> , 214 F.2d 664 (3d Cir. 1954)	35
<i>Wilson v. Hurschman</i> , 1993 WL 1303158 (Del. Ct. Com. Pl. Feb. 22, 1993)	37
<i>Wisniewski v. Johns-Manville Corp.</i> , 812 F.2d 81 (3d Cir. 1987)	56
 Statutes and Rules	
28 U.S.C. § 1291	1
28 U.S.C. § 1332	1
Federal Rule of Civil Procedure 30(b)(6)	3, 5, 15, 17, 23, 24, 30, 42, 50
 Other Authorities	
2 Fletcher Cyclopedia of the Law of Corporations § 449 (2006)	33
RESTATEMENT (SECOND) OF AGENCY § 26 (1958)	22, 23
RESTATEMENT (SECOND) OF AGENCY § 27 (1958)	22, 23
RESTATEMENT (SECOND) OF AGENCY § 34(b) (1958)	23
RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006)	22, 30
RESTATEMENT (THIRD) OF AGENCY § 3.03 (2006)	22

JURISDICTION

Plaintiffs (collectively, “Jurimex”) are two Austrian corporations (Jurimex Transit and Jurimex Projekt) and an Austrian partnership (IPC-Jurimex), whose two partners are Austrian corporations; Austria is the principal place of business for all of these entities. Joint Appendix (“A”) A283, 412-13. Defendant Case Corporation (“Case Corp.”) is incorporated in Delaware, has its principal place of business in Wisconsin, and is now known as CNH America LLC. A412-13. Because plaintiffs seek more than \$75,000, the district court had jurisdiction under 28 U.S.C. § 1332.

The district court entered summary judgment for Case Corp. on all claims on July 19, 2006. A13. Plaintiffs filed a timely notice of appeal on July 25, 2006. A14. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES

1. Whether Case Corp. properly received summary judgment on agency when plaintiffs admittedly had no contact with the alleged principal, Case Corp., regarding the potential Golden Grain deal and it is undisputed that there were no communications whatever between Case Corp. and its subsidiaries or Jurimex regarding the potential Golden Grain deal.

2. Whether Case Corp. is entitled to judgment on alternative grounds:
(a) there was no oral contract because the many parties in the potential Golden

Grain deal involving Jurimex never agreed on any essential terms, much less a complete agreement; and (b) because the transaction had no connection to Delaware or the United States, the *forum non conveniens* doctrine requires dismissal.

3. Whether the district court abused its discretion in denying additional discovery regarding transactions unrelated to Jurimex when there was no evidence that Jurimex knew of and relied on any such transactions.

STATEMENT OF THE CASE

A. Nature of the Case and the Course of Proceedings.

Plaintiffs' amended complaint alleges that Case Corp., through European subsidiaries supposedly acting as its agents, breached a \$20 million-\$40 million oral contract involving multiple parties, under which (1) plaintiffs allegedly would provide Case Corp. with certain services in connection with the sale of farm combines by Case Corp. to a Kazakhstan agricultural concern, Golden Grain, (2) Kazakh wheat would be sold to offtakers to pay part of the cost of the combines, and (3) various European banks would finance the transaction (the "potential Golden Grain deal"). A411-33. The complex transaction depended upon the agreement of the buyer, the seller, the banks, and the offtakers.

The district court dismissed plaintiffs' original complaint for failure to join indispensable parties and denied leave to file an amended complaint alleging a

principal-agent relationship between Case Corp. and its subsidiaries. This Court affirmed dismissal of the complaint, but ruled that plaintiffs should be allowed to amend and take discovery on the issue of agency in the potential Golden Grain deal. *Jurimex Kommerz v. Case Corp.*, 65 Fed. Appx. 803 (3d Cir. 2003). The Court noted that if the subsidiaries were Case Corp.’s agents, evidence of agency “would likely be found” in “documents concerning the communications between Case and its subsidiaries specifically limited to the Golden Grain transaction.” *Id.* at 808.

On remand, the district court allowed discovery of those communications, but refused to expand discovery beyond the potential Golden Grain deal. A146-49, 188-96, 809-12. The parties responded to numerous discovery requests, took Rule 30(b)(6) depositions, and produced all documents in their possession relating to that proposed transaction. A308 (Divis 22). Case Corp. moved for summary judgment on three grounds:

- (1) Case Corp. was not involved in the potential Golden Grain deal—Case France and Case Europe did not act as its agents, but as principals, in discussions with Jurimex regarding the transaction;
- (2) the discussions about the complex, multi-party deal between plaintiffs, Case France, Case Europe, Golden Grain and several other third parties failed to produce agreement on a single essential term. Indeed, plaintiffs admitted that they withdrew from the transaction because they disagreed with the other potential parties on important tax issues; and

(3) the *forum non conveniens* doctrine required dismissal because there are no witnesses or documents in the United States, no negotiations occurred in the United States, and performance would not have been in the United States.

Supplemental Appendix (“B”) B118-19.

B. Disposition Below.

Reaching only the first ground, the district court granted summary judgment to Case Corp. because there was no evidence that Case France and Case Europe acted as Case Corp.’s agents in the proposed Golden Grain deal. A8-12. Refusing to “accept Plaintiffs’ bald assertions,” the court held first that there was no evidence that defendant’s subsidiaries had actual authority to act on Defendant’s behalf—“Plaintiffs admit that there is no written record of such authorization,” and plaintiffs “failed to put forth any * * * evidence” of oral authority. A8. Second, the court concluded that “no jury could reasonably find that Defendant’s subsidiaries had apparent authority to act on Defendant’s behalf” in the Golden Grain transaction. A9. “[T]o establish an agency relationship, Plaintiffs must point to words or actions of the principal, which Plaintiffs have admitted they cannot do.” A10. Instead, “Plaintiffs point to the words and actions of every person involved in the transaction, except Defendant[.]” A9. The court ruled that apparent authority was not evidenced by an earlier “entirely unrelated” transaction; by third-party documents that post-date plaintiffs’ alleged involvement in and exit from the Golden Grain negotiations (they “could not have contributed to Plaintiffs’

belief that Defendant's subsidiaries were acting on Defendant's behalf"); or by the fact that Case Europe's president was a Case Corp. officer. A10-11.

STATEMENT OF FACTS

A. Negotiations Concerning The Proposed Golden Grain Deal (April 16, 1999–June 23, 1999).

On April 16, 1999, Patrice Loiseleur of Case France in Paris sent a letter, on Case France letterhead, to Sascha Divis at Jurimex: "We [Case France] have a potential client [Golden Grain] in Kazakhstan who has +/-200,000T of wheat for sale in Petropavlosk region. Would Jurimex be interested?" A410. On May 4, 1999, Case France and Jurimex met in Vienna for initial discussions about the potential transaction. A319 (Divis 66-67). Attendees were Thomas Karner, Robert Nowikovsky and Divis from Jurimex; Patrice Loiseleur from Case France; and representatives from IP Consult ("IPC"), another entity interested in participating in the proposed transaction. A319-20 (Divis 68-70). Divis, Jurimex's Rule 30(b)(6) witness, admitted that Loiseleur, the sole "Case" employee present at the meeting, was employed by Case France ("[m]y understanding is that he was employed by Case France"), passed out Case France business cards, and sent correspondence to Jurimex only on Case France letterhead. A319-20, 323, 324 (Divis 68-69, 81, 88).

The May 4 meeting began at Jurimex's office and then moved to the Vienna airport, where Golden Grain representatives joined the meeting. A319 (Divis 67-

68). Divis testified that plaintiffs entered into a binding \$40 million oral contract with Case Corp. (not Case France) at this initial meeting, although no Case Corp. employee attended the meeting and two of the plaintiffs (Jurimex Projekt and IPC-Jurimex) did not yet exist. A312, 319-20, 337 (Divis 38, 67-71, 138-39). Elsewhere, Jurimex admitted that it had no contact with Case Corp. employees or offices regarding the potential Golden Grain deal. A361-66 (requests for admission), A832 (Divis Declaration: “All of Jurimex’s dealings with Case occurred through employees affiliated with European subsidiaries”).

Divis acknowledged that “there was nothing [in] writing” reflecting the supposed May 4 agreement. A323 (Divis 83). The terms of the purported oral contract were as follows, according to Divis:

- Case Corp. would sell 300 combine harvesters for a price that was “not specific”—it was “roughly 40 million of dollars.” A320 (Divis 72).
- Delivery dates were not specified; they would be “approximately June of 1999, June, July.” *Id.*
- Financing was “a key issue,” but Divis conceded that there was no “agreement as to the financing on May 4th”—“we were not invited to give our statements yet on the finance at this stage.” A321-22 (Divis 73, 77).
- Although the purported contract was negotiated in Austria, would be signed “in Vienna or someplace in France or where European headquarters are,” and the combines would be delivered in Kazakhstan, Divis thought English law would govern the agreement. A321 (Divis 73-74). There was no “specific discussion” of the issue, but Divis thought English law was “implied” based upon a choice-of-

law clause in a prior written contract between Case France, Case Corp. and a non-party Jurimex entity. *Id.*; A62.

Divis also testified that this May 4 contract could be modified by two parties: “First of all, Case. Second, the buyer, Golden Grain.” A321 (Divis 75).

When questioned as to Jurimex’s role, Divis testified:

Q: Are you testifying that Jurimex * * * didn’t enter into any binding contract with anybody on May 4th?

A: I testified this is a contract that has a subject clause which is subject to a performance – I mean subject to work from our part. If you – we do our job well, if it comes to contract, then it was clear we’re part of the contract.

A321 (Divis 76). Finally, Divis stated that there was agreement on what Jurimex would be paid: Jurimex and IPC “knew that the price that the Case needs to achieve was about \$23 million, so that the balance had to be—had to cover some expenses. Don’t ask me exactly which ones, insurance, transport; and again, the balance was to be split by IPC and Jurimex.” A321-22 (Divis 76-77).

The next meeting occurred on May 26, 1999 in Paris, attended by representatives from Jurimex as well as Loiseleur, Gerard Chiffert, and Seppo Ropponen, all of whom produced business cards from Case France or Case Europe. A323 (Divis 81), 434-35. Divis explained that the meeting’s purpose was for Jurimex to report back and “know what’s the next steps, how they’re going to contract now with Golden Grain.” A323 (Divis 84). Divis testified that there was “no contract” with Golden Grain at this point, that Jurimex was asked for the first

time to guarantee \$2 million in financing, that “the number of combines to be sold was not yet fixed as of May 26, 1999,” and that the combine models “were changed”—“different models had to be delivered.” A323-25 (Divis 84-88, 90-91). At the May 26 meeting, Case France’s Loiseleur allegedly distributed a half-page, unsigned summary of the current status of the deal. A517, 829. The summary stated that “[p]reliminary talks already took place” to sell 300 tons of grain to pay for the combines through “traders like Glencore, Dreyfus or Sigma.” A517. The summary also said that “Jurimex has negotiated with Golden Grain a non-delivery guarantee for an amount of \$5.8M [million]” (*id.*), although Divis conceded that Jurimex, in fact, had “[n]o written commitment” for a \$5.8 million guarantee. A326 (Divis 93). The summary stated further that “Jurimex would provide a \$2M [million] Bank guarantee issued by a First class Western Bank.” A517. Divis’s view was that “there would still be a deal” even if Jurimex “didn’t come up with the \$2 million.” A325-26 (Divis 92-93).

On June 2, 1999, Jurimex and Case France representatives met with Societe Generale, a French bank, to discuss possible offtakers for the grain. A326 (Divis 95). Plaintiffs allege that as of June 8, Jurimex had confirmed a contract with Glencore for 80,000 metric tons of wheat. A419. Divis admitted that Jurimex never confirmed Glencore’s bid and that “[t]here is no written contract.” A326 (Divis 96).

On June 8, 1999, Jurimex met with IPC, Loiseleur and, for the first time, Leopold Plattner from Case Europe. A327 (Divis 98). (Plattner was also an officer of Case Corp., a common occurrence among parents and subsidiaries, but Jurimex did not know that until this lawsuit was filed. In 1999, Jurimex knew only that Plattner, located in France, was President of Case Europe. *Id.*)

In early June, Jurimex employees accompanied Case France representatives (Loiseleur and Elena Garmash) to separate, one-time meetings with three European banks: ING Bank, WestLB and Societe Generale. A327-28 (Divis 100-01). None of the banks ever committed to provide financing for the proposed transaction. A328 (Divis 102).

On June 10, Loiseleur (on Case France letterhead) wrote IPC and Jurimex, stating that “no bank could make any firm commitment” and that the banks “have all raised the same issues” about the transaction—namely, obtaining a letter of credit to offset the lack of a down payment and “the non-delivery risk” on the grain. A440. The letter also discussed having different combine models in the deal. *Id.*; A336 (Divis 134-35). Jurimex’s response, a June 14 letter to Loiseleur at “CASE FRANCE, S.A.,” stated: “we are working on an improvement of the bank guarantee * * * . However, according to our latest renewed talks with the customers they will insist on the proposed form of the non-delivery guarantee.” A442. As for the “new mix of products,” Jurimex stated that Golden Grain was

reviewing “this proposal” and would provide “an answer in the coming days” after “a technical review of their experts and even a revised comparison to the competition.” *Id.* Finally, Jurimex represented that WestLB “has already confirmed their readiness to finance.” *Id.*

WestLB had done no such thing. On June 17, 1999, Jurimex was copied on a letter from WestLB addressed to Garmash and Loiseleur at “Case France.” A436-39. Stating that it “by no means, constitute[s] a proposal or offer to provide finance,” WestLB’s letter provided its “preliminary thoughts on a financing facility for your proposed export sales of 300 combine harvesters, together with headers, spare parts and service * * * to Kazakhstan.” A436. WestLB detailed 11 conditions that “should serve as cornerstones for further discussions with yourselves” and had to be satisfied before WestLB would consider providing financing. A437. WestLB stressed that the “terms and conditions outlined above are for indication purposes only and do not constitute either an offer or a commitment to provide financing. An offer would be subject to agreement on a definite term sheet and approval by internal credit committees.” A437-39. Jurimex’s Divis admitted that none of the 11 conditions were ever met and that Jurimex never gave WestLB any of the requested information. A339-40 (Divis 148-49).

On the same day as WestLB's letter, Jurimex wrote IPC that Jurimex was still discussing "possible financing possibilities" and that "Case * * * want[ed] to increase the risk share of Jurimex and IP." A444. "We are—also in light of the technical/logistical problematic situation we are facing now—arriving now at the following alternative, which of course, has to be agreed upon by CASE France." *Id.* Jurimex proposed, among other changes, cutting the number of combines in half (to 150), reducing the price to "around USD 20 Million," using different models of combines, obtaining \$6 million in guarantees from Golden Grain, Jurimex, and IPC, and allocating the "remaining risk for account of CASE." *Id.*; A338 (Divis 143-44).

On June 21, 1999, Jurimex wrote Loiseleur and Garmash at "CASE FRANCE" requesting the "latest status on the quantities possible to be delivered to GOLDEN GRAIN should we arrive to fix the contract with them by the end of this week." A445. The contract referred to "was intended to be between Golden Grain and Arge-IPC-Jurimex. The only missing items was the quantities of combines." A341 (Divis 153-54). Divis testified that Jurimex got "drafts of contracts from Golden Grain," but as of June 21, Jurimex "had no contract with Golden Grain." A328, 341 (Divis 103, 154). (Jurimex never reached an agreement with Golden Grain. *Id.*) Jurimex's June 21 letter also referred to "our [Jurimex's] possibilities of finance." A445. Divis explained that "[m]ost probably, there was—he still had

some possibility to increase, perhaps the risk part from Jurimex, but I cannot say exactly.” A341 (Divis 155). Finally, Jurimex asked about “the status of negotiations with ING.” A445.

Loiseleur responded to Jurimex two days later, on Case France letterhead. A446. He began by stating that the number of machines “we might deliver varies between 100 to 250 pieces”; “[w]e can’t be more precise” because “[i]t depends o[n] the size of the grain contract G.G. is going to sign” and “[w]e can’t build new machines for this project.” *Id.* Furthermore, ING had told Case France it would not provide any financing if Jurimex was involved in the deal:

ING is the only bank willing to finance the project, and, more important to take risk. Among other conditions, ING is imposing to have the combine contract signed between CASE [France] and G.G [Golden Grain] and to have the grain contract signed with Glencore. ING made very clear that these were two non-negotiable conditions.

Id. However, Loiseleur stated that Case France “would still be open to discuss with Jurimex if you have any other possible financing scheme to offer us.” *Id.* See also A635 (June 29, 1999 email from Loiseleur to Ropponen: “Case is not insisting that the off-taker agreement has to be signed with Glencore: it is a non-negotiable requirement from ING which financial proposal is, so far, the only acceptable one”).

Jurimex phoned Loiseleur in response to his letter, but did not offer any other financing schemes. A343 (Divis 163-64). Jurimex was “disturbed” at being

“ask[ed] to come up with other alternative possible financial scheme[s].” A448 (June 24, 1999 letter from Jurimex to Plattner at Case Europe).

Eventually, ING agreed to finance a transaction involving Case Harvesting Systems, G.m.b.H. (the German subsidiary that made the equipment), IPC, and Golden Grain. A222, 229, 231, 234 (Cahill 90-92, 119-20, 127, 137). In August 1999, Case Corp. agreed to guarantee the loan given by ING; Case Corp. was not a party to the underlying sales transaction. *Id.*; A231, 233-34 (Cahill 127, 136-37).

B. Plaintiffs’ Admissions.

Plaintiffs have made a variety of admissions pertinent to this appeal.

1. In November 2001, Jurimex filed a criminal report in Austria concerning the potential Golden Grain deal. A282-91. In that document, Jurimex stated that the May 4, 1999 meeting resulted in a decision to do a “feasibility study” and that Golden Grain “stated its interest to do wheat and other grain business with JURIMEX.” A284. The May 26 meeting included discussion about “project financing,” the “revenue picture,” the “number of machines” to be delivered, and “substantial parts of the contract.” *Id.* Jurimex also explained in its filing why it did not participate in the transaction that eventually occurred:

One of the reasons why JURIMEX was ousted from the transaction is presumably because JURIMEX was not prepared to transact the business via an off-shore company to “save taxes that way”. JURIMEX placed great emphasis on handling the business the way it had been prepared, i.e. via an Austrian company, which gave rise to a different kind of tax obligation, or tax burden, than a transaction

involving a company structure such as the one in Gibraltar. In fact, IPC chose a structure which JURIMEX was not willing to support, i.e. the contract with GOLDEN GRAIN was concluded with IP Consult International Ltd. of Gibraltar on the part of IPC (in July 1999). This structure clearly aimed at avoiding taxation of the transaction in Austria. * * * This was [] probably one of the reasons why he eventually effected the transaction without JURIMEX because JURIMEX was not willing to do that.

A288. See also A437 (June 17, 1999 letter from WestLB, noting that “tax and legal issues” were among the “numerous issues * * * to be addressed”).

2. In responses to requests for admissions, plaintiffs also admitted:

- No one employed by Case Corp. in the United States ever communicated to Jurimex, orally or in writing, that any of its subsidiaries were acting as Case Corp.’s agents for the proposed Golden Grain deal. A368 (Resp. 18-19).
- No one employed by Case Corp. in the United States ever communicated with or received communications from Jurimex, orally or in writing, concerning or referring to the proposed Golden Grain Deal. A361-66, 372-73 (Resp. 1-12, 33-38).
- Jurimex has not identified a single person employed by Case Corp. and located in the United States who was involved in the proposed Golden Grain deal. A366 (Resp. 13).
- All communications between Jurimex and Case France or Case Europe concerning or regarding the proposed Golden Grain deal occurred in Europe. A374-75 (Resp. 39-43).

C. Testimony From Case Corp.

Case Corp.'s Rule 30(b)(6) witness, Brian Cahill, testified that Case Corp. had no communications with its subsidiaries about the Golden Grain deal that Jurimex proposed:

Q: During 1999 do you know if any employee of Case Corporation discussed the proposed sale of combines to Golden Grain with any employee of Case France?

A: I don't know of any. I have not run across anything, no.

* * *

Q: At any time in 1999 did any employee of Case Corporation discuss the proposed sale of combines to Golden Grain with any employee of Case Europe?

A: I'm not aware of any conversation other than possibly somebody that would have been in conjunction with Mr. Lamb signing the guarantee.

A235 (Cahill 142-43).

Cahill also testified that the proposed transaction did not include combines manufactured in the United States:

A: It had nothing to do with the U.S. corporation at all. These were going to be German combines. There was no reason for Case Corporation to be involved in it.

* * *

Q: Isn't it true * * * that in fact some of the equipment or parts for this deal came from Case in the U.S.?

A: They did not. No equipment came from Case U.S.

Q: And no parts either?

A: And no parts.

A222 (Cahill 90-91).

Finally, Cahill explained how Case Corp. normally provided one-time, individual authorizations for a subsidiary to sign a particular contract on its behalf:

A: I can tell you in general normally for Case Corporation how that would be done.

Q: Would you, please.

A: It would be he would have to obtain authority from an authorized representative of Case Corporation to sign on behalf of the U.S. company for a particular deal only. There was no individual – The authority had to be for an individual deal once it was decided the U.S. entity would be involved.

A214 (Cahill 59-60).

D. The 1998 Volgograd Contract.

Case Corp.'s lone transaction with any Jurimex entity was in 1998 with Jurimex Kommerz Agrar & Steel G.m.b.H., a separate entity that is not a party in this case and was not involved in the proposed Golden Grain deal. The signed contract, dated May 20, 1998, was between Case Corp., Case France and Jurimex Kommerz Agrar & Steel, and concerned the sale of various equipment in Volgograd, Russia (the "Volgograd Contract"). That contract involved a \$2 million sale of machines manufactured in the United States. A395-409. The

signed agreement was reviewed by legal counsel for all parties and spelled out all of the essential terms, including the quantity of machines, model numbers, unit price, taxes, delivery terms, terms of service and applicable law. A395-409, 316-19. Both Case Corp. and Case France signed the Volgograd Contract as separate, principal parties to the transaction; Case France did not sign as an agent. A404.

None of the Jurimex entities in this case were parties to the Volgograd Contract. A404. Plaintiffs' Rule 30(b)(6) witness admitted that the Volgograd Contract had "nothing to do with the alleged Golden Grain Deal." A316 (Divis 55).

RELATED CASES

This Court decided an earlier appeal in this litigation, No. 02-1916. *Jurimex Kommerz v. Case Corp.*, 65 Fed. Appx. 803 (3d Cir. 2003) (affirming dismissal of complaint; reversing denial of leave to amend).

Plaintiffs have filed two related actions. In Wisconsin state court, they have made identical allegations against Case Corp., as well as against Case France and Case Europe. A255-81. That court stayed the case pending resolution of this suit. In addition, plaintiffs filed a "criminal complaint" in Austria in October 2001 against Case Corp., its agents, and IPC. A282-301. Plaintiffs admit that the Austrian action did not proceed because the "Austrian state followed it up, made investigations," and found it had "no merit." A313 (Divis 41-42).

STANDARD OF REVIEW

This Court reviews summary judgment rulings *de novo*. *Gilles v. Davis*, 427 F.3d 197, 203 (3d Cir. 2005). Once the movant “inform[s] the district court of the basis for its motion,” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), the nonmovants must identify “specific facts showing that there is a genuine issue for trial.” *Lexington Ins. v. W. Pa. Hosp.*, 423 F.3d 318, 322 (3d Cir. 2005). The mere existence of some evidence is insufficient; there must be enough evidence to enable a jury to reasonably find for the nonmovant. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986). Nonmovants cannot defeat summary judgment by simply resting on assertions in the pleadings; Rule 56 requires nonmovants “to go beyond the pleadings” and offer “evidentiary materials” showing a genuine factual dispute that must be tried. *Celotex Corp.*, 477 U.S. at 324. In other words, “summary judgment is essentially ‘put up or shut up’ time for the non-moving party.” *Berkeley Investment Group v. Colkitt*, 455 F.3d 195, 201 (3d Cir. 2006).

Rulings on discovery requests are affirmed unless the district court abused its discretion. *Camiolo v. State Farm Fire & Casualty*, 334 F.3d 345, 354 (3d Cir. 2003). Review is “narrow.” *MCI Telecommunications v. Teleconcepts, Inc.*, 71 F.3d 1086, 1102 (3d Cir. 1995). “The test is not what this court would have done under the same circumstances; that is not enough. The court must feel that only one order could have been entered on the facts.” *In re Orthopedic Bone Screw*

Prods. Liab. Litig., 246 F.3d 315, 320 (3d Cir. 2001). “If reasonable [people] could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.” *MCI*, 71 F.3d at 1102.

SUMMARY OF ARGUMENT

There are several grounds for affirming the judgment here. First, there is no evidence that Case Corp. was involved at all in any of the discussions concerning the Golden Grain transaction that Jurimex was pushing. All of the discussions with Jurimex involved Case France and Case Europe, and there is not a shred of evidence that either corporation acted as Case Corp.’s agent. Indeed, it is undisputed that Case Corp. never had any communications with its subsidiaries or plaintiffs regarding the proposed Golden Grain deal and never told Jurimex that Case France and Case Europe had authority to act as its agent. To establish a principal-agent relationship on either an actual or apparent authority theory, there must be an act or statement *by the principal* involving the specific transaction at issue in the case. Plaintiffs do not—and cannot—point to any such evidence. There is none. And given the complete absence of any evidence tying Case Corp. to the proposed transaction, there was no reason for the district court to permit the plaintiffs to embark on a fishing expedition searching for evidence of agency in transactions unrelated to both Jurimex and Golden Grain.

Second, Case Corp. is also entitled to summary judgment because Jurimex's claims are all premised on the existence of an agreement—and the parties never came close to entering into one. The complex multi-party Golden Grain proposal with Jurimex did not result in an agreement on *any* essential term, much less all of them. The number of combines, the total price, the models involved, financing, guarantees, even the parties to the deal—all of these remained unsettled. Jurimex even admitted in an Austrian pleading that it was not involved in the final deal because it refused to go along with the tax-saving structure that the other parties wanted. The Austrian government may commend Jurimex for refusing to go along with a transaction that would cost Austria some tax revenue, but Jurimex has no ground for compelling other parties to the proposed deal to make the same choice.

Finally, this matter should be dismissed under the doctrine of *forum non conveniens* because this case unquestionably belongs in Europe, not the United States. Plaintiffs admitted in their responses to requests for admission that there is not one document, witness, or other piece of evidence in the United States that is related to the proposed Golden Grain deal. The negotiations occurred in Europe, the third parties involved in the transaction are all in Europe and Asia, performance was to be in Europe and Asia, and the documents and witnesses are all in Europe or Asia. Under these circumstances, it would be impossible to try this case here. Put simply, this lawsuit has no connection whatever to Delaware.

ARGUMENT

I. Case Corp.'s Subsidiaries Did Not Act As Agents Of Case Corp. In The Proposed Golden Grain Deal.

A parent corporation is rarely held liable for the acts of its subsidiaries. “It is a general principle of corporate law deeply ‘ingrained in our economic and legal systems’ that a parent corporation * * * is not liable for the acts of its subsidiaries.” *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). Parents and subsidiaries have “distinct legal personalit[ies],” *Pearson v. Component Technology*, 247 F.3d 471, 487 n.5 (3d Cir. 2001), and “are generally to be treated as separate entities,” *Bestfoods*, 524 U.S. at 61.

During the previous appeal in this case, this Court recognized that if there was any substance to plaintiffs’ agency hypothesis, there would be documents between Case Corp. and its subsidiaries concerning the transaction proposed by Jurimex:

[D]uring its earlier request for discovery, Jurimex asked for all documents concerning the communications between Case and its subsidiaries specifically limited to the Golden Grain transaction. Evidence of control by Case over the actions of Case France, Paris, and Neustadt would likely be found in such documents and demonstrate agency.

Jurimex, 65 Fed. Appx. at 808. That discovery has now occurred. The parties have produced everything related to the proposed Golden Grain deal, including all documents concerning the communications “between Case and its subsidiaries

specifically limited to the Golden Grain transaction.” A308 (Divis 22), A176-77, B84-85. And as discussed next, that discovery established conclusively that Case Corp. had nothing to do with the Golden Grain transaction proposed with Jurimex; there were no communications, oral or written, between Case Corp. and its subsidiaries or between Case Corp. and Jurimex concerning the proposed Golden Grain deal.

A. There Is No Evidence Of Any Manifestation From Case Corp. To Jurimex That Its Subsidiaries Were Its Agents For The Proposed Golden Grain Deal.

It is well settled that authority to act as an agent “can never be derived from the acts of the agent alone.” *Finnegan Constr. v. Robino-Ladd Co.*, 354 A.2d 142, 144 (Del. Super. 1976). Both actual and apparent authority to have one party act as another’s agent can only be created by the words or conduct “*of the principal.*” *Edwards v. Born, Inc.*, 792 F.2d 387, 390 (3d Cir. 1986) (quoting RESTATEMENT (SECOND) OF AGENCY §§ 26, 27 (1958))) (emphasis added). See also RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (agency arises “when one person (*a ‘principal’*) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf”) (emphasis added); *id.* § 3.03 cmt. b (“Apparent authority is present only when a third party’s belief is traceable to *manifestations of*

the principal”) (emphasis added).¹ Here, discovery has not uncovered *any* evidence that Case Corp. ever stated or indicated to its subsidiaries, Jurimex, or anyone else that the subsidiaries were its agents in connection with the potential Golden Grain transaction with Jurimex.

Plaintiffs admitted they had no contact at all with Case Corp. concerning the proposed Golden Grain deal. A361-66, 368, 372-73 (Resp. 1-12, 18-19, 33-38). In particular, plaintiffs admitted that Case Corp. never “communicated to Jurimex stating that any of the Subsidiaries were acting as agents of Case regarding the Golden Grain Deal.” A368 (Resp. 18-19). Case Corp.’s Rule 30(b)(6) witness testified that he was “not aware of any Case employees, Case Corporation employees, who had any contact with Jurimex.” A214 (Cahill 60). Sascha Divis of Jurimex confirmed that “[a]ll of Jurimex’s dealings with Case occurred through employees affiliated with European subsidiaries, such as Patrice Loiseleur, Elena Garmash, Emmanuel Reinhart, Gerard Chiffert and Leopold Plattner.” A832. In fact, at the May 4, 1999 meeting (the date of the alleged oral contract), the only employee of any Case entity present was Loiseleur, whom plaintiffs admitted was a Case France employee. A319-20 (Divis 68-69, 71). Every document Loiseleur

¹ Plaintiffs cite RESTATEMENT (SECOND) OF AGENCY § 34(b) (1958) in arguing that surrounding circumstances can support a finding of authority. Pl. Br. 37. However, the RESTATEMENT makes clear that authority must still be derived from “written or spoken words or other conduct of the principal.” RESTATEMENT (SECOND) OF AGENCY § 26 (actual authority); accord *id.* § 27 (apparent authority).

ever sent to Jurimex regarding the proposed Golden Grain Deal was on Case France letterhead. A410, 446, 450. Plaintiffs' own correspondence dated June 17, 1999, when Jurimex proposed drastically altering the transaction, acknowledges that its "alternative * * * of course, has to be agreed upon by *CASE France*," not Case Corp. A444 (emphasis added).

There is also no evidence that Case Corp. had any contact with its European subsidiaries with respect to the Golden Grain transaction proposed by Jurimex, much less authorized them to act as its agents for that deal. On the contrary, Case Corp.'s Rule 30(b)(6) witness testified unequivocally that Case Corp. never had any contact with its subsidiaries regarding the proposed Golden Grain Deal; "[i]t was a strictly European deal." A235 (Cahill 142-43). And Jurimex admitted that it could not identify even one Case Corp. employee in the United States who was involved in any way with the proposed transaction. A366 (Resp. 13).

In short, the undisputed facts demonstrate that Case Corp. never manifested an intention to either its subsidiaries or Jurimex that the subsidiaries were acting as the Case Corp.'s agents in the proposed Golden Grain transaction with Jurimex. Accordingly, the district court properly held that plaintiffs did not establish either actual or apparent authority as a matter of law.

B. There Is No Evidence That Case Corp. Granted Its Subsidiaries Actual Authority In The Proposed Golden Grain Deal.

The plaintiffs' actual agency theory is that the "subsidiaries had actual authority based on oral authorization." A8. As the district court noted, "Plaintiffs admit that there is no written record of such authorization." *Id.* Plaintiffs do not dispute—indeed, they tacitly acknowledge—the accuracy of this statement. See Pl. Br. 35. Instead, they contend that "[t]he district court failed to recognize that * * * authority can indeed be granted orally" and adopted "an unjustifiably narrow view that recognized only written evidence of actual authorization." Pl. Br. 29.

This is hardly fair to the district judge. The court stated explicitly that authority to act as an agent may be created by "words or conduct of the principal." A8. The problem with Jurimex's oral authorization hypothesis is not legal but factual: plaintiffs "failed to put forth any other evidence of this oral authority." *Id.* Because this case had reached the summary judgment stage, the court ruled that it "cannot accept Plaintiffs' bald assertions that such authority existed." *Id.* Evidence was required—and plaintiffs have none.

The items cited in plaintiffs' brief make this clear. Jurimex relies most heavily on the notion that Case Corp.'s Brian Cahill testified "in essence" that every employee of Case Corp.'s European subsidiaries had oral authority to act for Case Corp. with respect to any contract negotiations. Pl. Br. 33. There are two serious problems with this argument.

First, it is well established that the evidence of agency must be tied to the particular transaction at issue: an alleged parent-sub subsidiary “agency relationship must relate to the cause of action alleged in the complaint.” *E.I. DuPont de Nemours & Co. v. Rhone Poulenc*, 269 F.3d 187, 199 (3d Cir. 2001). “Not only must an arrangement exist between the two corporations * * *, but the arrangement must be relevant to the plaintiff’s claim of wrongdoing.” *Id.* at 198. See also *National Mortgage Warehouse v. Bankers First Mortgage*, 190 F. Supp. 2d 774, 781 (D. Md. 2002) (“an issuing agent is not cloaked with apparent authority to conduct closings on the insurer’s behalf merely because the insurer has issued closing protection letters for it in the past”—the agent only has authority if letters were “issued in connection with the particular transactions challenged in this case”).

Second, plaintiffs’ references to Cahill’s testimony (Pl. Br. 12, 33-34) are incomplete and out of context. Cahill specifically testified that the employees of Case subsidiaries did *not* have the type of broad authority Jurimex would like to ascribe to them. Cahill explained that in order for a subsidiary’s employee to obtain authority to sign a contract on behalf of Case Corp.,

he would have to obtain authority from an authorized representative of Case Corporation to sign on behalf of the U.S. company *for a particular deal only*. There was no individual—*The authority had to be for an individual deal* once it was decided the U.S. entity would be involved.

A214 (Cahill 59-60) (emphasis added). There is no evidence that Case Corp. granted any such authority, oral or written, for the proposed Golden Grain deal. To the contrary, Cahill stated unequivocally that Case Corp. had no communications with its subsidiaries about the potential Golden Grain transaction with Jurimex. A222, 235 (Cahill 90-92, 142-43). The fact that Chiffert of Case France was given “specific authority to sign [a] document on behalf of Case [Corp.]” in a wholly unrelated transaction (A219 (Cahill 79-80)) is irrelevant. It is undisputed that when Case Corp. gave subsidiaries authority to act for it, that authority was “for a particular deal only.” A214 (Cahill 59-60); see also A234 (Cahill 138) (when Chiffert acted for Case Corp., it was “[o]n a one-off basis”). Evidence of agency “must relate to the cause of action alleged in the complaint,” *DuPont*, 269 F.3d at 199, not to an unrelated transaction involving another party.²

The other actual authority “evidence” Jurimex cites is also legally insufficient. Jurimex points to documents from subsidiaries’ employees and third parties that post-date the failed negotiations with Jurimex. Pl. Br. 38-39. As discussed earlier, it has been settled for decades that authority to act as an agent

² Plaintiffs’ reliance on *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120 (3d Cir. 1998) (cited at Pl. Br. 35-36), is misplaced. In *Schoonejongen*, the record was “replete with evidence,” including testimony from the company’s Executive Vice President and in-house counsel, that a company executive had received oral authority to amend an employee benefit plan. 143 F.3d at 130. There is no such evidence here, and the undisputed testimony of a Case Corp. attorney (Cahill) specifically refutes Jurimex’s authorization theory.

must come from the words or conduct of the principal; the alleged agent cannot manufacture his own authority, nor can third parties create an agency relationship. See pp. 22-23, *supra*. Moreover, this Court has held that documents created after the events in question are not relevant to agency issues. See *Don Kemper Co. v. Beneficial Standard Life Ins. Co.*, 404 F.2d 752, 756 (3d Cir. 1968) (“Alleged subsequent agency authority, real or apparent, is of no help to plaintiff here. * * * [E]vidence of something occurring on a later date to show that type of authority is irrelevant”).

One subsidiary employee plaintiffs mention (Pl. Br. 38) is Leopold Plattner, who was President of Case Europe. He was also an officer of Case Corp., but Jurimex did not know that at the time. A327 (Divis 98). A subsidiary is not deemed to be its parent’s agent simply because the two companies “have common officers and directors” or the parent’s annual reports present a picture of unified international operations. *Japan Petroleum Co. v. Ashland Oil*, 456 F. Supp. 831, 841 (D. Del. 1978); see also *Soanes v. B.&O. R.R.*, 89 F.R.D. 430, 431-32 (E.D.N.Y. 1981); *Bestfoods*, 524 U.S. at 69 (“it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary’s acts’”); *Pearson*, 247 F.3d at 474 (same). What is more, there is no evidence that Case Corp. authorized Plattner to act as its agent in connection with the proposed

Golden Grain deal. In any event, Plattner did not meet with or talk to anyone at Jurimex until June 8, 1999, more than a month after the alleged contract was formed according to Jurimex; there is no evidence he met or talked with anyone at Jurimex on any other occasion; Plattner never sent Jurimex any correspondence or emails; and Plattner never stated that the subsidiaries were acting as Case Corp.'s agent. A327 (Divis 98); A829 ¶ 6.

Finally, Case Corp.'s later decision to act as a guarantor of ING's loan to the German subsidiary that made the combines—but not to be a principal for the underlying transaction (A229, 231, 233-34 (Cahill 119-20, 127, 136-37))—does not establish that the subsidiaries acted as Case Corp.'s agents in connection with earlier discussions with Jurimex that pre-dated ING's involvement and involved a much different structure for the transaction. See p. 26, *supra*. Indeed, it was because of the conditions that ING imposed (and Jurimex's unwillingness to structure the deal to minimize Austrian taxes) that Jurimex dropped out. See pp. 13-14, *supra*. Given that Case Corp. acted only as a guarantor of ING's loan, Case Corp.'s review of the contract between IPC and Golden Grain (A645; Pl. Br. 38-39) also is not evidence that Case France and Case Europe had authority to act as agents for Case Corp. Otherwise, a principal-agent relationship would arise every time a guarantor reviewed the documents governing the underlying transaction.

In sum, there is no evidence that Case Corp. ever gave its subsidiaries actual authority, written or oral, to act as its agents for the proposed Golden Grain deal.³

C. There Is No Evidence That Case Corp. Caused Jurimex To Believe That The Subsidiaries Had Apparent Authority To Act For Case Corp. In The Proposed Golden Grain Deal.

There is also no evidence of apparent authority. Jurimex contends, first, that because of the “prior pattern” of the 1998 Volgograd Contract—involving different parties, different equipment, and a different country (see pp. 16-17, *supra*)—Jurimex “naturally and reasonably assumed” that Case Corp.’s subsidiaries had authority to act for it the next year in a separate transaction.⁴ Pl. Br. 42, 48; see

³ Jurimex notes that the IPC-Golden Grain contract refers to equipment manufactured by Case Corp. Pl. Br. 39; A685. Brian Cahill, Case Corp.’s Rule 30(b)(6) witness, was questioned about this topic, and he testified unequivocally, based on his review of all of the documents produced in discovery concerning this transaction, that none of the equipment and parts came from Case Corp.—it was all from a German subsidiary. A222, 224, 229, 231, 234 (Cahill 90-92, 99, 119-20, 127, 137). The produced documents reviewed by Cahill included all of the invoices and bills of lading for the combine parts and equipment; those documents list only German combine model numbers and establish that the combine parts and equipment were all shipped to Golden Grain from Germany by Case Harvesting Systems G.m.b.H., a German subsidiary.

In any event, “[t]he fact that one party performs a service that facilitates the other’s business does not constitute * * * a manifestation” by the principal establishing apparent authority to act as an agent. RESTATEMENT (THIRD) OF AGENCY § 3.03 cmt. b.

⁴ Plaintiffs also allege a “Second Volgograd Deal” in support of their apparent authority argument. Pl. Br. 15, 48. However, plaintiffs’ “crucial piece of evidence” from that deal (*id.* at 15) did not originate from Case Corp. and did not

(cont’d)

also *id.* at 45-48, 52. But Case Corp. and Case France signed the Volgograd Contract as *principal* parties; no agency was involved. A404. And in the only other previous contract between “Case” and “Jurimex” entities—a January 1999 agreement for Jurimex Kommerz Agrar & Steel Handelsgesellschaft to act as Case France’s representative in canvassing for sales in Volgograd—Case France signed as the only principal on the “Case” side. A71-76. Thus, in every prior deal involving Jurimex and Case France, the subsidiary executed the contract as a principal party. Even if the prior contracts were relevant to agency—and they are not under *DuPont*, 269 F.3d at 198-99—they certainly do not indicate that Case France had apparent authority to act as an agent in the later Golden Grain transaction.⁵

(... cont’d)

exist until July 21, 1999, a month *after* plaintiffs’ involvement in the proposed Golden Grain deal ended. A683.

⁵ The cases Jurimex cites are nothing like this case. See *In re Victory Corrugated Container Corp.*, 183 B.R. 373 (Bankr. D.N.J. 1995) (auctioneer who sold goods right after an auction was an agent because it is common for auctioneers to sell goods in private sales after an auction); *Smith v. New Castle County Vocational-Technical School Dist.*, 574 F. Supp. 813 (D. Del. 1983) (small possibility that instructor had apparent authority as school district’s agent where district gave instructor business cards with its name); *United States v. 425,031 Square Feet of Land*, 84 F. Supp. 548 (D.N.J. 1949) (agent’s authority to enter lease inferred because principal accepted check to secure lease and agent had executed leases for principal on several prior occasions).

(cont’d)

Moreover, plaintiffs have admitted that the Volgograd Contract was “entirely unrelated to the Golden Grain transaction.” A11; A316 (Divis 55). And it is clear, as this Court has held, that a claim of a parent-sub subsidiary “agency relationship must relate to the cause of action alleged in the complaint”—the “plaintiff’s claim of wrongdoing.” *DuPont*, 269 F.3d at 198-99. An earlier, unrelated transaction indicates nothing about whether there is an agency relationship for a later transaction. *Id.*; see also *National Mortgage*, 190 F. Supp. 2d at 781 (apparent authority does not exist merely because agent had authority to act on principal’s behalf in the past). This is especially true where, as here, there is undisputed evidence that the parent authorized subsidiaries to act as its agents “for a particular deal only,” on a “one-off basis.” A214, 234 (Cahill 59-60, 138).

In support of its apparent agency theory, Jurimex also relies on evidence that post-dates Jurimex’s involvement in the alleged deal. Pl. Br. 48, 50-51. After-the-fact evidence is legally irrelevant and cannot establish apparent agency as a matter of law. As the district court observed, those documents “could not have

(... cont’d)

Plaintiffs disingenuously cite *Ege Int’l Forwarding House v. Case Corp.*, 2001 WL 477225 (N.D. Ill. May 7, 2001), as purported proof that Case Corp. has previously been found liable for the actions of its subsidiaries (Pl. Br. 53 n.11). *Ege* did not involve an alleged principal-agent relationship between Case Corp. and its subsidiaries. The court dismissed plaintiffs’ claims for breach of contract and equitable estoppel, allowing one count of promissory estoppel to continue. Plaintiffs ultimately dismissed the case in its entirety with prejudice.

contributed to Plaintiffs' belief that Defendant's subsidiaries were acting on Defendant's behalf." A10. See *Don Kemper Co.*, 404 F.2d at 756 ("Alleged subsequent agency authority, real or apparent, is of no help to plaintiff here. * * * [E]vidence of something occurring on a later date to show that type of authority is irrelevant"); *Mason & Dixon Lines v. Glover*, 975 F.2d 1298, 1304-05 (7th Cir. 1992) (statements made in fall 1998 are irrelevant to whether apparent authority existed in summer 1998); *Rittenhouse Assocs. v. Potts*, 1981 WL 15084, at *2 (Del. Ch. Apr. 21, 1981) (plaintiff alleging apparent authority "can rely only on those facts of which it had knowledge at the time" of the transaction); *Dierks & Sons Lumber Co. v. Morris*, 404 S.W.2d 229, 232 (Mo. Ct. App. 1966) ("Agency * * * can only be predicated on facts known or appearances shown at the time of the transaction"— "knowledge subsequently acquired is irrelevant"); 2 Fletcher Cyclopedia of the Law of Corporations § 449, at 411 (2006) ("Of course, the apparent authority must have existed before the act in controversy. * * * [A]pparent authority based upon corporate acts or conduct must be shown as of the time of the transaction or entering into the contract in question, and not as of a later date").⁶

⁶ *Verreries de L'Hermitage, S.A. v. Hickory Furniture Co.*, 704 F.2d 140 (4th Cir. 1983) (cited at Pl. Br. 40), is not relevant because it did not involve substantive agency law. See *id.* at 142 (where plaintiff alleged parent was alter ego of subsidiary that no longer existed, post-transaction evidence was admissible).

(cont'd)

Plaintiffs contend that Case Corp. “ratified” the supposed principal-agent relationship through inaction and retention of benefits, citing third-party post-transaction documents (none originating from Case Corp.), after Jurimex had admittedly exited the deal because of its own intransigence on tax issues. Pl. Br. 47-51; A288.⁷ Case Corp.’s “inaction” or “silence” is meaningless given that it is undisputed that Case Corp. had no contact with its subsidiaries or Jurimex regarding the proposed Golden Grain deal. It makes no sense to say that a company that was not involved in a deal somehow “ratifies” it by being silent about it. In addition, unlike the retention-of-benefits cases Jurimex cites, there is no evidence that Case Corp. received any payments from Jurimex.⁸ Cahill, in fact,

(... cont’d)

⁷ Plaintiffs never argued ratification in the district court and therefore have waived the argument. *Union Pac. R.R. v. Greentree Transp. Trucking Co.*, 293 F.3d 120, 126 (3d Cir. 2002) (appellants cannot “advance new theories or raise new issues in order to secure a reversal of the lower court’s” summary judgment order). In any event, plaintiffs cite only inapposite authority in arguing for ratification by silence or inaction. In *Tracinda Corp. v. DaimlerChrysler AG*, 362 F. Supp. 2d 487 (D. Del. 2005), the court discussed when it is appropriate to admit evidence under F.R.E. 801 and did not address substantive agency law. In *SEI Corp. v. Norton & Co.*, 631 F. Supp. 497 (E.D. Pa. 1986), the agent sent the principal a letter confirming that he had filed a court appearance on the principal’s behalf; the principal waited until trial before claiming the agent was unauthorized.

⁸ In all but one of Jurimex’s cited cases, the alleged principal retained payments made directly from the third party alleging agency. See *Phoenix Canada Oil v. Texaco, Inc.*, 842 F.2d 1466, 1478 (3d Cir. 1988) ; *In re Eton Furniture Co.*, 286 F.2d 93, 96 (3d Cir. 1961); *Murray v. Shipman Koal Co.*, 270 F. 740, 743 (3d

(cont’d)

testified that based upon his review of all the documents produced concerning the transaction, Case Corp. did not sell combines to Golden Grain or otherwise benefit from the proposed transaction because it “had nothing to do with the [United] [S]tates” and it “had nothing to do with the U.S. corporation at all. These were going to be German combines. There was no reason for Case Corporation to be involved in it.” A222 (Cahill 90-92); see also A224, 229, 231, 234 (Cahill 99, 119-20, 127, 137).

* * *

As in the district court, “Plaintiffs point to the words and actions of every person involved in the transaction, except Defendant’s in an attempt to demonstrate an agency relationship.” A9. Plaintiffs did not offer any evidence that Case Corp. granted its subsidiaries either actual or apparent authority to act on Case Corp.’s behalf in the proposed Golden Grain deal. Because of that failure of proof, the district court’s decision granting Case Corp. summary judgment should be affirmed.

(... cont’d)

Cir. 1921); *Willard C. Beach Air Brush Co. v. General Motors Corp.*, 118 F. Supp. 242, 247 (D.N.J. 1953), *aff’d*, 214 F.2d 664 (3d Cir. 1954). Plaintiffs’ remaining case, *In re RBGSC Inv. Corp.*, 242 B.R. 851 (Bankr. E.D. Pa. 2000), involved a contract dispute; there was no alleged principal-agent relationship.

II. The Judgment Can Also Be Affirmed On Alternative Grounds.

There are other compelling reasons to affirm the district court's judgment in addition to a complete absence of evidence of agency. It is also clear that there is nothing approaching an enforceable contract with Jurimex—a prerequisite for all of its claims—and that even if the claims had any arguable merit, which they do not, this case should be dismissed on *forum non conveniens* grounds because all of the evidence in this case is in Europe and Asia, where all of the discussions concerning the Golden Grain transaction occurred. Case Corp. raised both arguments in the district court. B130-51. This Court may affirm on an alternative ground not reached by the district court. *Armotek Industries v. Employers Ins. of Wausau*, 952 F.2d 756, 759 n.3 (3d Cir. 1991).

A. There Is No Evidence Of A Contract—No Essential Terms Had Been Agreed Upon.

All of Jurimex's claims hinge on Jurimex being a party to an enforceable oral agreement concerning the Golden Grain transaction. Counts I and II are breach-of-contract claims. A422-25. The promissory estoppel (III), unjust enrichment (IV, VI), tortious interference (V, VII), and unfair competition/misappropriation (VIII) claims all depend on the existence of an agreement; the claims cannot survive if there was no agreement. See A426-31; *Telephone & Data Sys. v. Eastex Cellular*, 1993 Del. Ch. Lexis 182, at *62 (Aug. 27, 1993) (“[T]he Court has found that TDS has no valid contract with Eastex. * * * On that basis

alone TDS cannot establish that [a third party] tortiously interfered with its contractual relations”); *Knight v. Sharif*, 875 F.2d 516, 526 (5th Cir. 1989) (because no contract existed as a matter of law, defendant could not have tortiously interfered with it); *Ankerstjerne v. Schlumberger, Ltd.*, 155 Fed. Appx. 48, 51 (3d Cir. 2005) (affirming summary judgment rejecting promissory estoppel and unjust enrichment claims; alleged promises were “simply too vague and indefinite to constitute a ‘promise’ for purposes of promissory estoppel”); *Mason & Dixon*, 975 F.2d at 1305 (plaintiffs’ promissory estoppel claim “fail[s] for the same reason” as their claim for breach of an oral contract); *Ocean Atl. Dev. Corp. v. Aurora Christian Schools*, 322 F.3d 983, 1004 n.9 (7th Cir. 2003) (unrecoverable expenditures of time and money during negotiations in a failed effort to finalize an agreement are not unusual).⁹ Jurimex’s last claim, prima facie tort (A431-32), is duplicative of the contract claims. *USX Corp. v. Prime Leasing*, 988 F.2d 433, 440 (3d Cir. 1993) (affirming summary judgment dismissing tort claim because it was based upon same acts that gave rise to contract claims).

⁹ Count II alleges in part that Case Corp. supposedly agreed to make Jurimex its representative in Kazakhstan for future deals. A424 ¶ 53. Divis testified that this purported agreement was for “at least for five years after, up to seven years minimum.” A345-46 (Divis 170-73). This supposed “agreement” is obviously unenforceable. *Wilson v. Hurschman*, 1993 WL 1303158 (Del. Ct. Com. Pl. Feb. 22, 1993) (oral contracts that cannot be performed within one year are barred by the statute of frauds).

As explained below, there was no agreement on any of the key terms for the Golden Grain deal that Jurimex was advocating. As a result, plaintiffs' claims fail as a matter of law regardless of the outcome of the agency issue.

1. A contract is not enforceable until all parties agree on the essential terms.

It is well settled that preliminary negotiations cannot form the basis of recovery in contract or in tort. As Judge Easterbrook has commented:

The shoals that wrecked this deal are common hazards in business negotiations. Letters of intent and *agreements in principle often, and here, do no more than set the stage for negotiations on details. Sometimes the details can be ironed out; sometimes they can't.* * * * [P]arties [may] approach agreement in stages, without fear that by reaching a preliminary understanding they have bargained away their privilege to disagree on the specifics.

Empro Mfg. v. Ball-Co Mfg., 870 F.2d 423, 426 (7th Cir. 1989) (emphasis added).

Courts recognize that “[n]egotiations typically proceed over time with agreements on some points being reached along the way towards a completed negotiation. *It is when all of the terms that the parties themselves regard as important have been negotiated that a contract is formed.*” *Leeds v. First Allied Connecticut Corp.*, 521 A.2d 1095, 1101 (Del. Ch. 1986) (emphasis added).

“Especially when large deals are concluded among corporations and individuals of substance, the usual sequence of events is not that of offer and acceptance; on the contrary, the businessmen who originally conduct the negotiations, often will consciously refrain from ever making a binding offer, realizing as they do that a large deal tends to be complex and that its terms have to be formulated by lawyers before it can be permitted to become a legally enforceable transaction. Thus

the original negotiators will merely attempt to ascertain whether they see eye to eye concerning those aspects of the deal which seem to be most important from a business point of view. Once they do, or think they do, the negotiation is then turned over to the lawyers, usually with instructions to produce a document which all participants will be willing to sign * * * . After a number of drafts have been exchanged and discussed, the lawyers may finally come up with a draft which meets the approval of all of them, and of their clients. It is only then that the parties will proceed to the actual formation of the contract.”

Id. at 1102 n.4 (emphasis added) (quoting *International Telemeter Corp. v. Teleprompter Corp.*, 592 F.2d 49, 57 n.1 (2d Cir. 1979) (Friendly, J., concurring)).

Thus, “[a]greements made along the way to a completed negotiation, even when reduced to writing, must necessarily be treated as provisional and tentative. Negotiation of complex, multi-faceted commercial transactions could hardly proceed in any other way.” *Leeds*, 521 A.2d at 1102. “There must be a meeting of the minds ‘at every point; nothing can be left open for future arrangement.’” *Diesel Power Equip. v. ADDCO, Inc.*, 377 F.3d 853, 856 (8th Cir. 2004).

[P]arties may reach agreement on elements A, B and C, with more negotiation required on D and E. If elements D and E are essential to the mix, Illinois does not bind the parties to A, B, or C alone. *Should agreement on essential elements fail, it is a failure of negotiation not performance.*

PFT Roberson, Inc. v. Volvo Trucks N. Am., 420 F.3d 728, 731 (7th Cir. 2005) (emphasis added). This means that parties cannot pick and choose which items in a negotiation they want to enforce and which ones they want to avoid:

[Plaintiff’s] position—that as soon as parties agree on any term, it is a jury question whether there is a contract on this term alone—would

make negotiations far too risky and is not the law in Illinois or any other jurisdiction of which we are aware. The give-and-take of negotiations will leave parties with bargains on some terms that must be made up for by others that benefit the trading partner. Letting one side accept the favorable terms without the compensatory ones would be like permitting the buyer to say: 'We have agreed on quantity but not price; I now accept the quantity term and am entitled to the goods at whatever price a jury thinks is reasonable.' Firms do not (and [defendant] did not) put themselves at the mercy of their counterparts in that way.

Id. at 732. Accordingly, “[a] contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement.” *Diesel Power*, 377 F.3d at 857.

Applying these principles and determining “whether a contract has been formed essentially turns upon a determination whether the parties to an alleged contract intended to bind themselves contractually * * * from the overt acts and statements of the parties.” *Leeds*, 521 A.2d at 1097. The inquiry is objective: “whether a reasonable man would, based upon the ‘objective manifestation of assent’ and all of the surrounding circumstances, conclude that the parties intended to be bound by contract.” *Id.* at 1101; see also *Roberson*, 420 F.3d at 729-30 (granting defendant summary judgment where a reasonable jury could not conclude that plaintiffs had entered into a binding contract with defendant); *Eastex*, 1993 Del. Ch. Lexis 182, at *38 (“That one party subjectively thought, supposed, or expected that there was an enforceable agreement does not establish that one arose”); *Knight*, 875 F.2d at 523 (affirming summary judgment where a review of

the correspondence between the parties objectively indicated an intent not to be bound).

Here, an objective review of the undisputed facts establish, as a matter of law, that no reasonable party could conclude that there was a binding, enforceable contract for the Golden Grain deal that Jurimex proposed. The many potential parties involved in the complex proposed multi-million dollar transaction engaged in preliminary negotiations, but there was nothing resembling a final agreement, as we discuss next.¹⁰

2. The parties never reached agreement on any essential term.

From the start, the proposed Golden Grain deal was a complex transaction involving a host of commercial entities: Case France, Jurimex, IPC, Golden Grain, offtakers to buy the grain, and banks to finance the deal. As evidenced by the series of meetings and correspondence (a) involving the entities that might participate in the deal, and (b) discussing the many issues inherent in a multi-party transaction worth somewhere between \$20 million and \$40 million, all of the pieces had to fit together before there was an agreement. See pp. 5-14, *supra*. If, for example, financing fell through or offtakers would not agree to buy the grain, the proposed transaction would collapse. Thus, “the negotiations were global,”

¹⁰ It is telling that although Case Corp.’s summary judgment brief discussed the absence of an agreement at length, Jurimex said nothing about it in its summary judgment response.

and the parties “wanted a complete and formal arrangement before being bound. Such caution is to be expected in a multi-million-dollar deal.” *Roberson*, 420 F.3d at 730.

The undisputed facts—in particular, the Case France-Jurimex correspondence and the admissions of Jurimex’s Rule 30(b)(6) witness, Sascha Divis—establish that there never was an agreement on the transaction Jurimex suggested. Indeed, there was not an agreement on even one essential term, let alone on all of them. Nor was there ever an agreement on the parties to be involved in the transaction.

Jurimex itself admitted, in legal pleadings it filed in Austria, that it refused to agree to the transaction as proposed by the other parties involved:

JURIMEX was not prepared to transact the [Golden Grain deal] via an off-shore company to “save taxes that way”. JURIMEX placed great emphasis on handling the business * * * via an Austrian company, which gave rise to a different kind of tax obligation. * * * IPC chose a tax structure which JURIMEX was not willing to support, i.e. the contract with GOLDEN GRAIN was concluded with IP Consult International Ltd. of Gibraltar. * * * This was [] probably one of the reasons why he eventually effected the transaction without JURIMEX because JURIMEX was not willing to do that.

A288. West LB, on June 17, 1999, had identified “tax and legal issues” as among the “numerous issues * * * to be addressed.” A437.

A structure to effectuate tax savings was far from the only issue that remained open. All of the following essential terms were also the subject of

continuing negotiations and remained unresolved when Jurimex dropped out of the deal:

1. NO CONTRACT WITH GOLDEN GRAIN: Although Divis originally testified that Case Corp. and Golden Grain had a binding agreement on May 4, 1999, he later conceded that Case Corp. had no contract with Golden Grain as of May 26 or at any relevant point in June. A319, 321, 324, 334, 336, 338, 341 (Divis 67, 75, 87, 128, 136, 143-44, 154). Jurimex never reached an agreement with Golden Grain. A328, 341 (Divis 103, 154). And Jurimex misrepresented that it had a commitment from Golden Grain for a \$5.8 million non-delivery guarantee—Divis conceded that there was “[n]o written commitment.” A326 (Divis 93); compare A517.

2. NO CONTRACTS WITH OTHER PARTIES: Jurimex never entered into a contract with IPC (A312 (Divis 39-40)) or any of the various offtakers being considered as possible buyers for the grain (A326, 329-30 (Divis 95-96, 108-09); A517).

3. NO FINANCING AGREEMENT: Divis admitted that there was no agreement on financing—“a key issue”—on May 4, 1999. A321-22 (Divis 73, 77). Jurimex never secured written confirmation of any financing for the proposed Golden Grain deal and misrepresented that WestLB and a “Kazakh bank” had made commitments when they unquestionably had not. A326, 328, 330, 335-40

(Divis 93, 102, 110-11, 132-33, 140-41, 147-52); A436-39 (letter from WestLB). In the end, ING was “the only bank willing to finance the project,” but it insisted that Jurimex not be involved. A446, 635. Case France told Jurimex it remained “open to discuss with Jurimex if you have any other possible financing scheme to offer us,” but Jurimex never suggested any other possibilities. A446; A343 (Divis 163-64).

4. GUARANTEES: Jurimex was asked on May 26 to guarantee \$2 million in financing, but Jurimex never provided that guarantee. A325, 330 (Divis 91-93, 111). During the latter half of June, Case France “want[ed] to increase the risk share of Jurimex and IP” and Jurimex indicated “some possibility to increase, perhaps the risk part from Jurimex,” suggesting the possibility of obtaining \$6 million in guarantees from Golden Grain, IPC, and Jurimex. A341 (Divis 155); A444. Jurimex never provided information about its finances, which was needed in connection with any guarantee. A328, 332-33, 339-40 (Divis 102, 117, 123-24, 148-52).

5. QUANTITY: According to Divis, the number of combines in the proposed transaction was 300 on May 4, 1999 (A320 (Divis 72)), “not yet fixed as of May 26, 1999” (A324 (Divis 87)), and suggested by Jurimex to be 150 on June 17, 1999 (A336-37 (Divis 136-37); A444). On June 23, 1999, Case France sent a

letter to plaintiffs noting that the “quantity of machines we *might* deliver varies between 100 to 250 pieces.” A446 (emphasis added).

6. PRODUCT: The types of combine models to be offered remained uncertain on June 23, 1999, when Case France confirmed that it could not produce new machinery under the current proposal. A324, 335-36, 338, 341 (Divis 86, 87, 132, 134-35, 143-44, 156); A446. The type of models was an open issue throughout the discussions. A324, 336 (Divis 86, 134-35); A440, 442. In mid-June, Golden Grain said it would be doing a “technical review” of the “new mix of products” proposed and making “a revised comparison to the competition” before deciding whether to accept the proposal. A442.

7. DELIVERY: Time of delivery was not specified. A320 (Divis 72).

8. PRICE: Price per unit was not specified. A320 (Divis 72) (“roughly 40 million of dollars sales price. * * * It was not specific”). The value of the alleged contract changed based upon the number and type of combines. A324 (Divis 86); A444 (June 17, 1999 fax from Jurimex to IPC: for 150 combines, there would be “[s]elling volume around USD20 Million”; this “alternative * * *, of course, has to be agreed upon by CASE France”).

9. FEES: Jurimex’s “commission” was an uncertain amount, to be split in unspecified proportions with IPC. A321-22 (Divis 76-77).

10. CHOICE-OF-LAW: There was no “specific discussion” of what law would govern the agreement. A321 (Divis 73-74). Based on an express choice-of-law provision in an earlier written contract between Case France, Case Corp., and a non-party Jurimex entity, Divis thought English law would apply. *Id.*; A62.

In short, for the proposed Golden Grain Deal, (a) there was no agreement on *any* salient term, (b) there was no agreement on the parties to be involved, (c) Jurimex refused to structure the transaction to save taxes for the other parties, and (d) ING would provide financing only if Jurimex was not a party to the transaction. Given all of this, the idea that Jurimex was somehow a party to an “agreement” is laughable.

When, as here, essential parts of an agreement are left unresolved, there cannot be an oral contract. *East Coast Resorts v. Paroni*, 1990 Del. Ch. Lexis 204, at *10-11 (Dec. 3, 1990) (the parties never reached an oral agreement to develop commercial land because other than the size of the land, no other terms had been settled between the parties); *Eastex*, 1993 Del. Ch. Lexis 182, at *45-50 (rejecting claim of an enforceable \$30 million oral contract; even assuming the parties agreed upon price and method of payment, other terms “were not as well-defined,” financing issues had not been resolved, and it was unlikely that an agreement worth \$4 million, much less \$30 million, would be oral); *Diesel Power*, 377 F.3d at 857 (no agreement where parties had not agreed, among other things, on the

amount and timing of contract payments). And because there was no agreement—nothing even close to one—Jurimex’s claims fail as a matter of law.

B. This Case Should Be Dismissed Under The Doctrine Of *Forum Non Conveniens*.

A second alternative ground for disposing of this case is that it does not belong in the United States. The proposed Golden Grain deal has utterly no connection to Delaware or the United States: the documents and witnesses are all in Europe or Asia; the contract negotiations occurred in, and contract performance was to take place in, Europe or Asia; and the applicable law would almost certainly be a country or countries in Europe or Asia. Under these circumstances, it would be impossible, as a practical matter, to try this case in the United States. Accordingly, even if Jurimex has a viable claim—and it clearly does not—this Court should dismiss the case pursuant to the doctrine of *forum non conveniens*.

Under *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), courts must consider a variety of private and public factors in deciding whether the *forum non conveniens* doctrine applies. Both sets of factors heavily favor dismissal here.

1. The private interest factors all favor dismissal.

The private factors are:

relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Piper Aircraft, 454 U.S. at 241 n.6. None of these factors favor litigation in Delaware.

Discovery has confirmed that there is absolutely no evidence in the United States. A361-66, 374-77 (Resp. 1-13, 39-40, 42-43, 48, 50, 52). The various meetings concerning the proposed transaction occurred in Europe (Vienna and Paris), and the place of performance was to be in Austria, France or Kazakhstan. A321, 323 (Divis 74, 81). The participants in those meetings all lived and worked in Europe or Asia. A320-21, 324, 327 (Divis 68-69, 88), A434-35, B1-2 (Kieffer Aff.). None lived in the United States. *Id.*; A364-65 (Resp. 7-10). The district court has no means to compel the testimony of anyone from Case France, Case Europe, or Jurimex, nor can it compel testimony from, or production of documents by, the many third parties involved (including IPC, ING, West LB, Societe Generale, Golden Grain, and Glencore)—all of them are in Europe or Kazakhstan, beyond the court’s subpoena power. A376-77 (Resp. 48, 50, 52). Moreover, the combines at issue were made in Germany, not the United States. A222, 224, 229, 231, 234 (Cahill 90-92, 99, 119-20, 127, 137). In short, this dispute has absolutely no connection to Delaware or the United States. See *Dawson v. Compagnie des Bauxites de Guinee*, 593 F. Supp. 20, 26 (D. Del. 1984) (dismissing case based upon *forum non conveniens* because “[n]o evidence, documentary or testimonial, is

located in Delaware”; all evidence and witnesses were located in Guinea), *aff’d*, 746 F.2d 1466 (3d Cir. 1984) (table).

Even if the European and Asian witnesses somehow could be deposed, their written testimony would be a poor substitute for oral testimony. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) (“Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants. Nor is it necessarily cured by the statement of plaintiff’s counsel that [plaintiff] will see to getting many of the witnesses to the trial”). And in a jury case, there is no substitute for the physical presence of a witness; “[v]ideo depositions * * * are unlikely to hold the rapt attention of a jury.” *Sherwood Med. Co. v. IVAC Med. Systems*, 1996 WL 700261, at *4-5 (D. Del. Nov. 25, 1996) (“being assured a court will hear live testimony” is an “important consideration” in deciding where a trial will be held). These considerations are especially significant in a case like this: *all* of the witnesses are overseas—and it may be impossible for the district court to order any of them to testify live.

2. The public interest factors also overwhelmingly favor dismissal.

The public factors likewise favor dismissal. Those factors are:

the administrative difficulties flowing from court congestion; the “local interest in having localized controversies decided at home”; the interest in having the trial of a diversity case in a forum that is at

home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Piper Aircraft, 454 U.S. at 241 n.6.

As just discussed, there is absolutely no local interest in this case. All of the pertinent events took place over 4,000 miles away. (To put matters in perspective, Vienna is closer to China than Delaware.) There is not even an allegation, much less any evidence, that anyone who participated in the proposed Golden Grain deal has ever set foot in Delaware or availed itself of the benefits of Delaware law.

True, Case Corp. was incorporated in Delaware. But Jurimex's Rule 30(b)(6) testimony and responses to requests to admit establish that Case Corp. employees had no involvement, either directly or through an agent, in the events that gave rise to plaintiffs' complaint. See pp. 5-6, 14, *supra*. Jurimex never spoke to anyone in the United States, or sent or received any documents from the United States, regarding the proposed Golden Grain deal. A361-66 (Resp. 1-13). The only "Case" entities to have any contact with Jurimex during the relevant time were Case France and Case Europe. A222 (Cahill 90-92); A832. France, Austria, and Kazakhstan are the only jurisdictions with any "local interest" in this case.

It is well settled that "[w]hen deciding a forum non conveniens motion, a court may properly rely on the difficulties attending the resolution of questions of foreign law." *Scottish Air Int'l v. British Caledonian Group*, 81 F.3d 1224, 1234

(2d Cir. 1996); see also *Piper Aircraft*, 454 U.S. at 260 (“the need to apply foreign law point[s] toward dismissal” for *forum non conveniens*). Delaware choice-of-law rules govern in this diversity action; Delaware courts apply the “most significant relationship test” to contract and tort allegations. *Townsend of Arkansas, Inc. v. Millers Mut. Ins.*, 823 F. Supp. 233, 237-38 (D. Del. 1993), *aff’d*, 26 F.3d 123 (3d Cir. 1994) (table); *Naghiu v. Inter-Continental Hotels Group*, 165 F.R.D. 413, 419, 421 (D. Del. 1996).

Delaware does not have *any*, let alone the most significant, contacts with Jurimex’s claims. For contract claims, Delaware courts “consider the place of contracting, the place of negotiation of the contract, the place of performance, the location and subject matter of the contract, and the residence of the contracting parties.” *Schering Corp. v. Zeneca, Inc.*, 958 F. Supp. 196, 202 (D. Del. 1996), *aff’d sub nom. Schering Corp. v. Roussel-UCLAF SA*, 104 F.3d 341 (Fed. Cir. 1997). Here, all of those are Europe or Asia; nothing happened in Delaware. The same conclusion follows when the events here are examined through a tort prism. See *Naghiu*, 165 F.R.D. at 421.

Trying this case to a Delaware jury would impose an onerous burden on the jurors. Not only would they have to apply foreign law (France, Austria, Kazakhstan, or England), but they would have to do so in large measure—perhaps entirely—without the benefit of live testimony of witnesses on the central issues in

the case. Delaware courts have consistently dismissed actions based upon *forum non conveniens* when Delaware law does not apply and none of the evidence is located in Delaware. *Dawson*, 593 F. Supp. at 27-28 (dismissing suit against Delaware corporation; “it would be unfair to burden Delaware citizens with jury duty in these cases when Delaware has so little connection with this controversy” because all the evidence and testimony were located in Guinea and Guinean law applied); *Banco Nominees, Ltd. v. Iroquois Brands, Ltd.*, 748 F. Supp. 1070, 1073 (D. Del. 1990) (dismissing contract action against Delaware corporation because there were “no witnesses or documents in Delaware. None of the negotiations took place in Delaware. Neither [party] ha[d] offices in Delaware. The Plaintiffs are even requesting that New York law rather than Delaware law be applied to the contract”).

In the district court, Jurimex asserted it was too late to raise *forum non conveniens*. But there is no formal time limit for a *forum non conveniens* motion. *American Home Assurance Co. v. TGL Container Lines, Ltd.*, 347 F. Supp. 2d 749, 766 (N.D. Cal. 2004) (“[A] motion to dismiss on *forum non conveniens* grounds is not a motion to dismiss for improper venue under Rule 12(b)(3) and is therefore not subject to waiver under Rule 12(h)"); *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 918 (N.D. Ill. 2003) (*forum non conveniens* challenge was properly brought at summary judgment stage even though defendant did not raise it in motion to

dismiss); *Westerby v. Johns-Manville Corp.*, 32 Pa. D. & C. 3d 163, 183-85 (Pa. Ct. Com. Pl. 1982) (dismissing action based upon *forum non conveniens* against all defendants even though several defendants had not raised the issue). This Court has noted that the only constraint on a *forum non conveniens* motion is that it must be asserted “within a reasonable time after the facts or circumstances which serve as the basis for the motion have developed and become known or reasonably knowable to the defendant.” *Lacey v. Cessna Aircraft*, 932 F.2d 170, 177 (3d Cir. 1991).

Case Corp. filed its initial motion to dismiss in April 2000 and included *forum non conveniens* as a basis for dismissal. The district court never reached the issue, and Case Corp. raised it again in response to plaintiffs’ attempt to compel the testimony of former employees of Case Corp.’s European subsidiaries. A194. Once the court had the benefit of discovery on the agency issue, Case Corp. once again raised *forum non conveniens* in its summary judgment motion. B145. Because Case Corp. has raised the issue all along and it has never been decided, *forum non conveniens* is an alternative ground for disposing of this case.¹¹

¹¹ *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604 (3d Cir. 1991), cited by Jurimex below, is inapposite. The district court there had ruled twice on *forum non conveniens* motions, and this Court had considered that issue twice. Moreover, by the time of the second district court ruling, there had been “extensive merits discovery,” a discovery deadline was approaching, and the case was scheduled for trial. *Id.* at 614-15. Here, in contrast, there was no discovery

(cont’d)

III. Plaintiffs Were Not Entitled To Additional Discovery.

Plaintiffs make two discovery-related arguments on appeal. This Court cannot reverse on those issues unless it concludes that the district court abused its discretion. *Camilo*, 334 F.3d at 354.

First, Jurimex contends that Case failed to preserve one document—a July 15, 1999 letter to the Kazakh government—and that the district court “ignor[ed] the possibility that the jury could draw an adverse inference” regarding that document. Pl. Br. 7, 23, 53-55. There is no merit to this argument. Case Corp. produced all documents in its possession and all documents from its European subsidiaries concerning the proposed Golden Grain deal. A384, 811; A176-77; B83-85. And the district court did not ignore plaintiffs’ argument; it implicitly rejected it in holding—correctly—that documents post-dating Jurimex’s involvement “could not have contributed to Plaintiffs’ belief that Defendant’s subsidiaries were acting on Defendant’s behalf.” A10. See also pp. 26-28, *supra*.¹² The district court did not abuse its discretion in not accepting Jurimex’s argument on this issue.

(... cont’d)

deadline in place, no discovery at all has been taken from the many third parties located in Europe and Asia, and trial was never scheduled.

¹² Moreover, the author of the letter, Gerard Chiffert, was a Case France employee. A323, 324 (Divis 81, 88). There was no evidence that Case Corp. gave him any authority to act as its agent in the proposed Golden Grain transaction.

It also cannot be said that the court abused its discretion in declining to expand discovery beyond the proposed Golden Grain deal into other unidentified transactions that, as plaintiffs' counsel admitted, were "[n]ot necessarily related to Golden Grain, not necessarily relating to Jurimex, but other transactions in which the subsidiaries acted on behalf of Case Corporation." A809. In denying plaintiffs' request, the court held: "It's irrelevant. You can pull that question as it pertains to Golden Grain. I think that's what the Third Circuit said. I thought I lifted their language. I went back and read the decision. I thought I lifted their language. And I'm going to stay with that." A810.

Plaintiffs do not cite any cases supporting their assertion that the court abused its discretion by not allowing additional discovery into unrelated transactions. Pl. Br. 55. Nor do they contend that Jurimex, in 1999, knew of and relied on any unrelated transactions. The district court's decision is supported by ample authority, including this Court's holding that evidence that a parent and its subsidiaries had an agency relationship "must relate to the cause of action alleged in the complaint"—the "plaintiff's claim of wrongdoing." *Du Pont*, 269 F.3d at 198-99. Jurimex received full discovery from Case Corp. on the proposed Golden Grain transaction, the "cause of action alleged in the complaint." That is the only evidence that is relevant on the agency issue; under *Du Pont*, evidence concerning other unrelated transactions is not pertinent.

An abuse of discretion will not be found unless appellants are able to show “how additional discovery would have cured the fundamental shortcomings of their claims.” *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 90 (3d Cir. 1987). Plaintiffs cannot make that showing. Additional discovery on unrelated transactions involving other parties would not have cured the fatal defect in Jurimex’s agency theory: there is simply no evidence that Case Corp., by its words or actions, indicated to Jurimex that Case France and Case Europe were its agents for the proposed Golden Grain deal. As the district court observed, documents unrelated to that transaction are legally “irrelevant.” A810.

CONCLUSION

The district court’s judgment should be affirmed. Alternatively, the case should be dismissed because of *forum non conveniens*.

December 19, 2006

Respectfully submitted,

David C. McBride
John W. Shaw
Dawn M. Jones
Young, Conaway,
Stargatt & Taylor
1000 W St., 17th Fl.
Wilmington, DE 19899
(302) 571-6639

William E. Deitrick
James C. Schroeder
Michelle V. Dohra
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

Attorneys for Defendant-Appellee Case Corporation
(now known as CNH America LLC)

CERTIFICATION OF BAR MEMBERSHIP

William E. Deitrick, James C. Schroeder and Michelle V. Dohra, appearing in this Court for Case Corporation, are all members of the bar of this Court.

/s/ James C. Schroeder

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i). According to the word processing program used to prepare this brief (Word 2002), this brief contains 13,889 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), in 14-point Times New Roman typeface.

/s/ James C. Schroeder

CERTIFICATE OF SERVICE—BRIEF

I hereby certify that I served two copies of the Brief of Defendant-Appellee Case Corporation on the following counsel of record by causing copies to be sent on December 19, 2006, via overnight courier for next business day delivery, to:

Daniel J. Kornstein
Kornstein Veisz Wexler & Pollard, LLP
757 Third Avenue
New York, NY 10017

Thomas C. Grimm
Morris, Nichols, Arsht & Tunnell
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899

and that I filed the foregoing brief pursuant to Fed. R. App. P. 25(a)(2)(B) by causing ten (10) copies of the brief to be dispatched on December 19, 2006, to a third-party commercial carrier for delivery on the next business day, December 20, 2006 to:

Office of the Clerk
U.S. Court of Appeals for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

/s/ James C. Schroeder

CERTIFICATE OF SERVICE FOR ELECTRONIC BRIEF

I hereby certify that I served an Electronic Brief of Defendant-Appellee Case Corporation on the following counsel of record by causing a copy to be sent on December 19, 2006, via e-mail, to the following email addresses:

Daniel J. Kornstein
Kornstein Veisz Wexler & Pollard, LLP
dkornstein@kvwmail.com

Thomas C. Grimm
Morris, Nichols, Arsht & Tunnell
tcgefiling@mnat.com

and that I filed the foregoing Electronic Brief by causing a copy of the brief in one PDF file to be sent via e-mail on December 19, 2006, to the Clerk's Office at electronic_briefs@ca3.uscourts.gov

/s/ James C. Schroeder

CERTIFICATE OF SERVICE—SUPPLEMENTAL APPENDIX

I hereby certify that I served one copy of the Supplemental Appendix of Defendant-Appellee Case Corporation on the following counsel of record by causing the copies to be sent on December 19, 2006, via overnight courier for next business day delivery, to:

Daniel J. Kornstein
Kornstein Veisz Wexler & Pollard, LLP
757 Third Avenue
New York, NY 10017

Thomas C. Grimm
Morris, Nichols, Arsht & Tunnell
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899

and that I filed the Supplemental Appendix pursuant to LAR 30.0 by causing four copies of the Supplemental Appendix to be dispatched on December 19, 2006, to a third-party commercial carrier for delivery on the next business day, December 20, 2006 to:

Office of the Clerk
U.S. Court of Appeals for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

/s/ James C. Schroeder

CERTIFICATION UNDER L.A.R. 31.1(c)

I hereby certify that the text of this electronic brief is identical to the text in the paper copies and that a virus detection program Symantic Anti-Virus has been run on the file and that no virus was detected.

/s/ James C. Schroeder