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IN THE SUPREME COURT THE STATEOF DELAWARE

DR. THOMAS MARKUSIC, DR. MAXYM POLYAKOV, NOOSPHERE VENTURE PARTNERS LP, and FIREFLY AEROSPACE, INC.,

Plaintiffs-Below, Appellants,

vs.

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.

No. 383, 2021

On Appeal from the Court Below: Court of Chancery

C.A. No. 2019-0753-KSJM

APPELLEES' ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

Appellants Dr. Thomas Markusic ("Markusic"),[1] Dr. Maxym Polyakov ("Polyakov"), Noosphere Venture Partners LP ("Noosphere"), and Firefly Aerospace, Inc.'s ("New Firefly" and collectively, "Appellants") disingenuously raced to the Delaware Court of Chancery after repeatedly asking Appellees Michael Blum ("Blum"), Patrick Joseph King ("King"), Lauren McCollum ("McCollum"), Steven Begleiter ("Begleiter"), Green Desert N.V. ("Green Desert"), Swing Investments BVBA ("Swing Investments"), Bright Success Capital Ltd. ("Bright Success Capital"), and Wunderkind Space Ltd. ("Wunderkind" and collectively "Appellees" or the "Old Firefly Investors") to defer filing their complaint in California. Appellants' Complaint in the Court of Chancery (the "Delaware Complaint") sought various declarations (*see* Footnotes 2 through 6, *infra*) relating to claims that Appellees chose to pursue in California, and should be decided by the courts in that forum.

The Court of Chancery, Chancellor Kathaleen St. J. McCormick presiding, denied Appellants' requested declarations in an Order dated June 16, 2021 (the "MJP Order"). (Op. Br. Ex. A.) Specifically, the Court of Chancery held that Appellants' Requested Declarations were overly broad, overripe, best determined by the

[1] The CEO of both Old and New Firefly.

California court, and/or did not speak to an active controversy, and that the rule against claim splitting and compulsory counterclaim rule are inapplicable to this case.

This dispute arises from Appellants' efforts to fraudulently and improperly render worthless Appellees' investment in a successful, promising aerospace business. Those efforts were Appellants' scheme to betray the trust of the original co-founders and investors by cutting them out of the company and fraudulently robbing Appellees of their investments.

On June 27, 2019, Appellees sent Appellants a letter enclosing a draft complaint to be filed in the California Superior Court. Appellees engaged in good faith negotiations with Appellants to resolve their dispute, but Appellants duped Appellees by rushing into the Delaware Court of Chancery seeking declaratory relief regarding Appellees' California claims after requesting that Appellees defer filing the California Action. Appellants' actions undermined Appellees'—the true plaintiffs—choice of forum and sought an end-run around Appellees' affirmative claims that Appellants knew Appellees planned to file in California.

Appellants moved for partial judgment on the pleadings (the "MJP"), relying predominantly on the Court of Chancery's August 18, 2020 Opinion and Order (the "MTD Order") dismissing Appellees' fiduciary duty counterclaims (the "Counterclaims"). Appellants assert that the Court of Chancery should enter

declaratory judgment in its favor, thus thwarting Appellees' right to pursue their claims which were properly and timely brought in California.

The Court of Chancery denied Appellants' MJP, concluding that:

(i) The First Declaration[2] is 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;

(ii) The Second Declaration[3] does not speak to an active controversy;

(iii) The Third Declaration[4] fails because the rule against claim splitting is inapplicable to the California Complaint, Appellees currently have outstanding claims only in California, and, if Appellants face prejudice from proceeding in two separate courts, it is because they filed preemptively and thus any prejudice is of their own making; and

(iv) The Fourth Declaration[5] fails for the same reasons as the First Declaration and Second Declaration and because it does not meet the four prerequisites for an active controversy.

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[2] "The First Declaration" shall mean "[Appellees] 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." (A00046.)

[3] "The Second Declaration" shall mean "Dr. Polyakov, Noosphere, and . . . New Firefly could not have aiding and abetting liability because no underlying breach of fiduciary duty occurred, and because their sole involvement in the relevant events involved arm's-length negotiations without any reason to believe that Dr. Markusic was breaching his fiduciary duties." (*Id*.)

[4] "The Third Declaration" shall mean "[Appellees] cannot split claims based on identical facts between two different courts and jurisdictions." (*Id*.)

[5] "The Fourth Declaration" shall mean "[Appellees] cannot prevail on claims against [Appellants] for breach of fiduciary duty, aiding and abetting same, fraudulent

While Appellants' MJP and the MJP Order did not specifically address Appellants' other requested declarations,[6] the MJP Order's holding effectively disposed of those, as well. Accordingly, the Parties stipulated to, and, on November 2, 2021, the Court of Chancery entered, a Final Order (the "Final Order"). (Op. Br. Ex. B.)

Appellants now assert that the Court of Chancery erred in denying the MJP because the rule against claim splitting and the rule regarding compulsory counterclaims apply and the Court of Chancery misapplied Delaware's Declaratory Judgment Act. However, Appellants erroneously accuse Appellees of forum

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inducement, tortious interference with prospective economic advantage, or statutory or common law unfair competition." (A00046.)

[6] "The Fifth Declaration" shall mean "Any claims against Dr. Markusic would fail due to the exculpatory provision in Old Firefly's Certificate of Incorporation, because Dr. Markusic's actions are protected by the business judgment rule, and because, even if they were not, his actions were consistent with his fiduciary duties to Old Firefly, which during the time in question covered its creditors as well as its stockholders." (*Id*.)

"The Sixth Declaration" shall mean "Dr. Markusic was not Old Firefly's controlling stockholder and consequently did not owe any fiduciary duty to its other stockholders in his capacity as a stockholder." (*Id*.)

"The Seventh Declaration" shall mean "As stockholders of an insolvent entity, [Appellees] cannot establish damages or causation with respect to any of their claims." (*Id*.)

The Fifth, Sixth, and Seventh Declarations are referred to herein as the "Remaining Declarations," and the First through Seventh Declarations are referred to collectively herein as the "Requested Declarations."

shopping even though the Court of Chancery correctly held that "[Appellants] filed [in Delaware] preemptively—if [Appellants] now face prejudice as a result of proceeding in two jurisdictions, it is of their own making." (MJP Order ¶ 35.) Appellants' other arguments in favor of vacateur of the MJP Order and Final Order are similarly meritless. The Court of Chancery did not err in its MJP Order, and this Court should affirm the MJP Order and Final Order.

SUMMARY OF ARGUMENT

1. The Court of Chancery correctly denied Appellants' MJP, holding that the rule against claim splitting and the compulsory counterclaim rule do not apply. Appellants attempt to rewrite history before this Court, accusing Appellees of forum shopping. In fact, however, it was Appellants who engaged in bad faith jockeying and forum shopping, by requesting that Appellees defer filing their complaint so that Appellants could preempt Appellees' California Complaint and their right to choose the forum. Appellants, *not* Appellees, caused claims to be split between Delaware and California. In any event, the Forum Selection Clause here only requires that fiduciary duty claims be brought in Delaware. Under these circumstances, the Court of Chancery correctly determined that the rule against claim splitting and the compulsory counterclaim rule do not apply.

2. The Court of Chancery correctly applied Delaware's Declaratory Judgment Act. The California Superior Court is a more appropriate forum and there is a strong possibility of inconsistent rulings and prejudice to Appellees. Specifically, (i) California has a close connection to the Parties and the non-fiduciary claims, where Delaware has none, (ii) the Forum Selection Clause permits claim splitting, and (iii) Appellees' non-fiduciary claims should proceed in California to preserve their Constitutional right to a jury trial. Additionally, the Court of Chancery

properly considered *Burris v. Cross* as binding precedent and the application of the *Burris* factors here supports denial of the Requested Declarations.

STATEMENT OF FACTS[7]

A. Old Firefly's Founding And Initial Investments

In late 2013, Markusic, who had significant expertise and industry knowledge, approached two potential investors, Blum and King, with a business plan for "Firefly," his private aerospace company that would develop commercial space launch vehicles for transporting payloads to orbit. (B8.) In or around January of 2014, Blum and King agreed to invest in Markusic's business plan and the three parties co-founded Old Firefly with Markusic as CEO. (*Id*.)

Based on representations by Markusic, Old Firefly was able to secure investments from McCollum, Begleiter, Green Desert, Wunderkind, Swing Investment, and Bright Success Capital. (B9.) Together, Appellees represented approximately 41.4% of the capital stock of Old Firefly. (*Id*.) At the time of each investment, Appellees relied upon Markusic's continual representations that he would be fully committed to managing and operating Old Firefly, would never compete with or otherwise harm Old Firefly or its shareholders, and would never work with anyone else to compete with Old Firefly. (*Id*.)

From 2014 through 2016, Old Firefly performed extremely well and its internal valuation increased from $2.2 million to $110 million. (*Id*.)

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[7] Citations to Appellants' Appendix shall be referred to herein as "A__" and citations herein to Appellees' Appendix shall be referred to herein as "B__."

B. Polyakov Approaches Markusic To Invest

In the fall of 2016, a wealthy Ukrainian businessman, Polyakov, who was the CEO of Noosphere at the time, approached Markusic about investing in Old Firefly. (B11; A00028.)

In November of 2016, Polyakov, Mark Watt ("Watt"),[8] and Noosphere presented a proposed term sheet for convertible note financing to Old Firefly's investor-shareholders. (B15.) The financing substantially undervalued the investments that Appellees had made in Old Firefly.[9] (*Id*.) Appellees, therefore, raised concerns with Markusic, who urged them not to accept the lowball offer. (*Id*.)

C. Appellants Scheme To Create New Firefly And Markusic Fraudulently Prevents Appellees From Participating In New Firefly

By December of 2016, Noosphere had switched its focus from investing in Old Firefly to acquiring its secured debt instead. (B13.) Although Markusic emailed Polyakov and Noosphere on December 6, 2016 to inform them that the parties had reached an impasse on negotiations, Markusic actually continued negotiations in secret. (*Id*.) On January 11, 2017, Polyakov, Watt, and Noosphere proposed to acquire Old Firefly's senior secured debt. (*Id*.) Markusic did not explain the details

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[8] Watt is not a party to this action.

[9] The financing would have resulted in the existing shareholders retaining only 10 percent of the company, with a 20 percent stock option plan being put in place. (*Id*.)

of his discussions with Polyakov's team to Appellees, but actively supported Watt and Polyakov's proposal. (*Id*.)

On January 27, 2017, Markusic falsely told Appellees that he would be taking a trip to the Ukraine, paid for by Noosphere and Polyakov, to determine firsthand the capabilities of Polyakov's companies and to solicit further strategic investments from Polyakov that would purportedly benefit Old Firefly. (B14; A00108.) In actuality, while in the Ukraine, Markusic, Watt, and Polyakov discussed a transaction that would benefit Markusic and Polyakov (and his companies) and cut out Appellees. (*Id*.) Under this plan, Markusic (ostensibly on behalf of Old Firefly) would agree to Noosphere's purchase of Old Firefly's senior debt. (*Id*.) Unbeknownst to Appellees, Polyakov then planned to foreclose on Old Firefly's assets with the goal of scuttling it and placing its assets with a new company he had founded.[10] Markusic was then to receive a position, salary, and other indirect compensation through the new entity and his relationship with Polyakov. (B14-15; A00108.)

Nevertheless, on or around February 20, 2017, Markusic expressed to Appellees that the deal proposed by Noosphere was still unacceptable. (B16.)

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[10] Polyakov co-founded a company named EOS Launcher, Inc. ("EOS") just a week before Markusic met with Polyakov in the Ukraine. (B14; A00108-109.) Polyakov and Markusic would later use this shell company to create New Firefly. (B14.)

Markusic agreed that he would discontinue discussions with Polyakov, Watt, and Noosphere should they fail to address Appellees' needs, that he would continue to look for other potential investors during these negotiations, and that he agreed that no material decisions would be made without first securing the consent of a majority of Old Firefly's shareholders. (*Id*.) Behind the scenes, however, Markusic knew that Polyakov was planning to invest at least $75 million into the New Firefly, but purposely avoided disclosing this fact to Appellees as part of his plan with Polyakov. (*Id*.)

On February 10, 2017, Noosphere purchased a secured note previously held by FITA, LLC. (A00109.) After repeated verbal warnings, King again informed Markusic that he had a conflict of interest in continuing to negotiate with Polyakov and his companies, and that Markusic should recuse himself from any further negotiations. (B17-18.) Despite his assurances to the contrary, Markusic unilaterally agreed to Noosphere's purchase of millions of additional debt owed by Old Firefly, without first obtaining the consent of Old Firefly's shareholders. (B17-18, B20.) Shortly thereafter, Noosphere foreclosed on the debt it had acquired. (*Id*.) By foreclosing on several million dollars in senior secured debt in less than a week, Noosphere was able to deplete Old Firefly's resources and force an asset sale. (*Id*.)

Because Markusic had permitted the various transactions that placed Old Firefly's future into the hands of EOS, Appellees demanded that Markusic file for

voluntary bankruptcy so that a bankruptcy trustee could manage the sale of Old Firefly's assets. (A00110.) Markusic ignored these requests. Instead, knowing that a period of ten days would be required to conduct a shareholder vote regarding the proposed bankruptcy proceeding, Markusic delayed soliciting shareholder input until the foreclosure was just days away – effectively nullifying the shareholder vote and facilitating a selective foreclosure. (*Id*.) With almost no notice, Appellants announced that "virtually all" of the assets of Old Firefly would be sold at an auction on March 16, 2017. (A00110-111.) The sham auction was not widely publicized and imposed terms that disincentivized potential buyers from participating. (A00111.)

At auction, EOS purchased all assets up for sale, including Old Firefly's intellectual property. (*Id*.) In the face of this gutting of the company, Old Firefly was forced to file for Chapter 7 bankruptcy. (*Id*.) Polyakov and his companies purchased the few remaining assets that Old Firefly owned, and Old Firefly went out of business. (*Id*.)

On March 24, 2017, EOS changed its name to Firefly Aerospace, Inc. (*i.e.*, New Firefly) and appointed Markusic as CEO. (B20.) New Firefly registered to do business in Texas on or around April 3, 2017. (*Id*.) New Firefly has continued on as a successful venture with hundreds of employees in Cedar Park, Texas, at the same location as Old Firefly.

D. Appellees' Good Faith Negotiations And Appellants' Bad Faith Race To The Delaware Courts

On June 27, 2019, California counsel for Appellees sent to counsel for Appellants a letter enclosing a draft complaint asserting direct claims relating to the issues in dispute between the Parties. (A000024-25.) Appellees shared the draft complaint with the goal of opening a constructive dialogue about the dispute and a potential pre-filing settlement. (B38-39.)

The Parties negotiated Appellees' claims for the next several months, during which time Appellants requested numerous times that Appellees defer filing their complaint. (B39) Appellees, acting in good faith and in an effort to resolve the claims, agreed. (*Id*.) On August 30, 2019, Appellants' counsel requested an in-person meeting of the principals to discuss the merits and a way to resolve the claims. Based on this, Appellants, again, requested that Appellees defer filing. In reliance on Appellants' representations, Appellees, again, agreed. (*Id*.)

At the in-person meeting on September 18, 2019, Appellants' counsel informed Appellees, for the first time, that they were in the process of filing this action that same day. (*Id*.) On November 22, 2019, Appellees answered the Delaware Complaint and asserted the Counterclaims against Appellants to preserve their rights. (A00015; A00055-120.) On February 7, 2020, Appellants moved to dismiss the Counterclaims (the "Motion to Dismiss"). (A00014; A00121-123; A00131-271.)

Meanwhile, on October 3, 2019, Appellees filed in the Superior Court of the State of California the complaint that they had shown Appellants in June 2019, which asserted claims against Markusic, Polyakov, Noosphere, New Firefly, and Mark Watt (the "California Action"). (A00543.) On December 5, 2019, Appellees filed their First Amended Complaint in California (the "California Complaint"). (B1-30; A00544.) The California Complaint sets forth six causes of action for fraud, aiding and abetting fraud, fraudulent inducement, negligent misrepresentation, tortious interference, and unfair competition. (B22-27; A00544-545.) Appellants moved to dismiss or stay the California Action. (A00545.) On March 3, 2020, the California court denied Appellants' motion to dismiss, but stayed the California Action pending resolution of this action in order "to 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 avoid the possibility of inconsistent rulings. (B54.)

On August 18, 2020, the Court of Chancery issued the MTD Order dismissing the Counterclaims for, *inter alia*, lack of standing. (A00005; A00394-407.)

On November 18, 2020, Appellants filed their MJP pursuant to Court of Chancery Rule 12(c) as to certain of the Requested Declarations, relying predominantly on the MTD Order. (A00005; A00408-533.)

The parties fully briefed Appellants' MJP on March 3, 2021, and the Court of Chancery, Chancellor McCormick presiding, heard oral argument on March 15, 2021. (A00408-768.)

E. The Court Of Chancery's Rulings

On June 16, 2021, the Court of Chancery issued the MJP Order denying Appellants' MJP, 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 (MJP Order ¶¶ 16-25.);
- The Second Declaration did not speak to an active controversy (MJP Order ¶¶ 26-28.);
- The Third Declaration failed because the rule against claim splitting is inapplicable to the California Complaint, Appellees currently have outstanding claims only in California, and, if Appellants face prejudice from proceeding in two separate courts, it is because they filed preemptively and any prejudice is of their own making (MJP Order ¶¶ 29-35.); 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 (MJP Order ¶¶ 36-39).

On September 9, 2021, the Court of Chancery held a status conference with the Parties during which the possibility of a final order without further motion practice was discussed. (A00002; A00769.) The Parties agreed that if the Court of Chancery were to apply its reasoning of the June 16 Order, the court would determine that the Remaining Declarations were moot. Because of this, the Parties stipulated to the Final Order. (Appellants' Ex. B.)

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DENIED APPELLANTS' MJP, HOLDING THAT THE RULE AGAINST CLAIM SPLITTING AND THE RULE REGARDING COMPULSORY COUNTERCLAIMS DID NOT APPLY

A. Question Presented

Whether the Court of Chancery correctly denied Appellants' MJP, holding that the rule against claim splitting and the rule regarding compulsory counterclaims did not apply.

B. Scope Of Review

This Court reviews questions of law de novo. *Bradfield v. Unemployment Ins. Appeal Bd.*, 53 A.3d 301 (Del. 2012); *see also 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)). The Court's scope of review is limited to a review of the contents of the pleadings for whether the court below committed legal error in formulating or applying legal precepts. *See Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993) (citations omitted); *see also W. Coast Opportunity Fund, LLC*, 12 A.3d at 1131.

When ruling on a motion for judgment on the pleadings under Court of Chancery Rule 12(c), "a trial court is required to view the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party." *Juul Labs, Inc. v. Grove*, 238 A.3d 904, 909 (Del. Ch. 2020) (citing *Desert Equities, Inc.*, 624 A.2d at 1205). "[T]he nonmoving party is entitled to the benefit of any inferences that may fairly be drawn from the nonmoving party's pleading." *Warner Commc'ns Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 965 (Del. Ch. 1969), *aff'd*, 567 A.2d 419 (Del. 1989) (TABLE). Appellants' MJP "should not be granted unless it appears to a reasonable certainty that under no set of facts that could be proven under the allegations of the Answer would plaintiffs' claim be defeated." *Id*.

C. Merits Of Argument

The Court of Chancery found that the rule against claim splitting and compulsory counterclaim rule did not apply because these rules exist to combat forum shopping and that it was Appellants, *not* Appellees, who engaged in forum shopping here. (MJP Order ¶¶ 34-35.)

Appellants argue that "[t]he Court of Chancery's Order promotes improper claim splitting because it effectively endorses the actions of [Appellees] for having brought two lawsuits in two different jurisdictions based on nearly identical facts and claims" (Op. Br. at 23.) and "[t]he [California] Claims are compulsory

counterclaims because they arise from the same 'transaction or occurrence' as the [Requested] Declarations and the Counterclaims." (Op. Br. at 30-31.) Recognizing that these rules are designed to inhibit forum shopping, Appellants provide a false account of the Parties' interactions, with which they attempt to mislead this Court into thinking, contrary to fact and the Court of Chancery's findings, that Appellees engaged in forum shopping.

The Court of Chancery found that "it was [Appellants] who defensively chose this court in an effort to deprive [Appellees], who are the natural plaintiffs, of the ability to decide the appropriate forum in which to bring their claims." (MJP Order ¶ 34.) That finding arose from the uncontested facts that the Forum Selection Clause here permitted the splitting of the fiduciary and non-fiduciary claims and Appellees asserted their non-fiduciary claims in a timely manner and in an appropriate forum. Based on this finding, the Court of Chancery correctly held that it would be inequitable to apply the rule against claim splitting and that "[t]he legal bar against claim splitting is not intended to reward this sort of behavior by [Appellants]." (*Id*.)

1. Appellants' Argument Mischaracterizes Facts And Attempts To Rewrite History

As the Court of Chancery summarized, "[Appellants] point to a combination of the Forum Selection Clause, Court of Chancery Rule 13(a), and the rule against claim splitting, which they contend operate in tandem to make Delaware the exclusive forum for all of [Appellees'] claims." (MJP Order ¶ 29 (citing A00166-

A00175).) Specifically, Appellants asserted that "the Forum Selection Clause required [Appellees] to bring any derivative or fiduciary claims in this court; second, Rule 13(a) required [Appellees] to assert any related claims (i.e., direct or non-fiduciary) as compulsory counterclaims in this court in response to the Complaint; and third, the rule against claim splitting precluded [Appellees] from bringing related claims in any other court." (MJP Order ¶ 32.) However, Appellants ignore (1) that the Forum Selection Clause at issue here[11] permits claim splitting and (2) Appellants, *not* Appellees, caused claims to be brought in two separate courts by engaging in forum shopping.

a. The Forum Selection Clause Permits Claim Splitting Here

The rule against claim splitting does not apply here because the Forum Selection Clause required that fiduciary claims be brought in Delaware, but permitted non-fiduciary claims to be brought elsewhere. If Appellants wanted all

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[11] Section E of Article VII of Old Firefly's Amended and Restated Certificate of Incorporation (the "Forum Selection Clause") reads:

> Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for … *any action or proceeding asserting a claim of breach of fiduciary duty* owed by any director or officer of the Corporation to the Corporation or the Corporation's stockholders.

(A00036 (emphasis added).)

claims to be litigated in Delaware, they could have contracted for such an outcome. They did not.

The Delaware courts honor the parties' contractual choice of forum provisions and hold the parties to their promises to litigate separately in the forums freely selected where sophisticated parties have exercised their contractual freedom to so agree. *See PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 2010 WL 2977392, at *5 (Del. Ch. July 29, 2010). The rule against claim splitting does not apply when "[t]he parties have agreed in terms or in effect that the plaintiff may split his claim." Restatement (Second) of Judgments § 26(1)(a) (1982); *see also Zohar II 2005-1, Ltd. v. FSAR Holdings, Inc.*, 2017 WL 5956877, at *35, n. 321 (Del. Ch. Nov. 30, 2017). Likewise, "the need to uphold forum-selection clauses alters the impact of the compulsory-counterclaim rule so that a party need not file a compulsory counterclaim in an improper forum to avoid having the claim barred in a proper forum." 6 FEDERAL PRACTICE AND PROCEDURE § 1412 (3d ed.)

Here, Old Firefly's Certificate of Incorporation requires that fiduciary duty claims be brought in the Court of Chancery, but says nothing of non-fiduciary claims. In other words, the Parties' agreement allowed for the litigation of non-fiduciary claims outside of Delaware. *See* Restatement (Second) of Judgments § 26(1)(a) (1982). If the Appellants wished for *all* claims to be litigated in Delaware, the Forum Selection Clause could have provided for this outcome. It does not.

b. Appellants Caused Claims To Be Brought In Two Separate Courts

Appellants' argument rests upon this Court ignoring that Appellants were the authors of their own supposed misfortune. By engaging in bad faith forum shopping and preemptively racing to the Court of Chancery, it was *Appellants* who caused claims to be brought in two separate courts. The Court of Chancery correctly recognized as much:

> [I]t was [Appellants] who defensively chose this court in an effort to deprive [Appellees], who are the natural plaintiffs, of the ability to decide the appropriate forum in which to bring their claims. [Appellees] reacted by filing their counterclaims in this court after filing the California Complaint and only did so to avoid waiver. The legal bar against claim splitting is not intended to reward this sort of behavior … [and] is therefore inapplicable to the California Complaint.

(MJP Order ¶ 34.)

Appellants, in bad faith and with the intent of depriving Appellees of their choice of forum, persuaded Appellees to delay the filing of the California Action so that Appellants could furtively file in Delaware first. This sort of underhanded, bad faith gamesmanship is disfavored in Delaware. *See, e.g.*, *AG Res. Holdings, LLC v. Terral*, 2021 WL 486831, at *3 (Del. Ch. Feb. 10, 2021) (citing *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Turner Constr. Co.*, 2014 WL 703808, at *1 (Del. Super. Ct. Feb. 17, 2014) and *Williams Gas Supply Co. v. Apache Corp.*, 1991 WL 18091, at *2 (Del. Super. Ct. Feb. 12, 1991)). "The purpose of a declaratory judgment is to provide a technique for early resolution of disputes, not to shift the forum for a

protracted trial." *OTK Assocs., LLC v. Friedman*, 85 A.3d 696, 722 (Del. Ch. 2014) (citations omitted).

The facts show, as elaborated *supra*, that Appellants' criticism that Appellees impermissibly split their claims between California and Delaware is false. Rather, Appellants caused the claims to be split by preemptively filing in Delaware, knowing that Appellees intended to file in California, after tricking Appellees into deferring filing of the California Action.

c. The Forum Selection Clause And Appellants' Bad Faith Pre-Emptive Filing Prevent Appellants From Abusing The Rule Against Claim-Splitting

The Court of Chancery properly recognized that "[t]he only reason claims arising from the same factual circumstances are proceeding in two separate courts is because [Appellants] filed here preemptively—if [Appellants] now face prejudice as a result of proceeding in two jurisdictions, it is of their own making." (MJP Order ¶ 35.)

Neither the rule against claim splitting nor the compulsory counterclaim rule permit a litigant to receive more than what is bargained for in a forum selection provision. *See Restatement (Second) of Judgments* § 26(1)(a) (1982) (providing that rule against claim-splitting does not apply when "[t]he parties have agreed in terms or in effect that the plaintiff may split his claim"); 6 FEDERAL PRACTICE AND PROCEDURE § 1412 (3d ed.) ("[T]he need to uphold forum-selection clauses alters

the impact of the compulsory-counterclaim rule so that a party need not file a compulsory counterclaim in an improper forum to avoid having the claim barred in a proper forum."). Appellants cite no cases in support of their unfounded proposition that a forum-shopping plaintiff can seek refuge in the rule against claim-splitting. Appellants bargained only for fiduciary duty claims to be brought in Delaware, but would have this Court expand the scope of that narrow forum selection clause. This is improper.

Similarly, the "main purpose of the general rule [against claim splitting] . . . is to protect the defendant from being harassed by repetitive actions based on the same claim." *Restatement (Second) of Judgments* § 26 cmt. a. The only basis for Appellants' assertion that they face a "harass[ing] multiplicity of suits" is their own bad faith race to the Court of Chancery seeking anticipatory and preemptive declaratory relief regarding claims that Appellants knew Appellees intended to file in California. Appellants filed in Delaware in an effort to deprive Appellees of their chosen forum. While Appellees filed the Counterclaims in Delaware, they did so only *after* filing the California Complaint and only to avoid waiver. (MJP Order ¶ 34.) In any event, Appellees currently only have claims pending in one forum—California. (MJP Order ¶ 35.) There never has been, and never will be, any duplication of claims between Delaware and California.

For these reasons, the Court of Chancery correctly denied Appellants' MJP, holding that the rule against claim splitting and the rule regarding compulsory counterclaims do not apply.

II. THE COURT OF CHANCERY CORRECTLY APPLIED THE DECLARATORY JUDGMENT ACT

A. Question Presented

Whether the Court of Chancery correctly declined to rule on Appellants' requests for declaratory judgment because the Requested Declarations did not constitute active controversies?

B. Scope 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)).

Delaware courts are statutorily authorized to entertain an action for declaratory judgment pursuant to 10 *Del. C.* § 6501, provided that an "actual controversy" exists between the parties. *XL Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1216–17 (Del. 2014) (*Stroud v. Milliken Enterprises, Inc.*, 552 A.2d 476, 479 (Del.1989)). For an "actual controversy" to exist, the following four prerequisites 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;

(4) The issue involved in the controversy must be ripe for judicial determination.

XL Specialty Ins. Co., 93 A.3d at 1217 (citation omitted).

C. Merits Of Argument

Appellants argue that "[t]he Court of Chancery incorrectly interpreted Delaware's Declaratory Judgment Act when it held that the Declarations did not constitute active controversies." (Op. Br. at 34.) This is false.

1. The Court Of Chancery Properly Considered *Burris v. Cross* As Binding Precedent

The Court of Chancery, considering Appellants' bad faith pre-emptive filing and considerations of comity with the California courts, properly applied *Burris v. Cross,* 583 A.2d 1364 (Del. Super. Ct. 1990) as instructive and determined that "[w]here 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." (MJP Order ¶ 24.)

Appellants argue that the Court of Chancery erred because Appellees "never made an argument under *Burris* or briefed any such issue before the Court of

Chancery" and because "*Burris* is not controlling precedent."[12] (Op. Br. at 36.) Neither of these arguments are meritorious.

"[W]hen an issue or claim is properly before a tribunal, 'the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.'" *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1112 (Del. 2005) (quoting *Kamen v. Kemper Fin. Serv.,* 500 U.S. 90, 111 (1991)). As such, Appellants' objection that *Burris* was not briefed by the Parties rings hollow.

Further, while obiter dicta may not constitute binding precedent, alternative rulings *are binding*. *See Yucaipa Am. All. Fund I, LP v. SBDRE LLC*, 2014 WL 5509787, at *12, n. 52 (Del. Ch. Oct. 31, 2014) ("The Third Circuit came down firmly on the side of giving preclusive effect to both [alternative] holdings.") (citing *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 249–55 (3d Cir.2006)); *see also Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, 2015 WL 5278913, at *10 (Del. Ch. Sept. 10, 2015) ("[Alternative rulings] are entitled to preclusive effect."). Appellants themselves explicitly recognize that the *Burris*

[12] Specifically, Appellants assert that the *Burris* court's "*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." (Op. Br. at 36 (emphasis added).)

court's discussion of overripeness was an alternative holding to its subject matter jurisdiction holding (Op. Br. at 36), but wholly ignore that such alternative holdings are binding precedent.

2. The California Superior Court Is A More Appropriate Forum And There Is A Strong Possibility Of Inconsistent Rulings

Appellants argue that the Court of Chancery "incorrectly concluded that '[where] (*sic*) 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.'" (Op. Br. at 37 (citing MJP Order at ¶ 24).) Appellants go on to state that "there is no more appropriate forum than Delaware" and that "[t]here is no chance of inconsistent rulings." (Op. Br. at 38.) Appellants, however, misinterpret the Court of Chancery's holding and completely ignore the court's discussion of comity and its application here.

a. California Has A Close Connection To The Parties And The Non-Fiduciary Claims, Where Delaware Has None

First, there *is*, in fact, a more appropriate forum than Delaware—the California Superior Court, where Appellees timely and properly brought their affirmative claims.

b. The Forum Selection Clause Permits Claim Splitting

Second, as noted *supra*, while the Forum Selection Clause in Old Firefly's Certificate of Incorporation calls for adjudication of fiduciary duty claims in

Delaware, it permits non-fiduciary claims to be adjudicated elsewhere. *See* Section I.C.1., *supra*. Accordingly, the non-fiduciary claims at the heart of the Requested declarations were properly brought in the California Superior Court.

c. The Parties And The Claims At Issue Here Are More Closely Connected to California

Third, the parties and the claims are far more closely connected to California than to Delaware.

California is the domicile of many of the Parties and was the locus of many of the key fraud-related events. King, McCollum, Polyakov, Watt, and Noosphere Venture Partners were California residents at the relevant time. (B5-6.) Old Firefly, which is at the center of all of the claims, was initially headquartered in Hawthorne, California. (B2.) Moreover, much of the fraudulent conduct that is at issue in this action took place in California. Many of the initial interactions between Markusic and Appellees, including some of the fraudulent statements made by Markusic, took place in California. (B58.) Blum and King met Markusic at the Hawthorne Firefly headquarters on multiple occasions, and the representations made by Markusic described in Paragraph 2 of the California Complaint occurred there at the California headquarters. (*Id*.) On another occasion, Blum and King met with Markusic and a representative for SWING Investments BVBA for a lunch meeting at Shutters on the Beach in Santa Monica, California, during which Markusic made many of the same misrepresentations. (*Id*.) And in 2016, Blum and King had several dinner meetings

with Markusic in California—again, meetings at which Markusic made key misrepresentations at the heart of this dispute. (*Id*.) California courts have expressed California's strong interest in adjudicating claims brought by its residents on issues that arose there within its borders. *See Sullivan v. Thieman Tailgates, Inc.*, 2020 WL 5904359, at *6 (Cal. Ct. App. Oct. 6, 2020) ("California choice of law cases recognize that a jurisdiction ordinarily has the predominant interest in regulating conduct that occurs within its borders …, and in being able to assure individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available to those individuals and businesses in the event they are faced with litigation in the future." (internal quotations omitted)).

In stark contrast, none of the Appellants or Appellees live in Delaware, and none of the relevant fraud-related conduct occurred in Delaware. As noted, while the Forum Selection Clause *could* have required all claims be litigated in Delaware notwithstanding the lack of connection to the state, it did not. *See Ascension Ins. Holdings, LLC v. Underwood*, 2015 WL 356002, at *3 (Del. Ch. Jan. 28, 2015) (declining to enforce non-compete where California had a materially greater interest in the dispute than Delaware, notwithstanding the Delaware choice of law provision); *see also Third Ave. Tr. v. MBIA Ins. Corp.*, 2009 WL 3465985, at *1 (Del. Ch. Oct. 28, 2009) ("When a state court with little legitimate interest in a

matter purports to speak on a subject of importance to a sister state, the reliability of state law is undermined and a counterproductive incentive is created for all state courts to afford less than ideal respect to each other.").

The Forum Selection Clause required that fiduciary duty claims be brought in Delaware, but permitted non-fiduciary claims to be brought elsewhere. Further, Appellants simply did not contract to have *all* claims required to be brought in Delaware. Any and all fiduciary duty claims were dismissed on August 18, 2020 pursuant to the MTD Order. Delaware has no remaining connection to any pending claims, and Appellees asserted their non-fiduciary claims in a timely manner and in an appropriate forum for them to be heard—California.

Appellees brought their non-fiduciary claims in a timely manner and in a proper forum. As such, the Court of Chancery correctly recognized that the Delaware courts should not impinge on the California Superior Court's adjudication of those claims by issuing Appellants' Requested Declarations. (MJP Order ¶ 38.)

d. Litigating The Non-Fiduciary Claims In Delaware Will Diminish Appellees' Substantive Rights

Finally, the Delaware courts' granting of Appellants' Requested Declarations would deprive Appellees of their right to a jury in California.[13]

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[13] While Appellees' right to a jury trial under the California Constitution was not a basis for the Court of Chancery's denial of the Requested Declarations, it is nonetheless a crucial issue for Appellees.

Forum selection clauses are not without limits under California law. The California Court of Appeal in *Verdugo v. Alliantgroup, L.P.* held that when the claims at issue are based upon unwaivable rights, "the party seeking enforcement [of the forum selection clause] bears the burden to show that litigating the claims in the pre-selected forum will not diminish in any way the substantive rights afforded under California law." 237 Cal. App. 4th 141 (2015). Appellants cannot meet the *Verdugo* standard because they cannot show that forcing Appellees to litigate their fraud claims in Delaware would not "diminish in any way" their substantive right to a jury trial as to the non-fiduciary claims.[14]

While claims for breach of fiduciary duty do not create a right to a jury trial under California law,[15] claims for fraud do. *Raedeke v. Gibraltar Sav. & Loan Assn.*, 10 Cal. 3d 665, 671 (1974) (right to jury trial recognized for fraud actions); *Shopoff & Cavallo LLP v. Hyon*, 167 Cal. App. 4th 1489, 1513 (2008) ("A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable

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[14] The California Constitution states: "Trial by jury is an inviolate right and shall be secured to all." Cal. Const., art. I, § 16. Under California law, pre-dispute jury waiver—such as the one found in Firefly's Certificate of Incorporation—is *unconstitutional and unenforceable as to claims that provide for a right to trial by jury*. *See Grafton Partners v. Superior Court*, 36 Cal. 4th 944, 956 (2005); *see also Handoush v. Lease Fin. Grp., LLC*, 41 Cal. App. 5th 729, 733, 741 (2019).

[15] *See Nelson v. Anderson*, 72 Cal. App. 4th 111, 122 (1999) (no right to jury trial for breach of fiduciary duty in California).

at law."). This is in contrast to the rule in the Delaware Court of Chancery. *See Sokol Hldgs., Inc. v. Dorsey & Whitney, LLP*, 2009 Del. Ch. LEXIS 142, at *19 (Del. Ch. Aug. 5, 2009) (bringing an action in Chancery "serves as an effective waiver of the right to a jury trial"); *see also Paron Capital Mgmt., Ltd. Liab. Co. v. McConnon*, 2012 Del. Ch. LEXIS 13, at *3 (Del. Ch. Jan. 24, 2012) ("[T]here are no jury trials in Chancery.").[16] In other words, in the Court of Chancery, litigants do not have a right to a final adjudication of issues by a jury— which California requires.

Here, Appellees (two of whom are California residents) have demanded a jury trial on their fraud claims in the California Complaint. (B1.) Under *Verdugo*, *Grafton*, and *Handoush*, forcing Appellees to litigate their fraud claims in the Delaware Court of Chancery would deprive them of their rights under the California Constitution.[17]

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[16] While procedures do exist for the Court of Chancery to utilize a jury, any determination by the jury is not binding on the Chancellor or Vice Chancellor, because "the verdict of the jury is only advisory and that if for any reason the verdict is not satisfactory to the Chancellor's conscience, for whose enlightenment is sought, another issue may be framed and submitted for trial to another jury, or the Chancellor may disregard the verdict already rendered and himself proceed on the evidence disclosed by the record to make a finding." *Scotton v. Wright*, 122 A. 541, 542 (Del. Ch. Nov. 7, 1923); *see also State v. Williams*, 1981 Del. Ch. LEXIS 616, at *3 (Del. Ch. Dec. 7, 1981) (a trial by jury "would not be binding on this Court . . . resulting in an inefficient use of judicial resources").

[17] It is not only Appellees' personal interests that are at stake here; California has an overriding public policy favoring access to its courts by resident litigants. *Thomson v. Continental Ins. Co.*, 66 Cal. 2d 738, 742 (1967); *see also Goodwine v. Superior*

With the fiduciary duty Counterclaims now dismissed in this Court, the Forum Selection Clause does not apply at all. The remaining non-fiduciary claims should be adjudicated in California to preserve Appellees' right to a jury trial. The Court of Chancery correctly denied Appellants' Requested Declarations for this additional reason.

1. Application Of The *Burris* Factors Here Supports Denial Of The Requested Declarations

Next, Appellants assert that an examination of the *Burris* factors as applied to the facts presented here "confirm *Burris's* inapplicability." (Op. Br. at 38.) This is wrong. In fact, application of the *Burris* factors to the facts presented here confirms the correctness of the Court of Chancery's denial of Appellants' Requested Declarations.

The *Burris* court recognized the concept of "overripeness," holding that "[j]ust as the Court has the discretion to dismiss an action if not ripe for

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Court of Los Angeles Cty., 63 Cal. 2d 481, 485 (1965) (in determining the forum selection issue, "the court must consider the public interest as well as the private interests of the litigants"). The agreed upon choice of forum cannot prevail in the face of California's strong public policy to protect its citizens' rights afforded under California law. *Verdugo*, 237 Cal. App. 4th at 147 ("a forum selection clause will not be enforced if to do so would bring about a result contrary to the public policy of this state"); *see also America Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 12 (2001) ("California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state's public policy.").

determination, so may a Court dismiss an action if a practical evaluation of the peculiar facts and circumstances of the case lead the Court to believe that events have proceeded past the point where declaratory action will serve a practical and useful purpose." *Burris*, 583 A.2d at 1372 n.6. In considering "overripeness," the *Burris* court evaluated seven factors, each of which favors Appellees here. *Id*. at 1372–73.

a. Appellees Were Willing Litigants, Favoring Denial Of The Requested Declarations

The first *Burris* factor asks "[w]hether the defendant is truly an unwilling litigant, thus necessitating declaratory action." *Id.* at 1372.

In *Burris*, the Superior Court found this first factor in favor of the defendant's motion to dismiss where there was a "willingness, and indeed actual intent to bring an action . . . if negotiations were not successful." *Id*. at 1373. Since the defendant in *Burris* prepared a complaint for filing and presented the plaintiff with this draft complaint, the *Burris* court held that the facts were "hardly the picture of 'an unwilling litigant' who would not move forward to litigate a claim. The defendant has, in fact already moved forward to litigate and, to my mind, in a forum which can provide a more efficient and complete remedy." *Id*.

The circumstances here are materially identical to *Burris*. On June 27, 2019, California counsel for Appellees sent to counsel for Appellants a letter enclosing a draft complaint relating to the issues in dispute between the parties. (A000024-25;

B38-39.) Appellees were always very "willing" litigants and clearly made their intention to file suit known to Appellants. Over the course of the Parties' negotiations regarding Appellees' claims, Appellants made three requests that Appellees defer filing the California complaint. (B39.) Appellants' third request for a deferral of court action was for the purpose of continuing negotiations through an in person meeting. Yet, even more egregiously than in *Burris*, during the meeting, Appellants took advantage of Appellees' good faith deferrals and informed Appellees for the first time that they were in the process of filing claims in Delaware. (*Id*.) Appellants raced into the Court of Chancery and are attempting to preempt Appellees' chosen forum. Appellants' assertion that "[u]nlike in *Burris*, there was no race to the courthouse here" is patently false. (Op. Br. at 38.) Accordingly, this factor weighs in Appellees' favor and in support of denial of the Requested Declarations.

b. Appellants' Requested Declarations Would Require Resort To The California Court For Supplemental Relief

The second *Burris* factor asks "[w]hat 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." *Burris*, 583 A.2d at 1372-73.

If the Requested Declarations are ultimately granted (which they should not be), the buck will not stop with the Delaware courts. Rather, Appellants must seek supplemental relief from the California court, asserting collateral estoppel, seeking an anti-suit injunction, et cetera, with respect to Appellees' affirmative claims there. This is inefficient, inequitable, and undermines the principle of comity. Comparatively, the California court can provide full due process rights to all parties. Appellants can raise any defense they wish in the California Action and, most importantly, the California court can provide the same relief sought here. *See Sec. Nat'l Mortg. Co. v. Lehman Bros. Holdings Inc.*, 2016 WL 6396343, at *9 (Del. Super. Ct. Aug. 24, 2016). The Delaware courts should respect the California court's jurisdiction over claims properly before it and endeavor not to "step on the toes" of that sister court. In addition, the Delaware courts should respect Appellees', as the natural plaintiffs to the claims at issue, choice of forum— the California Superior Court. The claims asserted in California were properly asserted there, and that Court should hear and decide on the merits all of Appellees' claims and Appellants' defenses before it.

Therefore, because Appellants will ultimately need to be before the California Superior Court for supplemental relief on the Requested Declarations, the second *Burris* factor weighs in favor of Appellees and denial of the Requested Declarations as "overripe."

c. Another More Effective And Efficient Remedy Exists

The third *Burris* factor asks "[w]hether another remedy exists and whether it would be more effective or efficient and, thus, whether declaratory judgment would serve a useful purpose." *Burris*, 583 A.2d at 1373. "The question is whether that remedy is a better choice in terms of the plaintiffs' claims and in the interest of judicial economy." *Id*. at 1374.

The claims about which Appellants seek declaratory relief are squarely at issue in the California Action. The prosecution and defense in California of those affirmative claims would be a more effective and more efficient means of dealing with them than issuing declaratory relief in Delaware. In the California Action, Appellants will have the opportunity to raise any and all defenses to those claims. In addition, Appellees will have the opportunity to have those claims resolved on the merits, in a proper forum, before a jury in accordance with Appellees' rights.

Further, denial of the Requested Declarations here so that the claims can be resolved in California will respect and further the principle of comity. The principle of comity provides that "[w]hen a state court with little legitimate interest in a matter purports to speak on a subject of importance to a sister state, the reliability of state law is undermined and a counterproductive incentive is created for all state courts to afford less than ideal respect to each other." *Third Ave. Tr.*, 2009 WL 3465985, at *1. If the Delaware courts award declaratory relief in this case, they will necessarily

undermine comity between states by reaching conclusions regarding claims that are properly before the California court and that concern Californian—but not Delawarean—citizens. For those reasons, the third *Burris* factor also weighs in favor of Appellees and denial of the Requested Declarations as "overripe."

d. Another Action Is Pending In Which Appellants Can Raise All Claims And Defenses Available In This Action

The fourth *Burris* factor asks "[w]hether 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." *Burris*, 583 A.2d at 1373. Appellees made their intention to file suit in California known to Appellants from the very start of this dispute. (A000024-25; B38-39.) Appellants' Requested Declarations here seek declaratory relief regarding the exact claims that are affirmatively asserted by Appellees in the California Action. It is undisputed that Appellants can raise all claims and defenses in that action. Accordingly, the fourth *Burris* factor also weighs in favor of Appellees and denial of the Requested Declarations as "overripe."

e. Appellants Filing In This Case Was Anticipatory, Preemptive, And Bad Faith Gamesmanship

The fifth and sixth *Burris* factors ask "[w]hether the instant action has truly been instituted to seek a declaration of rights or merely for tactical or other

procedural advantage," and "[w]hether the instant action was filed in apparent anticipation of other pending proceedings." *Burris*, 583 A.2d at 1373. The *Burris* court noted that where there is apparent "jockeying" for position, this favors denial of declaratory relief. *Id*. at 1375 (citing *General Foods Corp. v. Cryo–Maid, Inc.,* 198 A.2d 681, 684, 685 (Del. 1964)). The *Burris* court also noted that the filing of the declaratory judgment action in apparent anticipation of another proceeding weighs in favor of denial of declaratory relief. *Id*. at 1375 (citing *Ven-Fuel, Inc. v. Dept. of Treasury*, 673 F.2d 1194 (11th Cir. 1982)).

Here, the facts demonstrate that Appellants are guilty of "jockeying" for position and anticipatorily and preemptively filing their complaint for declaratory relief to deny Appellees their chosen forum as the natural plaintiff. As noted *supra*, Appellants filed this action after having *thrice* requested Appellees defer filing their California Complaint so that they could engaged in settlement negotiations. (B39.) Appellees agreed to these requests in good faith. (*Id*.) During those negotiations, Appellants secretly prepared this anticipatory action and were in the process of filing it when they met Appellees for settlement discussions. (*Id*.) Since Appellants plainly filed this action for a tactical or procedural advantage while the parties were "jockeying" for position, the fifth and sixth *Burris* factors also weigh in favor of Appellees and denial of the Requested Declarations as "overripe."

f. Appellants Will Not Suffer Any Prejudice, Whereas Appellees Will Suffer Severe Prejudice In The Form Of Violation Of Their California Constitutional Right To A Jury Trial

The seventh and final *Burris* factor asks "[w]hether plaintiff will suffer any prejudice if the instant action is dismissed." *Burris*, 583 A.2d at 1373.

As noted *supra*, Appellants will not, in fact, be prejudiced except to the extent they have to defend claims properly asserted against them. They will have the opportunity to present any and all defenses available to them before the California Superior Court. In contrast, should the Delaware courts determine to grant the Requested Declarations, Appellees will be gravely prejudiced. Appellees, as the natural plaintiffs, will be deprived of their chosen forum for their claims and, even more significantly, will be deprived of their California Constitutional right to a trial by jury on the claims asserted in that action. *See* Section II.C.2.d., *supra*.

Appellants claim that they are prejudiced by the Court of Chancery's denial of the Requested Declarations because they have been forced into "duplicative litigation in multiple jurisdictions based on the same set of operative facts." (Op. Br. at 42.) However, that argument ignores the facts and the parts of the Court of Chancery's ruling that it does not like. The Court of Chancery found that any duplicative or multiplicity of litigation that Appellants' now face is due exclusively to their own bad faith litigation tactics. (MJP Order ¶ 35.) Appellants are the authors of their own misfortune, and should not benefit from their bad faith jockeying and

preemptive declaratory filing. Further, there is no duplication of litigation here. As noted *supra*, there never has been, and never will be, any duplication of claims in Delaware and California. Additionally, after resolution of this appeal, the only claims remaining will be in California.

Therefore, the seventh and final *Burris* factor favors Appellees and denial of the Requested Declarations as "overripe."

2. Appellants Attack Only One of Three Alternative Bases for the Court of Chancery's Dismissal of the Requested Declarations

Finally, Appellants wholly ignore that *Burris* was only one basis for the Court of Chancery's denial of the First and Fourth Declarations. The Court of Chancery appeared to struggle with interpreting Appellants' Requested Declarations and provided three separate reasons for dismissal based upon different interpretations of the Requested Declarations, the final being application of *Burris*. Appellants disregard these additional reasons for denial of their Requested Declarations. As such, Appellants have waived any argument on appeal regarding these reasons for denial of the Requested Declarations. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) (noting it is "well-settled" in Delaware that failing to raise a legal issue in the text of an opening brief generally waives that claim for that proceeding).

a. The Court Below Correctly Denied The Requested Declarations Because The Controversies Were Disposed Of In The MTD Order

First, the Court of Chancery held, regarding the First Declaration, that "to the extent [Appellants] seek a limited declaration that [Appellees] lack standing to bring derivative claims . . . the [MTD Order] already addressed the issue." (MJP Order ¶17.) In essence, because the Court of Chancery already dismissed Appellees' Counterclaims— finding them to be derivative and that Appellees, therefore, lack standing—the First Declaration is not ripe because it does not speak to an active controversy. The Court of Chancery applied this same reasoning in denying the Second and Fourth Declarations. (*Id*. at ¶¶ 27, 37.)

The circumstances here are similar to those in *Intermec IP Corp. v. TransCore, LP*, 2021 WL 4841131, at *3 (Del. Super. Ct. Oct. 18, 2021). There, Intermec requested a declaration that it properly terminated a license, had no further obligations thereunder, and that TransCore was required to honor its post-termination obligations. The Superior Court in that case held that whether TransCore breached the license would be decided in the resolution of Intermec's express breach-of-contract claim. As a result, Intermec's proposed declarations amounted to affirming the undisputed consequences of TransCore's breach, should it be proven. The court denied the "ancillary declaration" because it was wholly unnecessary. *Intermec IP Corp. v. TransCore, LP*, 2021 WL 4841131, at *3 (Del. Super. Ct. Oct. 18, 2021).

Similarly here, the Court of Chancery correctly denied the First, Second, and Fourth Declarations because Appellants' First Declaration seeks a declaratory relief regarding the very subject of their motion to dismiss the Counterclaims, rendering such a declaration here ancillary and unnecessary.

b. The Court Below Correctly Denied The Requested Declarations Because The First Declaration Is Overbroad And Would Require The Court To Issue A Hypothetical Ruling

Second, the Court of Chancery denied the First Declaration on the further alternative basis that its issuance would, upon a broad view of that Requested Declaration, require it to issue an impermissible hypothetical or advisory opinion. Again, this same reasoning was also applied by the Court of Chancery in denying the Fourth Declaration. (MJP Order ¶ 38.)

"Delaware courts must 'decline to exercise jurisdiction over cases in which a controversy has not yet matured,' to avoid rendering advisory opinions." *Energy P'rs, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *6 (Del. Ch. Oct. 11, 2006) (quoting *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 480 (Del. 1989)). "Courts decline to render hypothetical opinions, that is, dependent on supposition," because to do so would "run[] the risk not only of granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law." *Stroud*, 552 A.2d at 480.

Here, Appellants' First Declaration seeks a judgment "[Appellees] 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." (A00046.) Obviously, on its face, this Requested Declaration sought to insulate Appellants from any number of potential claims, asserted or unasserted, derivative or non-derivative, in any number of jurisdictions and applying any set of laws. The Delaware Courts cannot provide that sort of limitless protection from litigation. As such, the Court of Chancery correctly held that "[t]o the extent that [Appellants] seek a broader declaration that *any* related claim brought against Markusic would be derivative in nature, the request is denied . . . [because] [Appellants'] overly broad request would require the court to evaluate every possible claim [Appellees'] could bring against Markusic … [and] [s]uch a ruling would, by definition, be hypothetical and dependent on supposition." (MJP Order ¶¶ 18, 20.)

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the Court of Chancery's June 16, 2021 Order and the stipulated Final Order.

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