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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DR. THOMAS MARKUSIC, DR. MAXYM POLYAKOV, NOOSPHERE VENTURE PARTNERS LP, and **FIREFLY AEROSPACE, INC.**, Plaintiffs-Below/ Appellants, v. **MICHAEL BLUM, PATRICK JOSEPH KING, LAUREN MCCOLLUM, STEVEN BEGLEITER, GREEN DESERT N.V., SWING INVESTMENTS BVBA, BRIGHT SUCCESS CAPITAL LTD.**, and **WUNDERKIND SPACE LTD.**, Defendants-Below/ Appellees,	C.A. No. 383,2021 Court Below: Court of Chancery of the State of Delaware C.A. No. 2019-0753-KSJM

APPELLANTS' SECOND CORRECTED OPENING BRIEF

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Defendants-Below/Appellees Michael Blum, Patrick Joseph King, Lauren McCollum, Steven Begleiter, Green Desert N.V., Swing Investments BVBA, Bright Success Capital Ltd. and Wunderkind Space Ltd. ("Defendants" or "Old Firefly Investors") are former investors and former board members of Firefly Space Systems, Inc. ("Old Firefly"), a venture capital startup in the aerospace industry founded in 2013 that ran out of capital in 2016. Defendants were unwilling to provide additional capital to Old Firefly to pay off defaulted, secured debt so the company could continue to operate. Noosphere Venture Partners LP ("Noosphere") and Firefly Aerospace, Inc. ("New Firefly") then purchased and foreclosed on Old Firefly's senior secured debt and started a new business in the same sector.

More than two years after Old Firefly filed for bankruptcy, and after seeing the success of New Firefly, the Old Firefly Investors reemerged, threatening litigation through a letter to Plaintiffs-Below/Appellants Thomas Markusic, Maxym Polyakov, Noosphere, and New Firefly ("Plaintiffs"). The letter attached a draft California complaint with five counts, including for alleged breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and three others. The Old Firefly Investors based these claims on allegations related to Markusic's efforts to address Old Firefly's financial problems, asserting he pursued his own interests over those of Old Firefly and its stockholders.

Plaintiffs responded by pointing out that Old Firefly's Amended and Restated Certificate of Incorporation ("Certificate") selected the Delaware Court of Chancery as the sole and exclusive forum for any action asserting a claim of breach of fiduciary duty by any director or officer of Old Firefly. Defendants conceded that their fiduciary duty claims would have to be brought in the Court of Chancery but threatened to split their claims between two jurisdictions by bringing some claims in California, *even though both sets of threatened claims arose from the same nucleus of operative facts*. The apparent purpose of this threat was to harass Plaintiffs with needlessly expensive litigation costs, duplicative litigation, and forum shopping.

After receiving Defendants' threat, on September 19, 2019, Plaintiffs filed a complaint in the Court of Chancery ("Complaint"), which asserts seven requests for declaratory judgment ("Declarations"). Two weeks later, on October 3, 2019, Defendants filed a complaint in California state court ("California Complaint," as amended on December 5, 2019). The California Complaint includes claims for fraud, aiding and abetting fraud, fraudulent inducement, negligent misrepresentation, tortious interference with prospective economic advantage, and statutory and common law unfair competition pursuant to the California Business and Professional Code. On November 22, 2019, Defendants answered the Complaint in this Delaware action and asserted counterclaims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, breach of contract, tortious

interference with contract, and tortious interference with prospective economic advantage ("Counterclaims"). All *eleven* claims asserted across both jurisdictions are based on the exact same set of operative facts.

In response to Defendants' assertion of five of those claims in Delaware, Plaintiffs filed a Motion to Dismiss Defendants' Counterclaims pursuant to Court of Chancery Rules 12(b)(1), 12(b)(6), and 23.1 ("Motion to Dismiss"), which the Court of Chancery granted on August 18, 2020, through a reasoned opinion ("August 18 Order").

To dispose of the remainder of the Delaware case, Plaintiffs filed a Motion for Partial Judgment on the Pleadings ("Motion on the Pleadings") based on the reasoning in the August 18 Order. The Court of Chancery denied the Motion, concluding that several of the disputes first raised by Plaintiffs here in Delaware were "best left for resolution by the California court" in Defendants' later-filed action. Respectfully, the Court of Chancery erred by, among other things, misapplying the rule against claim splitting and the rule governing compulsory counterclaims. The ruling in effect endorsed Defendants' scheme to file duplicative litigation in multiple jurisdictions based on the same set of operative facts.

After taking jurisdiction over the parties' disputes and correctly dismissing all Counterclaims, the Court of Chancery erred in deferring to California. First, the Certificate required Defendants to bring any fiduciary claims in the Court of

Chancery. Second, Court of Chancery Rule 13(a) required Defendants to assert as compulsory counterclaims any logically-related claims arising out of the same "transaction or occurrence that is the subject matter" and basis of Plaintiffs' underlying Complaint. Third, the prohibition against claim-splitting precluded Defendants from bringing claims based on the same set of operative facts in any other court.

By denying the Motion on the Pleadings, the Court of Chancery has given the green light to Defendants to assert causes of action in California that are based on the same nucleus of facts as Plaintiffs' claims and Defendants' Counterclaims, the latter of which the Court of Chancery has already resolved. This is contrary to Delaware law. A party must present all theories of recovery relating to a transaction in one action, rather than prosecuting overlapping or repetitive actions in different courts or at different times. In fact, that was the precise rationale used by the California court when it stayed the California action in favor of this first-filed Delaware action, and then twice denied motions to lift the stay brought by the Old Firefly Investors.

Case law and public policy compel a reversal here. The doctrine against claim splitting is designed and intended to preclude the contemporaneous litigation of the same factual or legal issues in different courts. Where a party had an opportunity to assert factual or legal claims, but neglected to present some of them or has failed to

assert claims which in fairness should have been asserted, that party is precluded from subsequently pressing the omitted claims in a subsequent action. This prohibition against claim splitting exists to bring an end to litigation and prevent needless or vexatious litigation, maintain stability of court decisions, promote judicial economy and convenience, prohibit a second bite at the apple with respect to recovery on the same transaction or occurrence, avoid double recoveries, and avoid potentially inconsistent determinations of fact as to the same controversy.

Plaintiffs filed in Delaware because the Certificate required it with respect to internal affairs and because Delaware is the only jurisdiction that can resolve all the disputes between the parties related to Defendants' investment in Old Firefly. Respectfully, correcting the error below is necessary to maintain the consistency of Delaware law, to avoid the possibility of inconsistent judgments, and to prevent the type of gamesmanship in which Defendants engaged.

SUMMARY OF ARGUMENT

I. The Court of Chancery erred in denying the Motion on the Pleadings and in holding that the rule against claim splitting and the rule regarding compulsory counterclaims did not apply:

A. The Court of Chancery's Order promotes improper claim splitting because it essentially endorses the Old Firefly Investors' tactic of bringing two lawsuits in two different jurisdictions based on nearly identical facts. The rule against claim splitting is designed to prevent burdening the parties (and the courts) with duplicative proceedings in different courts based on causes of action arising out the same facts. Here, both actions relate to the same time, space, origin, and motivation. Indeed, both span from late 2013 when Markusic approached potential investors to participate in his aerospace startup company through the operations of New Firefly. The focus of both complaints is Markusic's purported self-interest in allegedly helping New Firefly obtain the assets of Old Firefly. The rule against claim splitting is intended precisely to avoid this type of gamesmanship and forum shopping. The Court of Chancery's decision wrongly rewards the Old Firefly Investors for these abusive tactics.

B. The Court of Chancery further erred when it failed to enforce the rule regarding compulsory counterclaims. To determine whether a claim is a compulsory counterclaim, Delaware courts consider whether there is a logical relationship between the original action and the subsequent claim. Here, there is a logical relationship between the claims asserted in the Delaware action and those asserted in the California action, as they overwhelmingly share issues of fact and law and would involve presentation of the same evidence. The California Complaint was filed *after* the Delaware action had "commenced," and thus, the claims asserted by the Old Firefly Investors in California were compulsory counterclaims in the Delaware action. This is an important dispute to resolve via declaratory judgment because Defendants threatened to—and then did—assert as claims in California what were compulsory counterclaims here. A reversal will prevent duplicative, multi-jurisdiction litigation over the same controversy.

II. The Court of Chancery misapplied Delaware's Declaratory Judgment Act:

A. The Court of Chancery incorrectly opined that certain Declarations were "overripe," relying upon the Delaware Superior Court's ruling in *Burris v. Cross*, 583 A.2d 1364 (Del. Super. Ct. 1990). The Court of Chancery erred by misapplying (or not applying) the *Burris* factors to the facts of this action and, in so doing, reached a conclusion that promotes claim

splitting between multiple jurisdictions. Notably, neither party argued or briefed *Burris* before the Court of Chancery, and *Burris* is not controlling precedent. The *Burris* court's "overripeness" discussion centered on the interests of judicial economy and the availability of another venue, which is not the case here. *Burris* also identified seven factors to determine whether a matter is "overripe" for adjudication. To the extent those factors apply, they overwhelmingly support a conclusion that the matter is not overripe.

B. The Court of Chancery erred in its holding that certain Declarations do not speak to an active controversy. It is undisputed that there was an active controversy at the time that the Complaint was filed. Indeed, the Court of Chancery took jurisdiction of the underlying Declarations when it dismissed the Counterclaims. However, the Court of Chancery then it held that it could not rule on the Declarations. But the Court of Chancery should not have determined that there was no longer an active controversy because it had ruled in favor of Plaintiffs, on a motion brought by Plaintiffs, as to the very issues that gave rise to this action.

STATEMENT OF FACTS

A. The Parties

Old Firefly was an aerospace startup founded in 2013 by Blum, King, and Markusic. (A00395.) Defendants Blum, King, Lauren McCollum, Steven Begleiter, Green Desert N.V., Swing Investments BVBA, Bright Success Capital Ltd., and Wunderkind Space Ltd. all owned stock in Old Firefly. (A00395.) Markusic was the Chief Executive Officer of Old Firefly at all relevant times. (A00395.)

In June 2015, Old Firefly raised approximately $1 million in funding from Space Florida, the aerospace economic development agency of the State of Florida, in the form of a convertible note (the "Space Florida Note"). (A00395.) The Space Florida Note was senior to all other Old Firefly debt. (A00395.)

In October 2016, Old Firefly raised another $1.5 million in debt financing from FITA, Inc., an entity controlled by one of Old Firefly's investors (the "FITA Note"). (A00395.) The FITA Note served as a bridge loan while Old Firefly worked to conclude its Series A funding round. (A00395.) The FITA Note was senior to the Old Firefly Investors' investments in Old Firefly. (A00395.)

By late summer 2016, Old Firefly was experiencing severe financial difficulties—it had significant debt, no revenue, and faced a lawsuit by Virgin Galactic—and needed additional capital to stay afloat. (A00026; A00068.) By December 2016, Old Firefly was in debt to the tune of almost $20,000,000.

(A00027; A00068-A00070.) About $5.6 million of that debt was in the form of first priority secured loans. (A00027; A00069-A00070.) Old Firefly was unable to raise additional capital from its existing stockholders, including Defendants or new investors. (A00027; A00068.)

On October 16, 2016, Old Firefly entered into a confidentiality agreement (the "Confidentiality Agreement") with a new prospective investor, Noosphere. (A00396.) Noosphere's CEO, Polyakov, then visited Old Firefly's facilities in Texas. (A00396.) After the visit, Polyakov and his partner, Mark Watt, sent Markusic a summary of Noosphere's proposed next steps regarding an investment in Old Firefly. (A00396.) Over the next month, Markusic negotiated with Polyakov regarding Noosphere's investment. (A00396.)

On November 29, 2016, Noosphere presented a proposed term sheet for a convertible note financing. (A00396.) The Old Firefly Investors and Markusic believed this proposal "substantially undervalued" their Old Firefly equity. (A00396.) Markusic told the Old Firefly Investors that he would continue negotiating with Noosphere. (A00396.)

By December 2016, Old Firefly had ceased operations, laid off its employees, and was deeply insolvent and considering bankruptcy. (A00027; A00029-A00030; A00068-A00069; A00071-A00072; A00074.)

Thereafter, Noosphere shifted gears from negotiating a new convertible note financing to acquiring portions of Old Firefly's existing debt. (A00396.) The Old Firefly Investors allege that Markusic encouraged this change of plans, helping Polyakov, Watt, and Noosphere to "identify and target outstanding debt held by creditors that would be ripe for foreclosure," although there is no dispute that the debts were easily identifiable through public searches. (A00396.) The Old Firefly Investors also allege that at this time, Markusic began negotiating his own future employment with Noosphere. (A00396-A00397.)

On January 11, 2017, Polyakov, Watt, and Noosphere renewed their proposal to acquire Old Firefly's existing senior debt. (A00397.) This time, Markusic supported their proposal. (A00397.) On January 27, 2017, Markusic announced an intent to travel to Ukraine "to determine firsthand what capabilities Polyakov's companies had and to solicit further strategic investment from Polyakov that would purportedly benefit Old Firefly." (A00397.)

On January 30, 2017, the holder of an Old Firefly secured note in the principal amount of $1,556,000 issued an event of default notice and accelerated payment of the note. (A00030; A00075.)

Meanwhile, Polyakov founded EOS Launcher, Inc., which is now known as Firefly Aerospace, Inc., and referred to herein as "New Firefly." (A00030; A00075-A00076; A00397.) As it had every right to do—and just as Defendants could have

done—New Firefly purchased Old Firefly's secured debt. (A00030-A00031; A00076-A00077; A00397.)

On February 10, 2017, New Firefly purchased the FITA Note. (A00397.) After becoming aware of this transaction, the Old Firefly Investors "actively voiced their disapproval and concerns," although there is no allegation that this disapproval had any legal effect. (A00397.)

On February 14, 2017, New Firefly purchased the Space Florida Note. (A00397.) Markusic did not obtain the approval of the Old Firefly Investors or any other Old Firefly stockholders, which the Old Firefly Investors allege was required. (A00397.) However, there was no provision in the Space Florida Note or any other loan document granting such a control right. (A00031; A00076-A00077.) The Space Florida Note did contain a provision giving Old Firefly the power to block an assignment to the note, but this power was limited to ensuring that the assignment would not violate applicable securities law. (A00031; A00076-A00077.)

Shortly after acquiring the FITA Note and Space Florida Note, New Firefly foreclosed on both loans. (A00398.) The Old Firefly Investors then demanded that Markusic cause Old Firefly to voluntarily file for bankruptcy "so that a bankruptcy trustee could manage the sale of Old Firefly's assets and protect it from the selective foreclosure process." (A00398.)

As holder of Old Firefly's secured debt, New Firefly conducted a public foreclosure sale of Old Firefly's collateral for one of the secured notes. (A00033; A00079-A00080.) The public auction was noticed and then held on March 16, 2017. (A00033; A00079-A00080; A00398.) New Firefly purchased all assets of Old Firefly that were up for sale at the auction, including Old Firefly's intellectual property. (A00398.) After the auction, Old Firefly had very few assets. (A00398.)

In April 2017, Old Firefly filed for Chapter 7 bankruptcy protection and went out of business. (A00034; A00081-A00082; A00398.) In a subsequent auction run by a bankruptcy trustee, New Firefly purchased Old Firefly's remaining assets over competing bidders. (A00034; A00082; A00398.)

Markusic became CEO of New Firefly on May 1, 2017. (A00034; A00082.) After the investment of substantial new capital from Noosphere, New Firefly subsequently became a success story in the space technology industry. (A00035; A00082-A00083.)

B. The Litigation Between The Parties

More than two years after Old Firefly filed for bankruptcy, and after seeing the success of New Firefly, the Old Firefly Investors reemerged. In June 2019, the Old Firefly Investors wrote to Markusic, Polyakov, Noosphere, New Firefly, and Watt threatening litigation in connection with the alleged usurpation of Old Firefly's assets in circumvention of Defendants' economic interests in Old Firefly. (Ex. A, p.

2.) Notwithstanding the forum selection clause in the Certificate that provides "[t]he Court of Chancery of the State of Delaware shall be the sole and exclusive forum for … any derivative action or proceeding … [and] any action or proceeding asserting a claim of breach of a fiduciary duty," (Ex. A, p. 2), Defendants' letter included a draft complaint designated for the California court, (Ex. A, p. 2). The draft complaint alleged five counts: (1) breach of fiduciary duty against Markusic; (2) aiding and abetting breach of fiduciary duty against Polyakov, Noosphere, and New Firefly; (3) fraudulent inducement against Markusic; (4) tortious interference with prospective economic advantage against Polyakov, Noosphere, and New Firefly; and (5) statutory and common law unfair competition against all Plaintiffs pursuant to California Business and Professions Code § 17200 *et seq.* (A00462-A00482.)

Plaintiffs responded by letter on July 19, 2019, pointing out that the forum selection clause mandated the Delaware Court of Chancery as the sole and exclusive forum for any action asserting a claim of breach of fiduciary duty by any director or officer of Old Firefly. (A00484-A00496.) Thereafter, Defendants' counsel threatened that "we will plan to ultimately file our fiduciary-based claim in Delaware. However, [the Certificate] does not prevent our clients from pursuing their direct fraud and tortious interference claims in California, which they plan to

do," *even though both sets of claims admittedly arose from the same nucleus of facts and circumstances*. (*See* A00025; A00036; A00066; A00085.)

On September 19, 2019, Plaintiffs filed their Complaint below. (A00017; Ex. A, p. 3.) The Complaint asserted a single count seeking seven declaratory judgments, which include the four at issue in the Motion on the Pleadings:

- "Defendants have no standing to assert direct claims against Dr. Markusic in his role as an officer and director of Old Firefly, because any such claims would be derivative in nature, and thus only may be brought by the bankruptcy trustee" (the "First Declaration")[1];
- "Dr. Polyakov, Noosphere, and . . . New Firefly could not have aiding and abetting liability because no underlying breach of fiduciary duty occurred … " (the "Second Declaration");
- "Defendants cannot split claims based on identical facts between two different courts and jurisdictions" (the "Third Declaration"); and
- "Defendants cannot prevail on claims against Plaintiffs for breach of fiduciary duty, aiding and abetting same, fraudulent inducement, tortious interference with prospective economic advantage, or statutory or common law unfair competition" (the "Fourth Declaration").

(Ex. A, p. 2, 6, 10-11, 14.)

On October 3, 2019 (and amended on December 5, 2019), Defendants filed the California Complaint. (A00498; Ex. A, p. 2.) The California Complaint asserts

[1] Plaintiffs did not "seek[] a broader declaration that *any* claim brought against Markusic would be derivative in nature." Rather, Plaintiffs sought a determination as to the direct-or-derivative nature of claims that were asserted in the California complaint (or the Delaware action).

claims for fraud, aiding and abetting in fraud, fraudulent inducement, negligent misrepresentation, tortious interference with prospective economic advantage, and statutory and common law unfair competition pursuant to the California Business and Professional Code. (A00498; Ex. A, p. 2.)

Specifically, the Old Firefly Investors' *first cause of action* in the California action, the "Markusic Fraud Claim," alleges that Markusic misrepresented that he was negotiating with new potential investors in Old Firefly to ensure its continued success and that he was negotiating a convertible note financing and stock option deal for the Old Firefly Investors. (A00519.) Specifically, Markusic purportedly misled the Old Firefly Investors to believe that he was negotiating a stock warrant deal for them, urged them not to accept the offer provided by Noosphere, and omitted that Noosphere and Polyakov were planning to make substantial investments in New Firefly of at least $75 million. (A00519.) More so, Markusic's true intention was to separate himself from the Old Firefly Investors while maintaining ownership over Old Firefly's assets and intellectual property as an agent of Noosphere and Polyakov and as part of this fraudulent scheme, Markusic strategically gutted Old Firefly's assets and forced it into bankruptcy. (A00519.) And, Markusic's fraudulent scheme allowed Noosphere and Polyakov to gain control over the company's assets while Plaintiffs lost all value in their investments. (A00519.)

The Old Firefly Investors' *second cause of action* in the California action (the "Aiding and Abetting Fraud Claim," together with the Markusic Fraud Claim, the "Fraud Claims") alleges that Polyakov, Watt, Noosphere, and New Firefly aided and abetted Markusic's actions that serve as the basis for the first cause of action in the California Complaint. (A00520.)

The Old Firefly Investors' *third cause of action* (the "Fraudulent Inducement Claim") alleges that Markusic fraudulently induced the Old Firefly Investors into providing their original funding by making representations regarding his future commitment to and involvement in Old Firefly but later breached those representations when he helped Noosphere acquire Old Firefly's secured debt. (A00521.)

The Old Firefly Investors' *fourth cause of action* (the "Negligent Misrepresentation Claim") alleges that Markusic negligently made representations regarding Markusic's negotiations with New Firefly and allegedly concealing that Noosphere and Polyakov would invest large amounts into New Firefly. (A00522.)

The Old Firefly Investors' *fifth cause of action* (the "Noosphere TI Claim") alleges that Markusic engaged in wrongful conduct to disrupt a prospective business relationship between the Old Firefly Investors and Noosphere. (A00523.) In support of this claim, the Old Firefly Investors point to Markusic's actions taken to address Old Firefly's financial problems. Specifically they allege that he (1) misled the Old

Firefly Investors to believe that he was negotiating a stock option warrant on their behalf, (2) urged the Old Firefly Investors not to accept the offer provided by Noosphere, (3) did not inform the Old Firefly Investors that Noosphere and Polyakov were planning to make substantial investments in New Firefly, and (4) helped Noosphere acquire Old Firefly's senior debt without first securing a deal for the benefit of the Old Firefly Investors. (A00523.)

The Old Firefly Investors' *sixth cause of action* (the "Unfair Competition Claims") alleges that the defendants in the California action "engaged in business practices that constitute unfair and unlawful business practices" and thereby violated California Business and Professions Code and common law. (A00524.)

On November 22, 2019, Defendants answered the Complaint in the Delaware action and asserted the Counterclaims. (A00112-A00118; Ex. A, p. 3.) More specifically, Counterclaim I was brought against Markusic for allegedly breaching his fiduciary duty of loyalty as CEO and a board member of Old Firefly. (A00112-A00113) Counterclaim II (together with Counterclaim I, the "Fiduciary Counterclaims") was brought against Polyakov, Watt, Noosphere and New Firefly for allegedly aiding and abetting Markusic's purported breaches of fiduciary duty. (A00113-A00114.) Counterclaim III was brought against Noosphere for allegedly breaching the Confidentiality Agreement by misusing Old Firefly's confidential information to engineer a takeover of Old Firefly rather than investing in Old Firefly.

(A00114-A00115.) Counterclaim IV was brought against Markusic, Polyakov, Watt, and New Firefly for allegedly tortiously interfering with the Confidentiality Agreement by causing Noosphere's breaches. (A00115-A00117.) Counterclaim V was brought against Polyakov, Watt, Noosphere, and New Firefly for allegedly tortiously interfering with the Old Firefly Investor's prospective economic advantage by disrupting their business relationship with Old Firefly. (A00117-A00118.)

On March 2, 2020, the California court stayed the California action in order to "best promote judicial economy and efficiency by avoiding the prospect of simultaneously-pending lawsuits in two courts involving identical facts and closely related (but not identical) claims," and avoiding the possibility of inconsistent rulings. (A00530-A00531.) The California court also observed that "[b]y all appearances, the factual allegations in Blum et al.'s [California Complaint] in this case and Blum et al.'s Delaware Counterclaims appear identical, although the asserted causes of action in the two cases differ." (A00531; Ex. A, pp. 3-4.)

On August 18, 2020, the Court of Chancery dismissed the Counterclaims, finding that Defendants lacked standing to assert their Counterclaims, which were derivative in nature and thus belonged to the bankruptcy trustee, and that they had not adequately pleaded the elements necessary to state a claim for tortious interference with prospective economic advantage. (A00400-A00407; Ex. A, p. 4.)

On February 9, 2021, the California court denied the Old Firefly Investors' motion to lift the stay. Again, the California court stated, "[T]he Court stayed this case given the earlier-filed and pending Delaware Chancery Court declaratory relief action involving these same parties, the same facts, and very closely related claims. The Court did so primarily in the interests of judicial economy and efficiency, minimization of expense, and avoidance of potentially inconsistent rulings.… [G]iven the still on-going Delaware court proceeding, the court finds that the rationale and policy concerns underlying the 3-2-20 stay Order still apply." (A000696.)

Plaintiffs then moved for partial judgment on the pleadings pursuant to Court of Chancery Rule 12(c) as to certain Declarations. (Ex. A, p. 4.) The parties fully briefed Plaintiffs' motion on March 3, 2021, and the Court of Chancery heard oral argument on March 15, 2021. (A00730-A00768; Ex. A, p. 4.)

C. The Court of Chancery's Rulings

On June 16, 2021, the Court of Chancery denied Plaintiffs' request for partial judgment, holding that:

- The First Declaration was overly broad, overripe, and, to the extent it is more narrowly tailored to the claims in the California Complaint, best determined by the California Court (Ex. A, p. 10);
- The Second Declaration did not speak to an active controversy (Ex. A, p. 11);

- The Third Declaration failed because the rule against claim splitting is inapplicable to the California Complaint, Defendants currently have outstanding claims only in California, and, if Plaintiffs face prejudice from proceeding in two separate courts, it is because they filed preemptively and any prejudice is of their own making (Ex. A, pp. 13-14); and

- The Fourth Declaration failed for the same reasons as the First Declaration and Second Declaration and because it did not meet the four prerequisites for an active controversy (Ex. A, pp. 14-15).

On September 9, 2021, the Court held a status conference with the parties during which they discussed the possibility of a final order without further motion practice based on the legal rulings set forth the Court's June 16 Order and *without prejudicing any party's rights of appeal*. (Ex. B, p. 4.) Solely based upon the Court's holdings in the June 16 Order, the parties agreed that there are no live issues of fact that must be decided in order to adjudicate Plaintiffs' entitlement to the Fifth Declaration, Sixth Declaration, and Seventh Declaration under the conclusions of law and reasoning set forth in the June 16 Order. (Ex. B, p. 5.) *Reserving all, and without waiver of any, rights of appeal*, the parties agreed that if the Court were to apply its reasoning of the June 16 Order, the Court would determine that the requests for declaratory judgment as stated in the Fifth Declaration, Sixth Declaration, and Seventh Declaration are moot. (Ex B, p. 5.)[2]

[2] On November 3, 2021, the Old Firefly Investors filed another motion to lift the stay in the California action, which was denied for similar reasons as those provided in the previous orders. *Blum v. Markusic*, Case No. 19-CIV-05852 (Cal. Super. Jan.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN DENYING PLAINTIFFS' PARTIAL MOTION ON THE PLEADINGS AND HOLDING THAT THE RULE AGAINST CLAIM SPLITTING AND THE RULE REGARDING COMPULSORY COUNTERCLAIMS DID NOT APPLY

A. Question Presented

Whether the Court of Chancery conducted the proper analysis related to claim splitting and compulsory counterclaims. (Preserved at A00440-A00449; A00669-A00674.)

B. Standard of Review

This Court reviews questions of law *de novo*. *Bradfield v. Unemployment Ins. Appeal Bd.*, 53 A.3d 301 (Del. 2012); *see W. Coast Opportunity Fund, LLC v. Credit Suisse Sec. (USA), LLC*, 12 A.3d 1128, 1131 (Del. 2010) ("[T]he grant of a motion for judgment on the pleadings presents a question of law, which we review *de novo,* to determine whether the court committed legal error in formulating or applying legal precepts." (internal quotations omitted)).

14, 2022) (Minute Order) (D.I. 65). This Court may take notice of this fact. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 171 (Del. 2006).

C. Merits of Argument

1. Improper Application of the Rule Against Claim Splitting

The Court of Chancery's Order promotes improper claim splitting because it effectively endorses the actions of the Old Firefly Investors for having brought two lawsuits in two different jurisdictions based on nearly identical facts and claims. Of course, Delaware law and California law prohibit the adjudication of claims based on identical facts between two different forums. Because the Court of Chancery is the only court that can resolve all claims based on the identical facts at issue here, the Court of Chancery erred in denying the Motion on the Pleadings and thus violated the rule against claim splitting.

a. The Principles Related To Claim Splitting

Courts overwhelmingly favor the adjudication of all disputes relating to the same facts in one court. *See Ashall Homes Ltd. v. ROK Entm't Grp. Inc.*, 992 A.2d 1239, 1251 (Del. Ch. 2010). The risk of inefficiencies and the potential for injustice are serious enough that long-standing doctrines, such as *res judicata* and Delaware's *McWane* doctrine, have been developed to minimize claim splitting. *Ashall Homes Ltd.*, 992 A.2d at 1251 (citing *McWane Cast Iron Pipe Corp. v. McDowell–Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970)).

Res judicata minimizes inefficiency and inequity by making a judgment binding as to all claims that could and therefore should have been brought in the initial litigation. *Betts v. Townsends*, 765 A.2d 531, 534 (Del. 2000). *McWane*, which generally confines litigation to one forum, serves the public's interest in the orderly administration of justice by discouraging forum shopping and by reducing the risk of conflicting verdicts. 263 A.2d at 283 ("[A]s a general rule, litigation should be confined to the forum in which it is first commenced."); *see Lisa, S.A. v. Mayorga*, 993 A.2d 1042, 1047 (Del. 2010) ("Where the Delaware action is the first-filed, the plaintiff's choice of forum will be respected and rarely disturbed."); *Balin v. Amerimar Realty Co.,* 1995 WL 170421, at *4 (Del. Ch. Apr. 10, 1995). "In short, the rule against claim splitting is designed to 'prevent burdening the same defendant with duplicative proceedings in different courts brought by the same plaintiff based on different causes of action arising out of a common underlying nucleus of facts.'" *Goureau v. Lemonis*, 2021 WL 1197531, at *8 (Del. Ch. Mar. 30, 2021) (quoting *Winner Acceptance Corp. v. Return on Cap. Corp.*, 2008 WL 5352063, at *18 (Del. Ch. Dec. 23, 2008).)

Delaware takes a modern "transactional" view of claim splitting. *See Maldonado v. Flynn*, 417 A.2d 378, 381 (Del. Ch. May 29, 1980); *see also Villare v. Beebe Med. Ctr., Inc.*, 2013 WL 2296312, at *3 (Del. Super. May 21, 2013). In other words, Delaware bars overlapping complaints that arise from the "same

transaction or from a 'common nucleus of operative facts.'" *Villare*, at *3 (quoting *DeRamus*, 1986 WL 13089, at *5). In *LaPoint v. AmerisourceBergen Corp.*, this Court applied the analysis described in the Restatement (Second) of Judgments:

> Determining whether two claims arise from the same transaction requires pragmatic consideration, with the fact finder "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."

970 A.2d 185, 193 (Del. 2009) (quoting Restatement (Second) Judgments § 24(2) (1982)); *see also DeRamus v. Redman*, 1986 WL 13089, at *5 (Del. Super. Nov. 14, 1986).

b. The Counterclaims And The Claims Asserted In The California Court Are Inextricably Intertwined

The Court of Chancery failed to correctly apply the law to the undisputed facts before it. In so doing, the Court of Chancery reasoned that Plaintiffs "defensively chose this court in an effort to deprive Defendants, who are the natural plaintiffs, of the ability to decide the appropriate forum in which to bring their claims." (Ex. A, p. 13.) But the Court of Chancery ignored the fact that Defendants, not Plaintiffs, threatened to split their claims between two jurisdictions by bringing some claims in Delaware and some in California, even though both sets of claims clearly arose from the same nucleus of facts and circumstances. (A00025; A00035-A00036; A00066;

A00083-A00084; A00462-A00482; A00484-A00496.) Plaintiffs did not deprive Defendants of a chosen forum in Delaware. Instead, by their own admission, *Defendants always intended to bring claims before the Court of Chancery*—which they did. (A00025; A00035-A00036; A00066; A00083-A00084; A00462-A00482; A00484-A00496.) Contrary to the Court of Chancery's narrative, Defendants explicitly threatened and then asserted duplicative sets of claims based on the same operative facts in two different jurisdictions, *one of which was always going to be Delaware*. (A00025; A00035-A00036; A00066; A00083-A00084; A00462-A00482; A00484-A00496.)

When one party threatens (and then engages) in such behavior, the prohibition against claim splitting applies to not only protect the other party (whether a plaintiff or defendant) but also the resources and integrity of the courts. Thus, the only question that the Court of Chancery should have considered is whether the claims were in fact intertwined and thus subject to the rule against claim splitting.

Here, the Counterclaims asserted below and the claims asserted in the California Complaint arise from the same fundamental facts, would require litigation of the same essential questions, and would threaten to create inconsistent rulings if litigated in multiple forums. The defendants in this Delaware action are identical to the plaintiffs in the California action.

A comparison of the complaints shows extensively overlapping allegations, which span from late 2013 when Markusic approached potential investors to participate in his aerospace startup company, (A00104; A00505), through the creation of New Firefly, (A00111; A00517), as well as the operations of New Firefly (A00112; A00517-A00518).

Both complaints begin by describing that Markusic approached the Old Firefly Investors to fund Old Firefly. (A00104; A00505-A00506.) Both complaints then state that "[f]rom 2014 through 2016, … [Old] Firefly performed well and was projected to be cash-flow positive by 2018." (A00104; A00506.) Both discuss the funding that Old Firefly received, including the $1 million in funding from Space Florida, which took seniority and could not be assigned to other investors or lenders without Old Firefly's consent, (A00104; A00507), and the secured loan from FITA, Inc. "to bridge [Old Firefly's] Series A funding," (A00105; A00507).

The complaints then introduce Polyakov, who approached Markusic "to learn more about investing in [Old] Firefly." (A00105; A00508.) Both complaints describe the actions of Polyakov with respect to his plan to invest in Old Firefly, (A00105-A00106; A00510), and the alleged scheme between Polyakov and Markusic to create New Firefly (A00105-A00106; A00108-A00109; A00510-A00512). The complaints then provide that "[o]n or around November 29, 2016, Polyakov, Watt, and Noosphere presented a proposed term sheet for convertible note

financing to [Old] Firefly's investor-shareholders," (A00106; A00512), and detail the following negotiations (A00106-A00109; A00512-A00514). Both complaints then allege that the Old Firefly Investors "actively voiced their disapproval and concerns," (A00109; A00514), and contain allegations related to Markusic's conflict of interest in continuing to negotiate with Polyakov and his companies, (A00109-A00110; A00514-A00515). Both complaints assert that investors demanded that Markusic file for voluntary bankruptcy but such requests were ignored, (A00515-A00110; A00516), and then describe the auctions (A00110-A00111; A00516-A00517) and name change (A00111; A00517). Both complaints conclude with a description of the operations of New Firefly. (A00112; A00517-A00518.)

Moreover, the Old Firefly Investors seek the same damages in both lawsuits. (*See* A00106-A00110; A00112-A00113; A00115-A00117; A00519-A00520; A00522-A00523.) Indeed, the Old Firefly Investors' *only* alleged damages arise from the events in late 2016 that resulted in Old Firefly's bankruptcy and the sale of its assets to New Firefly to satisfy Old Firefly's secured debt. (*See* A00106-A00110; A00112-A00113; A00115-A00117; A00519-A00520; A00522-A00523.)

In summary, the two complaints manifestly derive from a "common nucleus of operative facts." *See Goureau*, 2021 WL 1197531, at *8. Both allege facts across the same time period, and all of the claims in both suits are based upon Markusic's alleged self-interest in the same events at issue in both lawsuits.

Given the uniformity of the complaints, the June 16 Order and November 2 Order subject Plaintiffs to duplicitous litigation and risk inconsistent findings and rulings, which is independent of whether Plaintiffs filed this lawsuit. In other words, had Plaintiffs not filed this action, and Defendants filed first in California and then filed their fiduciary claims in Delaware, the outcome would be the same. The two complaints would still arise from the same nucleus of operative facts. In that case, Defendants would be similarly required to assert all their claims in the only forum that could hear all the claims at issue: Delaware. Plaintiffs did not deprive Defendants of the "ability to decide the appropriate forum in which to bring their claims." The outcome in this case is not reliant on Plaintiffs' decision to file a lawsuit in Delaware. On the contrary, it derives from the Old Firefly Investors' decision to improperly split their claims between two jurisdictions. It may have been Defendants' desire to split their claims between Delaware and California and take two bites at the apple, but that is precisely the evil sought to be avoided by the rule against claim splitting. The Court of Chancery's decision wrongly rewards the Old Firefly Investors for these abusive tactics.

2. Failure To Comply With The Rule Regarding Compulsory Counterclaims

The Court of Chancery erred when it failed to enforce the rule regarding compulsory counterclaims. Court of Chancery Rule 13(a) requires that:

> "A pleading shall state as a counterclaim any claim, *which at the time of serving the pleading* the pleader has against any opposing party, *if it arises out-of-the-transaction or occurrence* that is the subject matter of the opposing party's claim … ."

Ct. Ch. R. 13(a) (emphasis added).

The "same transaction or occurrence" standard is interpreted liberally. *Mother African Union First Colored Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 1995 WL 420003, at *8 (Del. Ch. July 13, 1995). To determine whether a claim is a compulsory counterclaim, Delaware courts consider "whether there is a 'logical relationship' between the original action and the subsequent claim." *Id.* Whether two claims bear a logical relationship to one another may be informed by considerations such as whether they share issues of fact and law in common or would involve presentation of the same evidence. *Pontone v. Milso Indus. Corp.*, 2014 WL 2439973, at *9 (Del. Ch. May 29, 2014) (citing *Mott v. State*, 49 A.3d 1186, 1188-89 & n.8 (Del. 2012)).

The Fraud Claims, the Fraudulent Inducement Claim, the Negligent Misrepresentation Claim, and the Unfair Competition Claims are compulsory

counterclaims because they arise from the same "transaction or occurrence" as the Declarations and the Counterclaims—*i.e.*, Markusic's alleged discussions with Polyakov, Watt, and Noosphere and the resulting migration of Old Firefly's assets to New Firefly.

Counterclaim I was based on Markusic's alleged discussions with Polyakov, Watt, and Noosphere and the resulting transaction. (A00401.) Counterclaim II was based on Polyakov, Watt, Noosphere, and New Firefly's aiding and abetting of Counterclaim I. (A00401-A00402.) The Fraud Claims were likewise based on the same discussions and resulting transaction. (A00519-A00521.) Under Delaware's "same transaction" standard, therefore, the Fraud Claims and Unfair Competition Claims should have been brought with the Delaware Counterclaims.

The Fraudulent Inducement Claim is a compulsory counterclaim as well. The Old Firefly Investors appear to argue that Markusic made misrepresentations in 2013 and 2014 in order to induce theminto investing in Old Firefly and that he betrayed those representations years later by his discussions with Polyakov, Watt, and Noosphere and the resulting transaction. (A00505-A00506; A00501-A00512.) Specifically, that he had represented that he "would never do anything to compete with or otherwise harm [Old] Firefly or its shareholders and would never work with anyone else to compete with [Old] Firefly," (A00506), but did work against Old Firefly's interests when he "switched his focus" and "schemed" with Noosphere and

Polyakov. (A00501-A00512.) This is the same supposed scheme and resulting transaction that served as the basis for the Fiduciary Claims, making the Fraudulent Inducement Claim a compulsory counterclaim under Delaware law.

The Old Firefly Investor's Noosphere TI Claim and Negligent Misrepresentation Claim are also compulsory counterclaims. The Noosphere TI Claim is based on the allegation that "Plaintiffs had a prospective business relationship with Noosphere and the New Firefly … including (among other things) an offer for stock in the New Firefly from Noosphere." (A00523.) The Negligent Representation Claim was based on Markusic's representations "regarding his commitment to [the Old Firefly Investors] in negotiating a stock option warrant on their behalf" and the allegation that Markusic "as CEO of Old Firefly concealed the material fact that Polyakov and Noosphere would invest large amounts into … New Firefly." (A00522.) Plaintiffs included an offer of warrants in New Firefly in the fact section of the Delaware Complaint. (A00032.) The discussions between Noosphere and Old Firefly form the basis for the Counterclaims. Under the "same transaction" standard, the Noosphere TI Claim and the Negligent Misrepresentation Claim as pleaded in the California Complaint are compulsory counterclaims that should have been brought in Delaware.

The California Complaint was filed *after* the Delaware action had "commenced," and thus, under the plain language of Rule 13(a), the claims asserted

by the Old Firefly Investors in California were required to be brought as "compulsory" counterclaims in the Delaware action.[3] Nonetheless, the Order of the Court of Chancery failed to properly apply the compulsory counterclaim rule as necessitated by Plaintiffs' pending requests for declaratory relief. This is an important dispute to resolve via declaratory judgment because Defendants threatened to—and then did—assert compulsory counterclaims in duplicative serial litigation in California. Doing so now will save both sides (and the California court) from engaging in expensive litigation over issues that have already been determined.

Accordingly, the Court should reverse the rulings of the Court of Chancery because they ignored the rule against claim splitting and failed to apply the rule related to compulsory counterclaims.

[3] If Defendants attempted to assert the Fraud Claims, the Unfair Competition Claims, the Negligent Misrepresentation Claim, or the Noosphere TI Claim in Delaware now, they would be barred by Rule 13(a).

II. THE COURT OF CHANCERY MISAPPLIED DELAWARE'S DECLARATORY JUDGMENT ACT

A. Question Presented

Did the Court of Chancery err when it declined to rule on Plaintiffs' requests for declaratory judgment given that the court had previously dismissed the affirmative, non-declaratory claims of the opposing parties? (Preserved at A00432-A00440; A00663-A00665.)

B. Standard of Review

This Court reviews questions of justiciability *de novo*. *XI Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1216 (Del. 2014) ("It is well settled that a trial court has discretion in determining whether to entertain a declaratory judgment action. The court may not exercise that discretion, however, unless the action presents an actual controversy. We review questions of justiciability *de novo*." (internal quotations and citations omitted)).

C. Merits of Argument

The Court of Chancery incorrectly interpreted Delaware's Declaratory Judgment Act when it held that the Declarations did not constitute active controversies. To reach that conclusion, the Court of Chancery, among other things, incorrectly applied the *Burris* factors and then failed to make a practical evaluation of the circumstances presented. There is no other remedy that is more effective or

efficient to resolve the underlying dispute than declaratory judgment, and thus the Declarations serve a useful purpose.

1. Delaware's Declaratory Judgment Act

"The basic purpose of the Declaratory Judgment Act is to enable the courts to adjudicate a controversy prior to the time when a remedy is traditionally available and, thus, to advance to [a] stage at which a matter is traditionally justiciable." *Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*, 267 A.2d 586, 591-92 (Del. 1970). It is a tool to "promote preventive justice," *Stabler v. Ramsay*, 88 A.2d 546, 551 (Del. 1952) *adhered to on reh'g*, 89 A.2d 544 (Del. 1952), not "a means of eliciting advisory opinions from the courts." *Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. 1964).

It is well-settled that Delaware courts have discretion to grant or deny declaratory judgment. *XI Specialty*, 93 A.3d at 1216; *Delaware Bldg. & Constr. Trades Council, AFL-CIO v. Univ. of Delaware*, 2015 WL 884058, at *2 (Del. Super. Feb. 20, 2015). The court can exercise that discretion so long as the underlying matter presents an "actual controversy." *See Gannett Co., Inc. v. Bd. of Managers of the Delaware Criminal Justice Info. Sys.*, 840 A.2d 1232, 1237 (Del. 2003); *XI Specialty*, 93 A.3d at 1216-17. "[T]he term 'actual controversy' should be liberally interpreted to give wide scope to the provisions of the [Declaratory

Judgments Act] within the purposes thereof." *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662 (Del. 1973).

To determine whether an actual controversy exists, the following elements must be satisfied: (1) it must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; and (4) the issue involved in the controversy must be ripe for judicial determination. *XI Specialty*, 93 A.3d at 1217 (quoting *Stroud v. Milliken Enters., Inc.,* 552 A.2d 476, 479-80 (Del. 1989)).

a. The Declarations Are Not "Overripe"

The Court of Chancery opined that certain Declarations were "overripe," relying upon the Superior Court's ruling in *Burris v. Cross*, 583 A.2d 1364 (Del. Super. 1990). The Court of Chancery erred by misapplying the *Burris* factors and, in so doing, reaching a conclusion that promotes claim splitting between multiple jurisdictions.

As an initial matter, the Old Firefly Investors never made an argument under *Burris* or briefed any such issue before the Court of Chancery, and *Burris* is not controlling precedent. Further, the *Burris* court's entire discussion of "overripeness" and its alternative holding that the case would be "inappropriate for declaratory

judgment even if th[e] Court had subject matter jurisdiction over it" is inapplicable dicta. *See E.I. DuPont de Nemours and Co. v. Huttig Building Prods.*, 2002 WL 32072447, at *4 (Del. Super. Ct. May 28, 2002) ("[D]ismissal of the declaratory action [in *Burris*] was granted in large part due to the lack of subject matter jurisdiction.").

The *Burris* court's "overripeness" discussion centered on the interests of judicial economy and the availability of a more fulsome non-declaratory relief in a more appropriate venue. 583 A.2d 1364, at 1372-76; *see also DuPont*, 2002 WL 32072447, at *4. It then identified seven factors to determine whether a matter is "overripe" for adjudication:

> (1) Whether the defendant is truly an unwilling litigant, thus necessitating declaratory action, (2) What form of relief is truly being sought by the plaintiff and whether that relief, if not solely a declaration of rights, would require resort to another court for supplemental relief. If so, whether both the rights and relief could be attained in a single non-declaratory action already available, (3) Whether another remedy exists and whether it would be more effective or efficient and, thus, whether declaratory judgment would serve a useful purpose, (4) Whether another action is pending, instituted either before or after the instant action, at the time of consideration of the Motion to Dismiss, and whether plaintiff would be able to raise all claims and defenses available in the instant action, as part of the pending action, (5) Whether the instant action has truly been instituted to seek a declaration of rights or merely for tactical or other procedural advantage, (6) Whether the instant action was filed in apparent anticipation of other pending proceedings, (7) Whether

> plaintiff will suffer any prejudice if the instant action is dismissed.

Burris, 583 A.2d 1364 at 1372-73 (formatting altered).

Here, the Court of Chancery did not conduct an analysis of those factors "to reach a conclusion similar to that of the Superior Court in *Burris*," but incorrectly concluded that "[w]hen non-declaratory claims are pending in another court, the declaratory version of those same claims are overripe and risk the unnecessary burdening of the court's resources and the possibility of inconsistent factual and legal findings between the courts." (Ex. A, pp. 9-10.)

There are several flaws in this holding. First, there is no more appropriate forum than Delaware. As the California court determined, this case could only be resolved in full in Delaware—making it the more appropriate forum. Indeed, that is precisely why the Old Firefly Investors should have asserted <u>*all*</u> their claims here when they asserted their Counterclaims. Second, the Court of Chancery erroneously held, without analysis, that there was a risk of unnecessarily burdening its resources and inconsistent factual and legal findings between courts. But the California court had already <u>*stayed*</u> the California action in favor of the Delaware proceeding and repeatedly declined to lift it, instead choosing to proceed no further. There is <u>*no chance*</u> of inconsistent rulings. Given that Delaware is the only forum where all the claims at issue could be resolved and that this dispute is, at its core, about the

governance of a Delaware corporation, it is manifestly appropriate for a Delaware court to hear and resolve the requests for relief at issue in this case.

Moreover, an examination of the seven factors that the *Burris* court selected (without citation to authority) under the unique facts presented in that case and a comparison to the relevant facts in this case confirm *Burris*'s inapplicability.

FACTOR 1: It is evident that Defendants were unwilling to adhere to the rule against claim splitting. That is why they filed their Counterclaims in Delaware and their other claims in California. Unlike in *Burris,* there was no race to the courthouse here.

In *Burris*, the court determined that the defendant was a willing litigant, militating against the need for declaratory relief, because he filed suit in the Court of Chancery "only four days after" the plaintiff's action was filed in the Superior Court. *Burris*, 583 A.2d 1364, at 1373. In *DuPont*, which declined to follow *Burris*, the court determined that declaratory relief was appropriate where the defendant had not brought suit "until a month after" the plaintiff filed its claim for declaratory relief. 2002 WL 32072447, at *4. Here, Plaintiffs filed the Complaint in the Court of Chancery on September 19, 2019. Defendants then filed the California Complaint on October 3, 2019. The California Complaint is different than the one attached to the June 2019 letter, which included fiduciary claims. These facts demonstrate that

Defendants drafted the California Complaint only after Plaintiffs filed their Complaint in the Court of Chancery.

Further, the Court of Chancery has made express holdings concerning the Declaratory Judgment Act that appear to overrule this *Burris* factor. For example, the Court held that "under Delaware law, the willingness of the parties to litigate is immaterial in determining whether a controversy is ripe." *K&K Screw Prods., L.L.C. v. Emerick Cap. Invs., Inc.*, 2011 WL 3505354, at *9 (Del. Ch. Aug. 9, 2011) (internal quotations omitted); *see Stroud v. Milliken Enterprises, Inc.*, 552 A.2d 476, 480 (Del. 1989) ("[I]n weighing whether the time is ripe for judicial determination, the willingness of the parties to litigate is immaterial."); *Jim Walter Corp. v. Allen*, 1990 WL 3899, at *2 (Del. Ch. Jan. 12, 1990) ("[I]t is established that the willingness of a declaratory defendant to adjudicate the claim, if he has an interest in the matter that is actual and adverse, is irrelevant.").

Thus, the Court of Chancery should have weighed this factor towards Plaintiffs—if it was proper to consider it at all.

FACTOR 2: Unlike in *Burris*, Plaintiffs are not seeking injunctive or any other form of supplemental or extraordinary relief. Rather, Plaintiffs have asserted a request for a declaration of the parties' rights, which would not "require resort to another court for supplemental relief" as was the case in *Burris*. 583 A.2d 1364, at 1372.

Therefore, this factor weighs in favor of Plaintiffs.

FACTOR 3: Consistent with the previous factor, the Court of Chancery provides the most effective and efficient forum for the current disputes to be resolved because the Court of Chancery is the *only* court that could resolve every claim that is to be litigated between the parties. Indeed, there is no alternative proceeding currently pending (or otherwise) that will provide a full, effective, and efficient remedy of the claims between the parties. The Court of Chancery is the only court that the claims asserted by the parties can be resolved. And, the Court of Chancery has the expertise and ability to resolve this case in a more expeditious manner than the California court given that the Court of Chancery has already resolved the merits of some of the issues in its order dismissing the Counterclaims (and the California court has stayed the proceedings).

The fact that the only appropriate forum for resolution of all the parties' claims is in the Court of Chancery means that this factor (as well as the second factor) overwhelmingly supports a conclusion that the matter is not overripe.

FACTOR 4: For the reasons discussed above, the California court is an improper forum to resolve the parties' claims. Further, the California court is not in an advanced procedural posture. Indeed, no proceedings have taken place to date. Given the proceedings in the Court of Chancery to date, including the rulings made

in its August 18 Order, it would be a waste of the California court's judicial resources to duplicate work already completed here.

Had the Court of Chancery evaluated this factor, it would have held that it favored Plaintiffs.

FACTOR 5: Any claim that Plaintiffs brought this suit for a tactical or procedural advantage is unfounded. Plaintiffs filed their claim in the Court of Chancery because Defendants threatened to split their claims between two jurisdictions, even though both sets of claims arose from the same nucleus of facts and circumstances. (A00025; A00036; A00066; A00085.) The uncontroverted evidence before the Court establishes that it was *the Old Firefly Investors* that sought to use procedural gamesmanship to unfairly burden Plaintiffs. Any assertion that the Declarations were a means to achieve tactical advantage is manifestly wrong.

Again, the factor leans towards Plaintiffs.

FACTOR 6: Consistent with the above factor, Plaintiffs did not institute the action in the Court of Chancery in a race to the courthouse. Rather, Plaintiffs filed this action to protect their rights under a valid contract governed by Delaware law, which required causes of action related to breach of fiduciary duty to be brought in the Court of Chancery.

To the extent it was proper to weigh this factor, it would be neutral or slightly favor Plaintiffs.

FACTOR 7: As noted above, Plaintiffs have been prejudiced by the Court of Chancery's failure to act in accordance with its prior ruling on the Counterclaims. Rather, the Court of Chancery declined to enforce its own rulings on the merits, leaving the application of those rulings to another court that is unfamiliar with the facts and issues presented between the parties. The June 16 Order of the Court of Chancery has forced Defendants into "duplicative litigation in multiple jurisdictions based on the same set of operative facts."

This factor overwhelmingly leans towards Plaintiffs.

In sum, the Court of Chancery's reliance on *Burris* to determine that certain Declarations are "overripe" is misplaced. *Burris* is factually and procedurally distinguishable from this case, and its novel "overripeness" analysis is dicta and not supported by any binding authority from this Court. More fundamentally, it has no application here. As such, the Court of Chancery erred in relying on *Burris* and in declining to grant Plaintiffs' requests for declaratory relief.

b. The Declarations Are Active Controversies

The Court of Chancery held that certain Declarations do not speak to an active controversy because they are not "asserted against one who has an interest in contesting the claim" and do not address a dispute "between parties whose interests are real and adverse." Here, Plaintiffs were forced to bring certain requests for declaratory relief before the Court of Chancery because, among other reasons, the

Old Firefly Investors lack standing to bring any fiduciary duty claims. The Court of Chancery agreed with Plaintiffs that such claims are derivative in nature and belong to the bankruptcy estate only. (A00402-A00406.) The Court of Chancery, however, denied certain Declarations that request the application of the same law.

It is well established that a court's previous decision in a case will form the law of the case for the issue decided. *State v. Wright*, 131 A.3d 310, 321 (Del. 2016) (citing *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 894-95 (Del. 2015) ("Under the 'law of the case doctrine,' a court's legal ruling at an earlier stage of proceedings controls later stages of those proceedings, provided the facts underlying the ruling do not change.")). Here, the factual basis for the Court of Chancery's ruling did not change: a forum selection clause mandates that Defendants bring any derivative or fiduciary claims in the Court of Chancery; Defendants consistently complain that Markusic approved transactions that depleted the economic value of Old Firefly for Markusic's own benefit; and Defendants do not allege any dilution or loss of voting rights. The "law of the case" doctrine therefore required the Court of Chancery to declare that Defendants cannot prevail on claims against Plaintiffs for breach of fiduciary duty and aiding and abetting same.

At the time that the Complaint in the Delaware action was filed, there was an actual controversy regarding the Old Firefly Investors' allegations of breach of fiduciary duty and aiding and abetting against Plaintiffs. *Rollins Int'l, Inc.*, 303 A.2d at 663 ("We are of the opinion that an actual controversy sufficient to support a declaratory judgment action is shown to have existed at the time of the filing of the initial complaint … and that the intervening dismissal of the initial cause of action … did not end the basic controversy.").

In this case, the Court of Chancery resolved the controversy as to some, although not all, of the issues raised by Plaintiffs' requests for declaratory relief in response to a motion that Plaintiffs brought. Namely, the Court of Chancery took jurisdiction in a way that impacts the merits of the underlying Declarations when it dismissed the Counterclaims, but then it held that it could not rule on the Declarations. The Court curiously determined that there was no longer an active controversy because it had ruled in favor of Plaintiffs, on a motion brought by Plaintiffs, as to the very issues that gave rise to this litigation.

For obvious reasons, it cannot be the law in Delaware that a court somehow divests itself of an actual controversy when it resolves the issue in dispute in the litigation in favor of the party that brought the request for declaratory relief. That does not constitute the lack of an actual controversy—on the contrary, it *decides* the controversy in favor of the plaintiff. At that point, an affirmative ruling on the

request for declaratory relief is appropriate. Here, the Court of Chancery determined the issue underlying certain of Plaintiffs' requests for declaratory relief in favor of Plaintiffs, and it should have proceeded to issue appropriate final relief based upon that ruling.

Finally, while the Motion to Dismiss resolved *some* of the issues in the case, it did not resolve *all* of them. That is why Plaintiffs' Motion on the Pleadings sought *partial* judgment. There were other live factual controversies the Court of Chancery should have proceeded to hear and determine. It was improper for the Court of Chancery to dismiss other active disputes.

CONCLUSION

Respectfully, the Court of Chancery should be reversed and this case should be remanded for further proceedings consistent with this Court's decision and judgment.

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