IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

GEORGE R. ARIYOSHI, as Trustee of the George R. Ariyoshi Revocable Living Trust, et al., Plaintiffs, vs. EQUINIX, INC., a Delaware corporation, et al., Defendants.	CIVIL NO. 08-1-1709-08 RAT (Breach of fiduciary duty; breach of contract, bad faith breach of contract and conversion of corporate stock, inter alia) CONSOLIDATED COMPLEX LITIGATION ORDER GRANTING JOINT DEFENDANTS MOTION TO DISMISS COMPLAINT AS TIME-BARRED
RUBY KIMOTO, Plaintiff, vs. EQUINIX, INC., a Delaware corporation, et al., Defendants.	CIVIL NO. 08-1-2115-10 RAT (Breach of fiduciary duty; breach of contract, bad faith breach of contract and conversion of corporate stock, inter alia)

JOINT DEFENDANTS

ORDER GRANTING MOTION TO DISMISS COMPLAINT AS TIME-BARRED

Several Defendants jointly move to dismiss the Second Amended Complaint (the "Complaint" or "SAC") in its entirety as time-barred. The motion is hereby granted and the Complaint, and consequently this consolidated action, is hereby dismissed.[1]

as to all parties, except Defendant STT Communications who did not join in the instant Motion.

[1] The moving Defendants are Morgan Stanley, a Delaware corporation; Morgan Stanley Global Emerging Markets Private Investment Fund, L.P.; Morgan Stanley Global Emerging Markets Private Investors, L.P.; Morgan Stanley Dean Witter Equity Fund, Inc., a Delaware Corporation; David Liu; Equinix, Inc. (on its own behalf and as acquirer of Pihana Pacific, Inc.); Richard Kalbrener; Brett Lay; Harry Hopper; Jane Dietze; The Goldman Sachs Group, Inc.; Goldman Sachs Investments Limited; GS Special Opportunities (Asia) Fund, L.P.; Stone Street Asia Fund, L.P.; G.S. Special Opportunities (Asia) Offshore Fund, L.P.; Whitehall Street Real Estate Limited Partnership XIII; Whitehall Parallel Real Estate Partnership XIII; Stone Street Real Estate Fund 2000, L.P.; Stone Street Fund 2000, L.P.; and Daniel Klebes. In their own motions to dismiss, the UBS Defendants and the Columbia Capital Defendants joined in the instant motion. At oral argument, without objection from Plaintiffs, Defendants Hewlett-Packard Company and iReality Investments Limited also joined in the instant motion. *See* Transcript of Proceedings dated September 1, 2009 ("Tr.") at 41. Because the claims and allegations in the *Kimoto* action are identical to those in the *Ariyoshi* action, the Court dismisses the *Kimoto* complaint for the reasons set forth herein.

FACTUAL BACKGROUND[2]

Plaintiffs, who are mostly residents and domiciliaries of Hawai'i, sue in their capacities as common stockholders of Pihana Pacific, Inc. ("Pihana"), an internet exchange company incorporated in Delaware with its principal place of business in Hawai'i.[3] SAC ¶¶ 1-2, 4-22, 174. In 2002, Pihana entered into a merger transaction with Equinix, Inc. ("Equinix"), which closed on December 31, 2002. *Id.* ¶¶ 4, 81, 98. The merger consideration – which took the form of Equinix shares – was sufficient to provide at least some compensation to Pihana's preferred stockholders for their shares, but was not sufficient to provide compensation to Pihana's common stockholders for theirs. *Id.* ¶¶ 70, 82-84, 97, 103-04. The Complaint cites different justifications for the merger: Pihana asserted that it was facing financial distress, whereas Plaintiffs allege that Equinix was virtually bankrupt. *Id.* ¶ 103. At some point after the merger closed, however, the value of the post-merger corporation began to rise; by May 20, 2008, the post-merger corporation had a market capitalization of more than $3 billion. *Id.* ¶¶ 120, 137.

This lawsuit was commenced on August 22, 2008. Plaintiffs' claims allege that Pihana, through its directors, officers, and preferred stockholders, unfairly deprived Plaintiffs of their asserted right to vote on and/or block the merger.[4] *Id.* ¶¶ 4, 70-73, 158-62, 184. The asserted right was allegedly provided by written agreements among Pihana, the preferred stockholders, and certain common stockholders. *Id.* ¶¶ 4, 63, 70-73, 143-46. Plaintiffs further allege that the transaction "froze out" the common stockholders and that the transaction was invalid because there was no meeting or vote held concerning the merger. *Id.* ¶¶ 4, 70-73, 82-84, 87-88, 103,

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[2] The facts stated herein are drawn purely from the allegations of the Complaint and are assumed to be true for the purposes of the instant motion only. Because the motion turns solely on issues of law, and Plaintiffs have properly raised no fact issues on the motion, the motion may be decided on the pleadings.

[3] At oral argument, Plaintiffs' counsel stated that Plaintiff John Sawada lives in Nevada. Tr. at 29.

[4] The claims are: breach of contract (Count I); bad-faith breach of contract (Count II); breach of fiduciary duty (Count III); aiding and abetting breach of fiduciary duty (Count IV); conversion (Count V); unjust enrichment (Count VI); breach, and bad faith breach, of the implied covenant of good faith and fair dealing (Count VII); civil conspiracy (Count VIII); fraudulent misrepresentation (Count IX); fraudulent concealment (non-disclosure) (Count X); constructive fraud (Count XI); tortious interference with contractual relations (Count XII); and tortious interference with prospective economic advantage (Count XIII).

158-62. According to Plaintiffs, the failure to hold such a meeting or vote violated the Delaware General Corporation Law, Del. Code Ann. tit. 8, § 251. SAC ¶¶ 4, 70-73, 92-94, 99, 146, 174. Plaintiffs' claims accrued on or about September 30, 2002, when Pihana's board of directors approved the merger. *See, e.g., id.* ¶¶ 57, 59, 70, 81, 88-91, 98.[5]

Delaware law would apply a three-year statute of limitations to all claims in the Complaint.[6] Thus, if Delaware law governs the limitations periods applicable to those claims, then the claims are all untimely.[7]

LEGAL ANALYSIS

Under the "most significant relationship" test, which is the choice-of-law rule prescribed by the Supreme Court of Hawai'i, Delaware law controls here. Delaware has the most significant relationship to the parties and subject matter of this action because all of Plaintiffs' claims implicate the internal affairs of a Delaware corporation, *i.e.*, Pihana, and because Plaintiffs and several Defendants are parties herein in their capacities as stockholders (or officers and directors) of that same Delaware corporation. Where, as here, a particular state's law

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[5] In view of Delaware's three-year statute of limitations, it would make no difference for purposes of the instant motion if Plaintiffs' claims were held to have accrued on March 2003, which is the latest date on which Defendants are alleged in the Complaint to have engaged in any wrongdoing. *See* SAC ¶¶ 71, 103, 105, 116.

[6] *See* Del. Code Ann. tit. 10, § 8106; *Wedderien v. Collins*, No. 102, 2007, 2007 WL 3262148, at *4 (Del. Nov. 6, 2007) (breach of contract and bad faith breach of contract); *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007) (breach of fiduciary duty); *In re Fruehauf Trailer Corp.*, 250 B.R. 168, 184 (D. Del. 2000) (aiding and abetting breach of fiduciary duty); *Clarkson v. Goldstein*, No. 04C-03-109, 2007 WL 914635, at *4 (Del. Super. Ct. Feb. 28, 2007) (conversion); *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (unjust enrichment); *Ryland Group, Inc. v. Santos Carpentry Co.*, No. 00C09056, 2004 WL 692743, at *1 (Del. Super. Ct. Mar. 26, 2004) (breach, and bad faith breach, of implied covenant of good faith and fair dealing); *Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1064 (Del. Ch. 1989) (civil conspiracy); *Certainteed Corp. v. Celotex Corp.*, No. 471, 2005 WL 5757762, at *7 (Del. Ch. Jan. 24, 2005) (fraudulent misrepresentation); *Clarkson*, 2007 WL 914635, at *6 (fraudulent concealment (non-disclosure)); *Council of Unit Owners v. Carl M. Freeman, Assocs., Inc.*, No. 86C-AU-52, 1988 WL 90569, at *5, *7 (Del. Super. Ct. Aug. 16, 1988) (constructive fraud); *SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442, 450 (Del. 2000) (tortious interference with contractual relations and tortious interference with prospective economic advantage).

[7] In their opposition to the instant motion, Plaintiffs stated that "if Delaware's statutes of limitation [sic] apply, Plaintiffs' complaint filed in August 2008 would be time barred." Plaintiffs' Memorandum in Opposition to Joint Defendants' Motion to Dismiss Plaintiffs' Complaint as Time-Barred ("Opp.") at 2.

governs the substance of a claim, that same state's law must also govern the applicable statute of limitations. Thus, Delaware's three-year statute of limitations applies to all of Plaintiffs' claims.

A. The "Most Significant Relationship" Test

In tort and contract actions, choice-of-law questions are resolved by the "most significant relationship" test. *Del Monte Fresh Produce (Hawaii), Inc. v. Fireman's Fund Ins. Co.*, 117 Haw. 357, 364-65 (2007) (citation omitted); *Mikelson v. United Servs. Auto. Ass'n*, 107 Haw. 192, 198-99 n.6 (2005); *Peters v. Peters*, 63 Haw. 653, 660-63 (1981). This test, which is part of the modern trend in choice-of-law analysis, is a "'flexible'" approach that looks to the state with "'the most significant relationship to the parties and the subject matter.'" *Del Monte,* 117 Haw. at 364 (citation omitted). It focuses "'on deciding which state would have the strongest interest in seeing its laws applied to the particular case,'" based on "'the interests of the states and applicable public policy reasons.'" *Id.* (citation omitted). The approach avoids "traditional and rigid conflict-of-laws rules" and encourages courts to "arriv[e] at a desirable result in each situation." *Id.* (internal quotation marks and citation omitted).

In adopting the test, the Supreme Court of Hawai'i expressly rejected the traditional rule for choice-of-law in tort cases, *lex loci delicti* (*i.e.*, the law of the place of the wrong), as "inadequa[te]," outdated, and mechanical. *Peters*, 63 Haw. at 660-62 (calling rule of *lex loci delicti* "rigid" and "territorially-oriented") (internal quotation marks and citation omitted). For similar reasons, the Supreme Court also rejected any formula that necessarily results in application of *lex fori* (*i.e.*, the law of the forum). *See id.* at 663.[8] While no Hawai'i court has ruled on whether the most significant relationship test governs choice-of-law determinations for purposes of statutes of limitations, other states applying the test hold that it indeed governs such determinations,[9] to the exclusion of *lex fori*, *lex loci delicti*, and other traditional rules.

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[8] The traditional choice-of-law rule in contract cases is *lex loci contractus* (*i.e.*, the law of the place where the contract was made). *See Trousseau v. Cartwright*, 10 Haw. 138, 1895 WL 1501, at *5-6 (Sup. Ct. Repub. Haw. 1895).

[9] *New England Tel. & Tel. Co. v. Gourdeau Constr. Co.*, 647 N.E.2d 42, 43-46 (Mass. 1995); *Doe v. Emerson*, No.

In particular, courts following the modern trend in choice-of-law analysis hold that statutes of limitations are substantive for choice-of-law purposes, and accordingly that the most significant relationship test governs statutes of limitations. *See, e.g., Fulton County Adm'r v. Sullivan,* 753 So.2d 549, 553 (Fla. 1999) ("statutes of limitations are to be treated as substantive law and thus are subject to the significant relationship test in determining which state's statute of limitations applies . . . ."); Restatement (Second) of Conflict of Laws § 142 cmt. e (1988 Rev.) ("Many subsequent cases . . . no longer characterize the issue of limitations as ipso facto procedural and hence governed by the law of the forum. Instead, the courts select the state whose law will be applied to the issue of limitations by a process essentially similar to that used in the case of other issues of choice of law. These cases represent the *emerging trend.*" (emphasis added) (citing cases)).[10] In its 1988 revision, the Restatement (Second) of Conflict of Laws itself adopted the modern trend, holding that statutes of limitations are substantive for choice-of-law purposes. *See id.*, Reporter's Note ("[New section 142] takes the position that the statute of limitations should not be treated as procedural for choice of law purposes. Instead, it advocates that choice of law questions relating to the statute of limitations should be decided in much the same way as other questions of choice of law.") (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n.10 (1984) ("There has been considerable academic criticism of the rule that permits a forum State to apply its own statute of limitations regardless of the significance of contacts between the forum State and the litigation.")).

2005-CA-00290-O, 2006 WL 2971314, at *3-4 (Fla. Cir. Ct. June 2, 2006); *Jackson v. Chandler*, 61 P.3d 17, 19 (Ariz. 2003); *Dillon v. Dillon*, 886 P.2d 777, 778 (Idaho 1994); *Perkins v. Clark Equip. Co., Melrose Div.*, 823 F.2d 207, 209 (8th Cir. 1987) (applying North Dakota law).

[10] *See also Kearns v. Am. Honda Motor Co.*, 641 F. Supp. 420, 424 (D. Idaho 1986) ("[T]here is a true conflict necessitating a most significant relationship analysis which results in application of Idaho's substantive law. Idaho Code § 5-219(4) (1979), [the relevant statute of limitations,] being substantive law, bars this products liability action, as it was filed well after the two-year period had lapsed."); *Taylor v. Liberty Mut. Ins. Co.*, 579 So.2d 443, 447 (La. 1991) (noting that modern trend is to consider statutes of limitations substantive for choice-of-law purposes).

B. Application of the Most Significant Relationship Test

While Hawai'i has some interest in having its statute of limitations applied to cases brought by its residents and domiciliaries, two factors make Hawai'i's interest here relatively confined as compared with Delaware's.

First, this dispute is between and among various parties in their capacities as constituencies of a Delaware corporation, *i.e.*, Pihana, regarding a corporate matter. Plaintiffs themselves sue as stockholders of the corporation, and many of the Defendants (aside from Defendant Pihana itself, *see* SAC ¶ 22) are sued as stockholders, officers, or directors of the corporation (*see id.* ¶¶ 24-46, 65, 68).

Second, Delaware has a compelling, overriding interest in having its law apply to actions where, as here, the claims at issue implicate a Delaware corporation's internal affairs – *i.e.*, the relations between and among the corporation's stockholders, officers, and directors, and the corporation itself. The principle that a corporation's internal affairs should be governed by the law of the state of incorporation is known as the "internal affairs doctrine" and has been widely adopted across state and federal jurisdictions.[11] Although Hawai'i's courts have not yet been asked to rule on the internal affairs doctrine, Hawai'i's legislature has adopted the doctrine by statute, Hawai'i Revised Statutes ("H.R.S.") § 414-435, which specifically disclaims any state interest in regulating the internal affairs of a foreign corporation. In view of H.R.S. § 414-435, it cannot be said that Hawai'i has an overriding interest in regulating the internal affairs of Pihana. As discussed below, Delaware has such an overriding interest.[12]

1. *The Internal Affairs Doctrine*

The United States Supreme Court has repeatedly endorsed the internal affairs doctrine.

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[11] *See Resolution Trust Corp. v. Chapman*, 29 F.3d 1120, 1122 (7th Cir. 1994) (internal affairs doctrine is "recognized throughout the states"), *overruled on other grounds by Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213 (1997); *Newell Co. v. Petersen*, 758 N.E.2d 903, 925 (Ill. App. Ct. 2001) (doctrine is "'widely accepted'") (citation omitted).

[12] Three of Plaintiffs' claims are brought expressly under Delaware law: conversion, breach of contract, and bad faith breach of contract. SAC ¶¶ 174, 146, 152. Thus, for these three claims, no choice-of-law analysis is required: The Complaint concedes that Delaware law governs.

First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983); *see also CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89-91 (1987); *Edgar v. MITE Corp.*, 457 U.S. 624, 645-46 (1982). The doctrine "is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs – matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders – because otherwise a corporation could be faced with conflicting demands." *Edgar*, 457 U.S. at 645; *see VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005). Thus, "in order to prevent corporations from being subjected to inconsistent legal standards, the authority to regulate a corporation's internal affairs should not rest with multiple jurisdictions." *VantagePoint Venture Partners*, 871 A.2d at 1112 (citing *Edgar*, 457 U.S. at 645); *VantagePoint Venture Partners*, 871 A.2d at 1116 (citing *CTS Corp.*, 481 U.S. at 89); *Rosenmiller v. Bordes*, 607 A.2d 465, 468 (Del. Ch. 1991) (same); *see also McDermott Inc. v. Lewis*, 531 A.2d 206, 216-17 (Del. 1987) ("The alternatives [to the internal affairs doctrine] present almost intolerable consequences to the corporate enterprise and its managers.").

Corporate voting and mergers are classic examples of a corporation's internal affairs. *See CTS Corp.*, 481 U.S. at 89 ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders."); *id.* (the law of the incorporating state should "'determine the right of a shareholder to participate in the administration of the affairs of the corporation.'") (citation omitted); *VantagePoint Venture Partners*, 871 A.2d at 1115 ("disputes concerning a shareholder's right to vote fall squarely within the purview of the internal affairs doctrine."); *Berger v. Intelident Solutions, Inc.*, 911 A.2d 1164, 1166, 1169-70 (Del. Ch. 2006) (applying internal affairs doctrine when stockholder in Florida corporation brought suit against majority stockholders for breach of fiduciary duty in connection with freeze-out merger); *In re First Interstate Bancorp Consol. S'holder Litig.*, 729 A.2d 851, 865-66 (Del. Ch. 1998)

(applying internal affairs doctrine to claims of breach of fiduciary duty in connection with merger).

2. *Plaintiffs' Claims Implicate Pihana's Internal Affairs*

Plaintiffs' claims not only concern corporate voting and a corporate merger but also allege rights arising under the Delaware General Corporation Law and contracts between Pihana and its stockholders. Thus, Plaintiffs' claims quintessentially involve Pihana's internal affairs. Courts have applied the internal affairs doctrine to the very types of claims that Plaintiffs assert. *See In re Verisign, Inc., Derivative Litig.*, 531 F. Supp. 2d 1173, 1215 (N.D. Cal. 2007) (holding that law of Delaware, as state of incorporation, governs all claims implicating company's internal affairs, including claims for breach of fiduciary duty, unjust enrichment, constructive fraud, and breach of contract); *VantagePoint Venture Partners*, 871 A.2d at 1115-18 (applying internal affairs doctrine to request for judicial declaration that shareholder was not entitled to class vote of preferred stock on corporation's proposed merger with Delaware subsidiary of another corporation); *Rosenmiller*, 607 A.2d at 469 (applying internal affairs doctrine to suit regarding rights under stockholder voting agreement); *see also In re Atmel Corp. Derivative Litig.*, No. C 06-4592, 2008 WL 2561957, at *5 n.4, *12-13 (N.D. Cal. June 25, 2008) (holding that law of Delaware, as state of incorporation, governs all claims implicating company's internal affairs, including claims of unjust enrichment, constructive fraud, corporate waste, and breach of contract); *In re Maxim Integrated Prods., Inc., Derivative Litig.*, 574 F. Supp. 2d 1046, 1067-69 (N.D. Cal. 2008) (same for claims of breach of fiduciary duty, unjust enrichment, and rescission); *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 114 Cal. App. 4th 434, 442 (2003) (holding that breach of fiduciary duty claim relating to payment of dividends implicated internal affairs doctrine, that law of Illinois, as state of incorporation, governed, and that Illinois law also governed claim regarding covenant of good faith and fair dealing).

3. *Hawai'i Has Statutorily Disclaimed Any Interest in Regulating the Internal Affairs of Foreign Corporations*

Hawai'i has expressly disclaimed any interest in regulating the internal affairs of foreign corporations.[13] The Hawai'i Business Corporation Act, *see* H.R.S. §§ 414-431 *et seq.*, specifically states that the statutory sections governing foreign corporations do "not authorize this State to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this State." H.R.S. § 414-435(c). This model legislation explicitly adopts the internal affairs doctrine and has been enacted in at least 26 states. *Newell*, 758 N.E.2d at 924-25. Under H.R.S. § 1-24, the Court must interpret and construe H.R.S. § 414-435(c) to maintain uniformity among the states that have also enacted it. Thus, the Court must honor the legislature's adoption of the internal affairs doctrine.

Legislative declarations of state interests have been accorded great weight by the courts of this state when conducting a most significant relationship analysis. *See, e.g., Del Monte,* 11 Haw. at 365.[14] They have also been held to be "devastating" to any party that would oppose application of the internal affairs doctrine. *See Newell*, 758 N.E.2d at 925; *see also Nagy v. Riblet Prods. Corp.*, 79 F.3d 572, 576 (7th Cir. 1996) (holding that, under internal affairs doctrine, Delaware law governed foreign corporation doing business in Indiana because corporation was incorporated in Delaware and Indiana's corporation code recognized internal affairs doctrine for foreign corporations); *Hicks ex rel. Union Pac. Corp. v. Lewis*, 148 S.W.3d 80, 84-85 (Tenn. Ct. App. 2004) (holding that, under Tennessee code, foreign corporation's internal affairs are governed by law of state of incorporation).

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[13] As a Delaware corporation, *see* FAC ¶¶ 1, 22, 174, Pihana is a foreign corporation for purposes of the statute. *See* H.R.S. § 414-3 ("'Foreign corporation' means a corporation for profit incorporated under a law other than the law of this State.").

[14] *See also Sommers Drug Stores Co. Empl. Profit Sharing Trust v. Corrigan*, 883 F.3d 345, 353-54 (5th Cir. 1989) (in applying most significant relationship test, district court properly held that law of Maryland, as state of incorporation, governed claim to exclusion of law of forum state (Texas), in view of Texas statute's adoption of internal affairs doctrine).

4. *Under the Most Significant Relationship Test and the Internal Affairs Doctrine, Delaware Law Governs the Applicable Statutes of Limitations*

As numerous courts have determined, the internal affairs doctrine controls the determination of choice of law for purposes of statutes of limitations. *See Verisign*, 531 F. Supp. 2d at 1214-15 (holding, under internal affairs doctrine, that law of Delaware, as state of incorporation, applies, and that Delaware statutes of limitations therefore apply); *In re Norstan Apparel Shops, Inc.*, 367 B.R. 68, 82 (E.D.N.Y. 2007) ("the internal affairs doctrine controls and Pennsylvania's statute of limitations applies"); *Estate of Johnson v. Melvin Rose, Inc.*, No. WOCV200400622, 2007 WL 1832029, at *35, *37 (Mass. Super. May 9, 2007) (holding, under internal affairs doctrine, that law of Connecticut, as state of incorporation, governs breach of fiduciary duty claim and accordingly applying Connecticut statute of limitations to breach of fiduciary duty claim); *In re Circle Y of Yoakum, Texas*, 354 B.R. 349, 359 (D. Del. 2006) (holding that, because internal affairs doctrine mandates application of Texas law to Texas corporation, "Texas law governs the applicable limitations period").[15] Accordingly, because all of Plaintiffs' claims implicate the internal affairs of a Delaware corporation, *i.e.*, Pihana, Delaware law governs the statute of limitations applicable to those claims.

The conclusion that Delaware law governs the applicable limitations period finds further support in a line of authority – distinct from the internal affairs doctrine – holding that, when a particular state's law governs the substance of a claim, that same state's law also governs the applicable statute of limitations. *See, e.g., Republic of Philippines v. Westinghouse Elec. Corp.*, 774 F. Supp. 1438, 1450 (D.N.J. 1991) (that foreign state's law applies to substance of claim is "'critical'" factor in determining whether foreign state's law applies to applicable statute of limitations) (citing, *inter alia*, *Schum v. Bailey*, 578 F.2d 493, 495 (3d Cir. 1978)); *Taylor*, 579 So.2d at 447 (noting that that choice of law regarding applicable limitations period "should be

[15] *But see Norman v. Elkin*, No. 06-005, 2007 WL 2822798, at *3 (D. Del. Sept. 26, 2007) (applying *lex fori* to statute of limitations); *Aboushanab v. Janay*, No. 06 Civ. 13472, 2007 WL 2789511, at *4 (S.D.N.Y. Sept. 26, 2007) (same); *In re MacGregor Sporting Goods, Inc.*, 199 B.R. 502, 511-12 (D.N.J. 1995) (same).

controlled by the state whose law would govern the merits of the action") (citing authorities).[16] This line of authority is consistent with the emerging choice-of-law trend, noted above, holding that statutes of limitations are substantive for choice-of-law purposes. *See Fulton County Adm'r*, 753 So.2d at 553; Restatement (Second) of Conflict of Laws § 142 cmt. e (1988 Rev.); *Kearns*, 641 F. Supp. at 424; *Taylor*, 579 So.2d at 447. Thus, where the most significant relationship test, in conjunction with the internal affairs doctrine, requires that Delaware law govern the substance of a claim, Delaware law must therefore also govern the applicable statute of limitations.

5. *This Action Is Time-Barred*

All of Plaintiffs' claims implicate the internal affairs of Pihana, a Delaware corporation. Under the internal affairs doctrine, Delaware therefore has a compelling, overriding interest in having its law apply to those claims, including as to the determination of the statute of limitations. Moreover, while Plaintiffs are primarily Hawai'i residents and domiciliaries, they are, simultaneously, suing in their alleged capacities as stockholders of Pihana; most of the Defendants are likewise sued in their

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[16] The rationale underlying this line of authority was stated most cogently in *Heavner v. Uniroyal, Inc.*, 305 A.2d 412 (N.J. 1973), *cited in Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988):

> [While i]t would be an impossible task for the court of [the forum] state to conform to procedural methods and diversities of the state whose substantive law is to be applied. . . . , [a] statute of limitations is . . . not subject to the same problems as strictly procedural matters. The limitation period of the foreign state can generally be ascertained even more easily and certainly than foreign substantive law. . . .
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> This law-of-the-forum rule as to the applicable period of limitations has been almost universally criticized by legal commentators . . . .
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> The fundamental illogic and unsoundness of the [law-of-the-forum] rule are well set forth in [scholarly] writings. . . . There is little reason for this rule, other than historical . . . . [A]fter suit is barred by the law to which reference is made as governing the claims of the parties, the plaintiff's claim, now deprived of its most valuable attribute, should be unenforceable by action elsewhere. . . .
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> It would have made better logic if the limitations rule of the state whose substantive law is chosen to govern the right were deemed substantive also, so that both the original and the terminal existence of the right would be related to the same body of law.

Heavner, 305 A.2d at 415-16 (internal quotation marks and citations omitted).

alleged capacities as stockholders, officers, or directors of Pihana, and Pihana itself is named as a Defendant. Thus, weighing all the factors, the Court concludes that Delaware has the most significant relationship to the parties and subject matter of this litigation. Under all of the authorities cited above, the Court consequently holds that Delaware law governs the statutes of limitations applicable to Plaintiffs' claims. Because it is undisputed that Delaware law applies a three-year limitations period to all of Plaintiffs' claims, and that Plaintiffs' claims accrued on September 30, 2002, the three-year statute of limitations applicable to those claims expired on September 30, 2005. Accordingly, this action, which was commenced on August 22, 2008, is time-barred.[17]

6. ***Plaintiffs' Arguments***

Plaintiffs make several arguments, which the Court addresses in turn below.

Noting that the internal affairs doctrine is a choice-of-law principle, Plaintiffs contend that there is no conflict of laws in this case. However, given the Court's holding that statutes of limitations are substantive for choice-of-law purposes, there is clearly a conflict of laws as to the applicable limitations period. Moreover, in paragraph vi of Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Designation as Complex Litigation, Plaintiffs concede that "[t]his Court will have to determine a number of choice of law issues."

Plaintiffs argue that statutes of limitations are procedural, and thus that the law of the forum state, Hawai'i, necessarily applies. But Plaintiffs are simply advocating the "traditional" rule, which the Court rejects for the reasons stated above.

Plaintiffs contend that the internal affairs doctrine "only applies to matters governing a corporation" and that the doctrine therefore is inapplicable to statutes of limitations. As a preliminary matter, Plaintiffs are incorrect insofar as they suggest that the doctrine is inapplicable to rights or obligations found outside of the Delaware corporate code (*i.e.*, Del. Code Ann. tit. 8). In fact, as noted above, the doctrine applies fully to common-law claims used

[17] In a separate order, the Court identifies additional grounds for dismissal of claims in the Complaint.

to challenge internal corporate affairs – including the precise claims brought by Plaintiffs. In any event, Plaintiffs ignore the numerous decisions holding that, under the modern trend in conflicts analysis, statutes of limitations are substantive for choice-of-law purposes and applying the internal affairs doctrine to statutes of limitations.

To avoid application of Delaware law here, Plaintiffs' memorandum in opposition to the instant motion argued that H.R.S. § 657-9 applies in this case.[18] However, Plaintiffs have abandoned that argument because, as Defendants' reply points out, the presumption underlying H.R.S. § 657-9 – namely, that the claims at issue arose outside of Hawai'i – is rebutted by Plaintiffs' allegations that their claims arose within Hawai'i. (The abandonment occurred in Plaintiffs' memorandum in opposition to the UBS Defendants' motion to dismiss.[19]) Having abandoned H.R.S. § 657-9, Plaintiffs cite no statute or on-point authority to block application of Delaware law – only the general assertion that there is no reason not to apply Hawai'i law here.

That assertion, however, is inconsistent with the body of authority holding that, under the most significant relationship test, the internal affairs doctrine compels application of Delaware law to the exclusion of the forum state's law. Contrary to Plaintiffs' assertion, the internal affairs doctrine provides more than sufficient basis for holding that the state of incorporation has a greater interest than the forum state in seeing its law applied to the case. The case that Plaintiffs cite for the proposition that the internal affairs doctrine is insufficient – *Dow Chemical Co. v. Reinhard*, No. 07-12012-BC, 2008 WL 495501 (E.D. Mich. Feb. 20, 2008) – actually supports Defendants' position: *Dow* held that a claim implicating a Delaware corporation's internal affairs should be governed by Delaware law, to the exclusion of the law of the forum state (there, Michigan). *See id.* at *11.

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[18] H.R.S. § 657-9 provides: "*When a cause of action has arisen in any foreign jurisdiction*, and by the laws thereof an action thereon cannot there be maintained against a person, by reason of the lapse of time, an action thereon shall not be maintained against the person in this State, except in favor of a domiciled resident thereof, who has held the cause of action from the time it accrued." (Emphasis added.)

[19] In their memorandum in opposition to the UBS Defendants' motion to dismiss, Plaintiffs included sur-reply argument in opposition to the instant motion.

Plaintiffs also rely on *Klussman v. Cross Country Bank*, 134 Cal. App. 4th 1283, 1298-99 (Cal. Ct. App. 2005). Contrary to Plaintiffs' assertions, however, the case does not concern or even mention statutes of limitations, and nothing in the opinion indicates that the defendants there were making any argument based on the internal affairs doctrine.

Finally, at oral argument, Plaintiffs asserted that the statute of limitations on their claims began to run not on September 30, 2002, but rather at some unspecified date after March 2003. Tr. at 18-19. The Court rejects that assertion for two reasons, even assuming that Plaintiffs had identified a date certain on or after August 22, 2005 (which they did not). First, the assertion is inconsistent with the position taken on page 2 of Plaintiffs' memorandum in opposition to the instant motion, namely, that if Delaware law applies to the statutes of limitations at issue, then Plaintiffs' action would be time-barred. Opp. at 2. Nothing in the original complaint, the First Amended Complaint, the Second Amended Complaint, Plaintiffs' memorandum in opposition to the instant motion, or Plaintiffs memorandum in opposition to the UBS Defendants' motion to dismiss gave Defendants fair notice that Plaintiffs' position was different from that stated on page 2 of their memorandum in opposition to the instant motion. Nothing in any of these five filings (six if one counts the *Kimoto* complaint) gave Defendants fair warning that Plaintiffs' position actually was that the action is *not* time-barred notwithstanding the assertion to the contrary on page 2 of Plaintiffs' memorandum in opposition and even if Delaware law applies to the limitations period. Defendants accordingly made no responsive argument in their written submissions. Moreover, Plaintiffs have offered no legitimate reason why they could not have included their new position in their memorandum in opposition to the instant motion. Tr. at 21-22. Under these circumstances, the doctrine of judicial estoppel bars Plaintiffs' assertion. As the Supreme Court of Hawai'i has stated:

> Pursuant to the doctrine of judicial estoppel, a party will not be permitted . . . to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action. Judicial estoppel . . . prevents parties from playing fast and loose with the court or

blowing hot and cold during the course of litigation.

State v. Adler, 108 Haw. 169, 175 (2005) (internal quotation marks, citations, and brackets omitted).

Second, and in any event, Plaintiffs' assertion is procedurally improper. Where, as here, issues are not raised in the briefs, those issues need not be addressed. *See Hana Ranch, Inc. v. Kaholo*, 2 Haw. App. 329, 332 (Haw. Ct. App. 1981).

7. ***Conclusion***

IT IS HEREBY ORDERED that leave to amend is denied and that the Complaint, and as to all parties except Defendant STT Communications ~ who did not join in the instant motion. ~ hence this consolidated action, is dismissed with prejudice.[20]

Date: MAR 1 9 2010

FIRST CIRCUIT COURT SEAL

The Honorable Rom Alex Trader
JUDGE OF THE ABOVE-ENTITLED COURT

[20] *See Silver v. Queen's Hosp.*, 63 Haw. 430, 438 (1981) (adjudication "on the merits" is, "in the parlance of the courts, 'with prejudice'"); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) ("[D]ismissal on statute-of-limitations grounds" is "a judgment on the merits." (citing Fed. R. Civ. P. 41(b)); *H.E. Johnson Co. v. Emma Int'l, Inc.*, 102 Haw. 381, 2003 WL 22020166, at *5 (Haw. Ct. App. Aug. 26, 2003) (Table) ("'HRCP Rule 41(b) is the same as [Fed. R. Civ. P.] Rule 41(b). Therefore, the interpretation of Fed. R. Civ. P. Rule 41(b) by the United States (U.S.) Supreme Court under similar circumstances is persuasive to us.'") (citation omitted).