



**IN THE SUPREME COURT THE STATE OF DELAWARE**

WILLIAM WEST,

Plaintiff-below/  
Appellant,

vs.

ACCESS CONTROL RELATED  
ENTERPRISES, LLC; LLR  
EQUITY PARTNERS, IV, L.P.;  
LLR EQUITY PARTNERS  
PARALLEL IV, L.P.;  
SETH LEHR, an individual;  
DAVID STIENES, an individual;  
GREG CASE, an individual;  
ROBERT CHEFITZ, an individual;  
and JOSEPH GRILLO, an individual;

Defendants-  
below/Appellees.

No. 230, 2022

On appeal from the  
Superior Court of the State of  
Delaware,  
C.A. No. N17C-11-137-MMJ-CCLD

**PUBLIC VERSION**

**APPELLANT WILLIAM WEST'S  
CORRECTED OPENING BRIEF**

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Dated: October 13, 2022

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## NATURE OF THE PROCEEDINGS

Plaintiff-below/Appellant, William West, came to Delaware privileged and burdened with a constitutional right as a California citizen to have lawsuits decided by a jury. West, a cofounder of ACRE, the market leader in electronic security, arrived involuntarily in Delaware from the Superior Court of California, County of Los Angeles, after the California court stayed his case and enforced a forum selection clause designating either Delaware's federal District Court or the Court of Chancery as the proper forum for litigation. The Delaware District Court could not host West because of a lack of diversity.

West is suing a billion-dollar equity firm out of Philadelphia, LLR. LLR led the charge to fire West after he disagreed with how they planned to take money out of ACRE for their investors, rather than invest their money into ACRE acquisitions. Rather than simply observe LLR execute its plan, West structured a management buy-out offer to take to the ACRE Board, which would have put money into ACRE, and kept management in place. LLR managers (who were also Board members) were furious. But they could not get rid of West without the vote of at least the other two non-LLR co-founders. So LLR admittedly bought the co-founder's votes and voted West out.

One of the co-founders is Steve Wagner, a former defensive back for the Green Bay Packers. Wagner was a co-sponsor of the MBO with West and did all

the things that West did that led to West's termination for cause and forfeiture of his founder shares worth more than \$25M. At trial, Wagner explained how LLR bought his vote.

Unfortunately, Delaware could not provide West an adequate forum because West could not abide by his contract with ACRE and re-file his lawsuit in the Court of Chancery without the filing being deemed a waiver of his right to a jury. So, West filed in the Superior Court and immediately sought to appoint Judge Johnston as Vice Chancellor to hear his claims involving questions of fiduciary duty. Defendants opposed, Judge Johnston was never appointed.

The Superior Court first ordered that West transfer his breach of fiduciary duty claim to the Court of Chancery, and later ordered transfer of the entire case, finding the entire complaint shod with references to fiduciary duty.

West did not transfer the case. He went back to the Superior Court of California and asked for relief from the stay and got it. The California Court agreed to try all claims and defenses to a jury in one case and to apply Delaware law as agreed. The Delaware Superior Court then, *sua sponte*, without a hearing, motions, or briefs entered an order, 7 months after the transfer order, stating that the Court will "continue to exercise jurisdiction", effectively a *de facto* vacation of the transfer order. Then the Superior Court set a trial date prior to the California trial.

West, believing that the Superior Court simply cannot try all of his claims and the Defendants' defenses, filed numerous requests for voluntary dismissal without prejudice from the Superior Court in favor of going back to California. Each time Defendant failed to establish any of the factors necessary to meet its burden of "plain legal prejudice." Each time the Superior Court failed to address the legal standard and misconstrued facts that expressly lead to denying dismissal.

The Superior Court proceeded to trial and gutted West's claims. The Court refused to try any of the tort claims or claims against the individual board members and LLR managers who orchestrated West's termination and the concurrent forfeiture of his founder shares. The only (partial) claim the Superior Court would try was the contractual termination. Even though West's termination was based upon an alleged breach of fiduciary, the Court instructed the parties to disregard that element at trial.

Further, West was stripped of his right to submit interrelated evidence arising from a common nucleus of operative events related to how the Defendants interfered with his contracts and business expectations, and how they violated their duty to him and ACRE. Only hearing what West did relative to a portion of the employment contract was unfair. The jury, unable to hear the whole story, decided that ACRE did not breach the employment contract when it fired West. No claims against the



individual defendants were before the jury. Plaintiff is left with a piecemeal litigation, and is still determining what if anything he can pursue in California.

## SUMMARY OF ARGUMENT

I. The Superior Court erred when it *sua sponte* decided to “continue to exercise” jurisdiction over the case after it ordered the transfer to the Court of Chancery. Defendants/Appellees proper remedy for attempting to affect the September 1, 2020, Order Regarding Jurisdiction And Trial Scheduling would have been to seek relief under Superior Court Rule 60. The transferring court can no longer adjudicate a case after the transfer is ordered.

II. The Superior Court erred when it did not allow the Plaintiff to voluntarily dismiss the case in favor of proceeding to a jury trial on all issues in California. Defendants-below did not establish any factor of plain legal prejudice under Superior Court Rule 41(a)(2).

## STATEMENT OF FACTS<sup>1</sup>

### **A. The Parties and Their Dispute**

In 2012, Plaintiff-below/Appellant, William West (“West”), a California resident, co-founded Defendant-below/Appellee ACRE (“ACRE”), a Delaware LLC, which provides security technologies to limited physical campuses, buildings, rooms, or other environments. (A73; A84.) ACRE’s principal place of business is in Long Beach, California. (A1503-1517.) All of the shareholders of ACRE have significant connections with California either by virtue of primarily conducting business in California, being registered in California, or creating continuing obligations in California. (*Id.*) West was ACRE’s Chief Financial Officer and Chief Operating Officer. (A73.)

In 2013, Defendants-below/Appellees LLR Equity Partners, IV, L.P. and LLR Equity Partners Parallel IV, L.P. (collectively “LLR”), a private equity firm based in Philadelphia, made an investment into ACRE and obtained a majority share and control of ACRE’s Board of Directors. (A82; A85-86.) In connection with LLR’s 2013 investment, West, ACRE, LLR, and others executed eight separate contracts: (1) Securityholders’ Agreement, (2) LLC Agreement, (3) Securities Purchase Agreement, (4) Equity Award Agreement, (5) Equity Incentive Plan, (6) Severance

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<sup>1</sup> Pursuant to Delaware Supreme Court Rule 13, citations to Appellant’s Appendix shall be referred to herein as “A\_\_”.

Agreement, (7) Non-Competition Agreement, and (8) Contribution and Purchase Agreement. (A451; A1503-1517.) Six of the agreements contained inconsistent forum selection clauses that provide for either (a) Delaware Court of Chancery or Delaware federal courts (Securityholders' Agreement and LLC Agreement), (b) Delaware federal or state courts (Severance Agreement and Non-Competition Agreement), or (c) California state or federal courts (Contribution and Purchase Agreement). (*Id.*) The two remaining agreements (Equity Award Agreement and Equity Incentive Plan) do not contain any forum selection clause. (*Id.*) As reflected in these agreements, the parties agreed that ACRE's founders, including West, would continue their management role for the company and receive restructured equity stake and executive compensation.

On December 17, 2015, ACRE terminated West. (A95-96.) ACRE claimed that West's pursuit of a buyout of an ACRE subsidiary and associated disclosure of ACRE's confidential information constituted "cause" for his termination. (*Id.*) The representations by Defendants-below/Appellees that West relied upon to his detriment and that underlie his wrongful termination claim originated in discussions held in California. (A478.) West's claims arise under California statutory and common law. (*Id.*) They implicate fundamental public policies of California, including the enforcement of non-compete agreements, non-waivable statutory provisions concerning payment of wages, and Corporations Code provisions

regarding sales of securities in California. *See, e.g.*, Cal. Bus. & Prof. Code § 16600; Cal. Corp. Code § 25701; Cal. Labor Code § 219. (*Id.*)

**B. The Pretrial Litigation**

**1. The Initial Complaint**

On November 28, 2016, West filed his initial complaint in the Los Angeles California Superior Court against ACRE, LLR, and the individual ACRE directors who orchestrated his termination, alleging four causes of action: breach of fiduciary duty, wrongful termination, conversion, and declaratory relief. (A452; A1503-1517.) West's claims are premised on ACRE's improper termination of him and the resulting divestment of a portion of his valuable equity. Defendants' purported justification for the termination was that West improperly explored a management buyout of ACRE's subsidiary, Mercury Security Corporation, a California company with a principal place of business in California. (A479-480.) As alleged in his complaint, West had believed in good faith that the management buyout option should be given fair consideration in the best interest of ACRE. (*Id.*) Even though LLR had previously mentioned a management buyout as a potential option, LLR and individual defendants vehemently attacked West's actions: in short, LLR wanted to pursue a dividend recapitalization that would spin off millions of dollars into LLR's pockets, burdening ACRE with more debt, with no benefit to ACRE. (*Id.*)

Seeking to preserve its dividend recapitalization, LLR needed to shut West down. (A480.) According to Defendants, they terminated West on the grounds that his pursuit of the buyout and disclosure of ACRE's confidential information to potential investors for the buyout constituted "cause" for termination. (*Id.*) Based on the parties' agreements granting West equity in ACRE, a "for-cause" termination gave Defendants the excuse to deprive him of incentive equity of significant monetary value. (*Id.*) However, their agreement specifically allowed West to share confidential information in the course of carrying out his duty as the officer of the company. (*Id.*)

On April 12, 2017, then-presiding Judge Lyons of the Los Angeles Superior Court granted Defendants' motion to stay, enforcing the Delaware forum selection clause in the "Securityholders' Agreement." (A1503-1517.) Judge Lyons trusted that the contractually selected Delaware court would respect California laws and rights, recognizing that Delaware courts are capable of enforcing California law. (*Id.*)

## **2. The Delaware Federal Complaint**

On August 25, 2017, West filed a complaint in the United States District Court for the District of Delaware alleging the same claims as his prior California complaint. (A452; A1503-1517.) West subsequently dismissed the Delaware

federal complaint without prejudice because there was not complete diversity of citizenship to confer jurisdiction. (*Id.*)

### **3. The Delaware Superior Court Case**

Unable to gain jurisdiction in federal court, on November 14, 2017, West filed a complaint in the Delaware Superior Court, alleging the same claims as his prior California complaint. (A631-664.) On December 15, 2017, one month after filing the complaint in the Delaware Court, West wrote a letter to then-Chancellor Bouchard requesting he request to this Court that Judge Johnston, the Superior Court Judge below, be appointed as Vice-Chancellor to hear the fiduciary duty issues at issue in the case. (A665-670.) Defendants opposed, submitting that the Delaware Superior Court has no subject matter jurisdiction, that the Delaware Court of Chancery is the “only” Court with subject matter jurisdiction, and that the Delaware Constitution does not allow parties to circumvent the Court of Chancery’s exclusive jurisdiction. (A671-677.) Defendants concluded by arguing that the requested designation should be denied because the only reason for a departure from the statutory course is West’s unexplained but persistent desire to escape the Chancery Court jurisdiction. (*Id.*) West’s request was never acted upon by the Chancellor. (A686.)

On or about January 12, 2018, Defendants filed a motion to dismiss, contending that the Delaware Superior Court lacked subject matter jurisdiction to

hear any of West's claims because they all implicate matters of equity and fiduciary duty that belong to the Chancery Court's exclusive jurisdiction. (A707-886.) Specifically, with respect to the breach of fiduciary duty claim, Defendants submitted numerous Delaware authorities showing that such equitable claim exclusively belongs to the Court of Chancery without exception. (*Id.*)

On June 13, 2018, the Superior Court determined that West's breach of fiduciary duty claim must be dismissed and transferred to the Court of Chancery because it has exclusive jurisdiction over equitable claims. (A1589.) She retained jurisdiction on the remaining claims. (*Id.*)

Subsequently, on July 24, 2018, in compliance with Judge Johnston's June 18, 2018 order, West dismissed his Delaware breach of fiduciary duty claim "without prejudice." (A887-888.) West did not effectuate the transfer of his breach of fiduciary duty claim by filing a new complaint in the Court of Chancery because doing so would have deprived him of his right to a jury trial. (A688.)

In January 2019, West amended his Delaware complaint adding additional tort claims. (A68-166.) On July 1, 2019, the Delaware Superior Court first set a jury trial to commence on March 9, 2020. (A889-893.)

[REDACTED]

[REDACTED]

[REDACTED]





allegedly in derogation of the wishes of the Board. (*Id.*) Finally, when asked whether this case could go back to California, Defendants unequivocally misinformed the Court, “No.” (A1260.)

The Court noted that even after the transfer of the breach of fiduciary duty claim, the complaint “is shod with references to breach of fiduciary duty” (A1285), which “kind of muddy the waters.” (A1262.) In the end, the Court resolved that this is a case of “mixed question of law and equity.” (A1291.) Also, after still further questioning by the Court, that the parties agreed that this case cannot be tried without reference to the Securityholders’ Agreement. (A1277.) The Court found that the case cannot be bifurcated. (A1287.) The Court also found that the Securityholders’ Agreement falls within the Delaware LLC Act, Title 16, § 18-111. (A1288.) The Court then concluded: “I find that the Court of Chancery has at least permissive jurisdiction under the Act” (*Id.*), “[s]o I’m ordering that transfer right now and I’m granting the motion to transfer.” (A1289.)

The Court explained that the jury trial issue has “such a ripple effect” and “is too important to the jurisdiction of that Court,” that the Court of Chancery “should address this issue in the first instance.” (A1290.) Judge Johnston deemed Defendants’ motion to strike the jury demand moot because she already ordered the transfer to the Court of Chancery. (A1290.)

#### **4. The California Court Lifts the Stay**

Rather than transferring this action to the Court of Chancery and risk a loss or waiver of his right to a trial by jury, on June 18, 2020, West filed a motion in the California case seeking to lift that Court's April 12, 2017 stay order and proceed with the action in that forum. (A598-623.)

On June 30, 2020, West asked the Delaware Superior Court to stay the Delaware case pending the California Court's adjudication of his motion to lift the stay. (A477-485.)

On July 29, 2020, California Superior Court Judge Cowan lifted the stay, holding that enforcing the Securityholders' Agreement in Delaware would diminish West's right to a jury trial because the Court of Chancery does not conduct jury trials. (A2399.) The Court reasoned that refusing to lift the stay on the grounds that the Securityholders' Agreement forum selection clause is enforceable would result in a pre-dispute waiver of West's inviolate right to a jury trial because the Delaware Court of Chancery simply does not conduct jury trials (at least non-advisory jury trials). (A2398.) The California Court concluded:

Discovery already conducted in Delaware can still be used here and does not prevent the parties from proceeding in California. Similarly, that the other parties are largely non-Californian does not deprive West of his right to a jury [a] trial as a California resident, and moreover[,] a California forum would not be inappropriate where ACRE conducted substantial business in California.

(A2403.)

## **5. Summarily Reviving the Delaware Superior Court Case**

At the July 29, 2020, hearing on West's motion to lift the California stay, Defendants stated they are "not challenging the court's determination about the fundamental jury trial right or whether that was waived." (A457.) Defendants then advised Judge Cowan they would be withdrawing their Delaware motion to transfer West's case to the Court of Chancery, in order to "accommodate the public policy issue by allowing it to go to trial in front of a jury." (*Id.*)

On August 31, 2020, knowing that Defendants (having lost in California) were belatedly attempting to withdraw their already ruled upon motion for transfer to Chancery, West moved the Delaware Superior Court to maintain the transfer order, or dismiss the case without prejudice. (A1307-1313.) West filed a motion asking for "a hearing and briefing to ensure fundamental fairness and to avoid any uncertainty as to the application of Delaware law to these important issues." (*Id.*)

West asserted:

As to the vacation of the transfer order, Defendants ask this Court to vacate the transfer (without a motion, briefing[,] or a hearing). They are now asking the Court to effectuate their request for vacation by inserting language in a draft unilateral scheduling order, arguing by letter to the Court that vacation is "implicit in the Court's exercise of jurisdiction." Plaintiff, by this Motion, hereby asserts his right to be heard on this issue, as a matter of fundamental fairness and due process.

(A1308-1309.) The motion reiterates: “[a]s set forth in the August 27, 2020, letter to the Court, ‘Plaintiff is now proceeding with his breach of fiduciary duty claim.’ Plaintiff is unwilling to proceed in any court without including all of his claims.”

(A1308 (emphasis added).) Finally, West asserted:

The Court cannot vacate the order of transfer because it has lost jurisdiction, because Delaware law only provides for Plaintiff to re-file in the Court of Chancery, and because Delaware law does not provide for Defendant or the Superior Court to take any further action after transfer to the Court of Chancery. These issues will be fully briefed by the parties.

(A1309.)

As promised, Defendants withdrew their motion to transfer to the Court of Chancery. (A457.) Defendants submitted a proposed order to Judge Johnston stating that the Court vacated the transfer order at an August 20, 2020, status conference.

(A691; A1314-1334.) West submitted a competing draft order and advised the Court:

The most significant disparity in the competing language submitted to the Court is [the] Defendants’ proposal that the Order (with no motion, briefing[,], or hearing) vacate the Court’s prior order granting Defendants’ motion to transfer. Plaintiff has no recollection or notation of the Court making such an order during the status conference with Your Honor and submits that any such vacatur of a prior court ruling should be made after full briefing and an opportunity to be heard.

(*Id.*)

The Court did not sign Defendants' proposed order containing language vacating the transfer order. (*Id.*) Rather, on September 1, 2020, ignoring West's request to be heard, Judge Johnston entered an order that the Delaware Superior Court would continue to exercise jurisdiction and schedule a jury trial date at the earliest practicable date, thereby undoing the transfer order. (A1305-1306.)

## **6. Defendants' Unsuccessful Attempts to Stay the California Case**

### **a. The Initial Motion for Stay**

On September 21, 2020, Defendants filed a motion to stay the California action, arguing that, because the Delaware Superior Court was willing to take the Delaware Action to a jury trial, "the jury trial issue has since been resolved" and thus, the trial court should stay the action in favor of proceeding in Delaware. (A1463-1478.) West opposed, asserting that the concerns over the jury trial still existed because his breach of fiduciary duty claim, very much alive in California, must be heard by a jury, but Delaware courts cannot provide a jury trial on this claim as a matter of law. (A1482-1503.)

On October 15, 2020, the California Court denied Defendants' motion to stay. (A1503-1517.)<sup>2</sup> Judge Cowan (noting that the original complaint has a claim for

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<sup>2</sup> At the same time the Court granted West's motion for leave to file a first amended complaint. The first amended complaint deleted claims for declaratory relief and conversion from the originally filed complaint and added the claims for breach of contract and tortious interference (i.e., the same causes of action as Delaware). It also added facts revealed from the discovery in this case. The California Court

breach of fiduciary duty)<sup>3</sup> found that the breach of fiduciary duty claims are intertwined with West's employment claims because the dispute relates in part to corporate opportunities and ownership issues, and not merely West's employment. (A1512)<sup>4</sup> Judge Cowan decided that the fiduciary claim is part of the "gist" of the action as a whole. (A1515.) He ruled that the continued enforcement of the forum selection clause would be "unfair" to West, reasoning that there is no purpose in forcing West to separately litigate his employment and fiduciary duty claims in two separate courts, rather than pursuing them to a jury in a single California forum. (A1512-1513.)

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granted leave and the first amended complaint is now the operative complaint between the parties.

<sup>3</sup> The Court found that the transfer and voluntary dismissal of the breach of fiduciary duty claim did not affect West's ability to continue to litigate the claim in the California case because it was in the original complaint which was never dismissed. (A1511.)

<sup>4</sup> Underpinning the Court's ruling was its finding that California has substantial connections to the case and the injury (West's termination) took place in California. (A1512.) "ACRE, Mercury, and Quicksilver (registered in California) conduct business primarily in California." (*Id.*) "The remaining corporate defendants, such as LLR, Prudential, and Egis, voluntarily entered into these agreements with companies registered in or primarily conducting business in California." (*Id.*) "In sum, the parties at issue have significant connections with California either by virtue of primarily conducting business in California... being registered in California... or creating continuing obligations with California residents by entering into agreements with West and Quicksilver..." (*Id.*) "Indeed, to the extent West was fired in connection with the buyout of Mercury, the Court notes again that Mercury is a California corporation." (*Id.*)

Judge Cowan found that ACRE is not prejudiced by having a jury trial in California on all the claims: “The additional discovery required for a jury trial in California on West’s fiduciary claim does not necessarily impose a greater burden than ACRE would bear if West had separately litigated his claims in the Delaware Superior Court or Chancery.” (A1512.) At the hearing, the Court explained: “We’re not going to relitigate issues that were decided in Delaware, trust me.” (A1533.)

Similarly, the Court explained that it was not concerned about its relative lack of knowledge or familiarity with the case:

Though Delaware handled pre-trial matters, this is not particularly significant because the claims at issue in Delaware would be decided by a jury in any event, not the judge. Thus, any loss of knowledge or familiarity with this action from the Delaware judge’s involvement would be mitigated by the fact that a jury is deciding those claims whether in California or Delaware.

(A1512-1513.) And, “[t]here is little risk of conflicting rulings if this action proceeds in California.” (A1513.)

At the hearing Judge Cowan clarified the point that West had no real choice in dropping the fiduciary duty claim:

I do not see that [quote] dropping of the fiduciary duty claim was a [quote] strategic decision. It’s only strategic in the sense that ... he wanted to make sure that he got a jury trial to some of his claim. Because if he didn’t have – if he kept his fiduciary duty claim under the peculiarity of Delaware law, apparently, he would have lost his right to any jury because in Delaware, as I understand it, fiduciary duty claims are the exclusive province of the



Chancery Court which operates, as I understand it, without a jury.

(A1529-1530.) “It’s kind of like a Hobson’s choice. Do I lose [the] jury altogether?”

(A1533.) “So[,] I think that it wasn’t until 2020 or late 2019 that Plaintiff saw that he wasn’t going to get any jury trial for any of his claims. So[,] then the difficult choice early on became an impossible situation in terms of having a jury trial.”

(A1534-1535.)

At the hearing Judge Cowan said that he is looking at the “management issue”, and it’s kind of my function here, seems to me that [sic] it’s not fair that Plaintiff should have to litigate in two different Courts the causes of action: one in a jury trial in Delaware and then a bench trial in Chancery Court where these issues are intertwined ...” (A1530.) “If the fiduciary duty claim was some wholly separate claim the Court might have concluded differently ... It seems as though it is all part of the same package.” (*Id.*)

At the hearing, Judge Cowan also addressed the collision of Delaware and California law in this case. On the notion that West purposely litigated in Delaware, Judge Cowan said, “[t]he only reason he litigated in Delaware is [that] the Defendant brought a motion in this Court to stay based upon the forum selection clause. And so[,] I think to me it’s really about the peculiarities of Delaware law and the command of California law.” (A1534.) “After all, Mr. West initially filed this complaint in this Court[,] not in Delaware.” (*Id.*)

Judge Cowan concluded the hearing by speaking about West's motion to dismiss the Delaware case: "It's important to me to learn, however, that Plaintiff [is moving] to dismiss his Delaware case because it wouldn't be fair to the Defendant[s] to have to defend in two different states." (A1535.) In the ruling, the Judge said that he presumes "West will dismiss the Delaware action, as he is currently seeking to do." (A1512-1513.)

**b. The California Appeal**

On November 16, 2020, Defendants appealed Judge Cowan's decisions to the Court of Appeal of the State of California for the Second Appellate District. (A398-441.) Defendants sought a writ vacating Judge Cowan's October 15, 2020 decision and directing the California Superior Court to enter a new order staying the California case pending the resolution of the parties' dispute in the Delaware Superior Court. (A438.) After extensive briefing, on February 5, 2021, the California appellate court denied Defendants' requests. (A475-476.)

**c. The Second Motion for Stay**

On February 17, 2021, Defendants filed their second motion to stay the California case, contending that "new facts supported re-imposing a stay." (A295.) On May 5, 2021, the California court (Judge Brazile now presiding) denied Defendants' second motion to stay. (A297.) Judge Brazil expressed serious concerns as to whether the Delaware court "proceeding to a jury trial would violate

West’s right to a jury trial” on the fiduciary duty issues. (*Id.*) The Court said, “it is unclear whether West would be able to subsequently pursue litigation in California relating to his breach of fiduciary duty claim.” (*Id.*) The California Court warned: “determine the appropriate forum *before* proceeding to trial.” (A298 (emphasis in original).) The Court agreed with West that, unlike a jury trial in Delaware, “there ‘would be no surprises as to what [a] jury trial would look like’ in California.” (A297.)

**7. Plaintiff’s Unsuccessful Attempts to Voluntarily Dismiss the Delaware Superior Court Case**

**a. The Initial Motion for Voluntary Dismissal**

West’s initial request for voluntary dismissal was heard on December 9, 2020, together with West’s request to maintain the order transferring his breach of fiduciary duty claim to the Court of Chancery. (A1669-1723.) Judge Johnston denied the requested dismissal, incorporating her prior ruling on January 20, 2020, concerning the forum selection clause and Delaware’s strong interest in the governance of Delaware LLCs. (A1711.) The Court also denied dismissal at this juncture because the California appellate court had not decided Defendants’ appeal of Cowan’s decisions. (A1715.) The Court stated how fiduciary issues would be resolved at trial: the jury would decide certain factual questions and the judge would decide what constitutes a breach of fiduciary duty. (A1713.) Judge Johnston clarified that “whether something is a breach of fiduciary duty, in Delaware is, a

legal question, and “it may well be that the same is true in California.” (A1712-1713.)

As to the transfer order, Judge Johnston acknowledged that (i) “it hasn’t officially been vacated” (A1715 (emphasis added).), (ii) “I created this procedural quagmire, and I will take the blame for that” (A1719 (emphasis added).), and (iii) “there are many layers of confusion.” (A1721 (emphasis added).)

**b. The Application for Certification of Interlocutory Appeal of the Denial of the Initial Motion for Voluntary Dismissal**

On January 8, 2021, after the Delaware Superior Court refused to allow West’s initial request for voluntary dismissal without prejudice and expressed an intention for the judge (rather than the jury) to decide what constitutes a breach of fiduciary duty (in derogation of West’s inviolate right to have a jury decide the issue), and in light of the “quagmire” and many “layers of confusion,” West asked the Superior Court to certify an interlocutory appeal to this Court. (A1724-1733.) On January 26, 2021, the Court denied West’s application for certification. (A1790-1793.)

**c. No Action Taken on Plaintiff’s Notice of Interlocutory Appeal to the Delaware Supreme Court on the Denial of Plaintiff’s Initial Motion for Voluntary Dismissal**

On January 13, 2021, West filed a notice of appeal to the Delaware Supreme Court from the interlocutory order denying his initial motion for voluntary dismissal

without prejudice. (A1794-1797.) On February 17, 2021, the Delaware Supreme Court issued its mandate to close the case with “no action.”

**d. The Renewed Motion for Voluntary Dismissal**

On July 21, 2021, West filed its renewed motion to dismiss without prejudice. (A167-476.) By the motion, West informed Judge Johnston that Judge Brazile in the California case answered her question about whether, under California law, the trial judge or the jury determined whether a breach of fiduciary duty has occurred. Judge Brazil said, “It is not true in California, breach of fiduciary duty is an issue of fact, not law.” (A298.) On September 27, 2021, the Delaware Superior Court denied West’s renewed motion for voluntary dismissal without prejudice. (A1799-1853.) The Court did not allow dismissal because West “voluntarily dismissed” the “fiduciary duty portion” (A1847) and the Court “think[s] that these claims can be bifurcated[,]” even though it is going to be “tricky” to keep the breach of fiduciary duty claims out of the employment claims. (*Id.*) The Court again reiterated her January 20, 2020 finding that the forum selection clause in the Securityholders’ Agreement is enforceable, and would not rule any differently. (*Id.*)

Again, addressing the transfer order, the Court said, “standard procedure is to transfer the whole thing to Chancery. They can take care of the legal claims, do the clean-up doctrine, or they can choose to cross-appoint and have this Court handle the breach of fiduciary duty claims along with the legal claims.” (A1850.) “It’s that

you don't transfer claims piecemeal." (*Id.*) "[T]hat's not the way we do it. We transfer the whole case." (*Id.*)

e. **Reargument of the Renewed Motion for Voluntary Dismissal**

On October 14, 2021 – understanding that the Superior Court misapprehended that it had actually involuntarily dismissed West's claim for breach of fiduciary duty (and that the ruling was wrong as it was predicated on the fact that West had voluntarily dismissed it) and because other material misunderstandings had formed the basis for the Court's express reasons for denying the dismissal – West moved for reargument of the denial of his renewed motion for voluntary dismissal. (A1854-2174.) On December 1, 2021, the Court denied West's request for a reargument. (A2175-2177.)

C. **The Unfair Truncated Delaware Jury Trial**

The Superior Court held a pretrial conference on May 10, 2022. At the conference, West reasserted that he believes that the entire case, including the wrongful termination claim, should be heard in California. (A2191-2192.) The Court noted at the outset that the parties still maintain (in the pretrial stipulation before the Court) that West's "termination was caused in part because Mr. West breached his fiduciary duty. Now my understanding of the California Court's ruling is that I cannot hear that." (A2193.)

Specifically, the Court recited: “I do not know how we can decide whether or not Mr. West breached his fiduciary duty because the California Court has already said he’s entitled to a jury trial on that factual issue.” (A2194.) The Court also said that “[it] does not have jurisdiction” to decide whether there has been a breach of fiduciary duty. (A2217.)

Even though breach of fiduciary duty is listed in the contracts as a basis for “cause” termination, the Court held that the jury could not hear “the words” fiduciary duty, and the parties will “try” the other enumerated basis: “which are dishonesty [and] disloyalty.” (*Id.*)

Shining honest light through this hollow construct, the Court recognized that disloyalty is a form of breach of fiduciary duty, then noted that, “as a practical matter, the evidence will be the same.” (A2217-22188.)

The Court then advised, instead of referring to whether West “was in breach of a duty of loyalty”, ask was he “disloyal”? (A2220.) The Court noted that the contract provides termination for cause for not maintaining confidentiality, and that too “would be part of fiduciary duty.” (A2232.)

The Court then decided that all of West’s other claims, other than for breach of the employment contract (i.e., tortious interference, tortuous wrongful termination (California law), and breach of fiduciary duty) will not be heard at trial. (A2245.)

Defendants argued that the tortious wrongful discharge “factually overlaps” the breach of employment claim, and “should be tried in the same court.” (A2244.)

A Delaware jury heard the sole claim of breach of the applicable employment contracts – without hearing any evidence concerning Defendants’ “interrelated” tortious conduct and breaches of fiduciary duty born by Defendants against West as his “employment” grew ever more precarious – and decided, in this unfair and unnecessary judicially engineered vacuum of a forum, that Defendants properly terminated West for “cause”. (A2259.)



## ARGUMENT

### I. **THE SUPERIOR COURT ERRED WHEN IT *SUA SPONTE* DECIDED TO “CONTINUE TO EXERCISE” JURISDICTION OVER THE CASE AFTER IT ORDERED THE TRANSFER TO THE COURT OF CHANCERY**

#### A. **Question Presented**

Whether the Superior Court properly applied 10 *Del. C.* § 1902 when it transferred the case to the Court of Chancery on January 20, 2020, and then entered an order continuing to maintain jurisdiction on September 1, 2020? (Preserved at A1308-09; A1715-1722; A1727-1728; A1850-1853.)

#### B. **Scope of Review**

Statutory interpretation is a question of law that this Court reviews *de novo*. See, e.g., *Manti Holdings, LLC v. Authentix Acquisition Company, Inc.*, 261 A.3d 1199, 1214 (Del. 2021) (citing *Salzberg v. Sciabacucchi*, 227 A.2 102, 112 (Del. 2020)).

#### C. **Merits of Argument**

##### 1. **Defendants’ Withdraw Of Their Motion To Transfer Seven Months After It Was Granted Had No Legal Consequence**

On January 20, 2020, the Superior Court decided that the forum selection clause in the Securityholders’ Agreement controlled the case, mandated that the parties’ dispute must be litigated in the Court of Chancery, and ordered the transfer of the entire case to the Court of Chancery. (A1244.) The Court asked Defendants whether the case could go back to California on the jury trial issue, and Defendants

unequivocally said: “No.” (A1260). West did not effectuate the transfer because he would have waived his fundamental right as a citizen of the State of California to a jury trial. *See Sokol Holdings, Inc. v. Dorsey & Whitney, LLP*, 2009 WL 2501542, at \*5 (Del. Ch. Aug. 5, 2009) (bringing an action in Chancery “serves as an effective waiver of the right to a jury trial”). This is “because there are no jury trials in Chancery.” *Paragon Capital Management, LLC v. Crombie*, 2012 WL 214777, at \*1 (Del. Ch. Jan. 24, 2012); *see also, e.g., In Re Del Monte Foods Company Shareholders’ Litigation, I*, 2010 WL 5550677, at \*2 (Del. Ch. Dec. 31, 2010).

Rather than transferring this action to the Court of Chancery and risk a loss or waiver of his right to a trial by jury, on June 18, 2020, West filed a motion in the California case seeking to lift that Court’s April 12, 2017 stay order and proceed with the action in that forum. (A598-623.) On July 29, 2020, the California Court lifted the stay, refusing to enforce the mandatory forum selection in the controlling Securityholders’ Agreement designating the Court of Chancery as the parties’ pre-dispute chosen forum. (A2399.) The California Court reasoned that refusing to lift the stay on the grounds that the Securityholders’ Agreement forum selection clause is enforceable would result in a pre-dispute waiver of West’s inviolate right to a jury trial.

At a June 18, 2020 hearing, Defendants advised the California Court they would be withdrawing their motion to transfer in light of the ruling. (A457.) At a

status conference on August 20, 2020, seven months after the Superior Court entered its' transfer order, Defendants informed the Superior Court that they were withdrawing his motion for a transfer order. (A457; A1305.) On August 31, 2020, West moved the Superior Court to maintain the transfer, to not attempt vacatur of the transfer without briefing and a hearing: "assert[ing] his right to be heard on the issue, as a matter of fundamental fairness and due process." (A1308-1309.)

In this light, on September 1, 2020, the Superior Court *de facto* vacated the transfer order by its *sua sponte* Order Regarding Jurisdiction And Trial Scheduling. (A1305-1306.) The Order says that the Court "was advised that Defendants have withdrawn their request to transfer the case to the Delaware Court of Chancery." (A1305.) The Order also states that Defendants have "advised the Court that they are prepared to proceed with a trial by jury in this Court." (A1306.) The Order then advises that the Superior Court "will continue to exercise jurisdiction over this case." (*Id.*)

Neither the Superior Court, nor Defendants, followed Superior Court Civil Rule 60, proscribing relief from orders. Rule 60 requires a motion. Defendants never moved the Superior Court for its requested relief. Furthermore, Rule 60 does not authorize *sua sponte* relief from rendered orders.

2. **The Superior Court Had No Power Or Authority To Maintain Jurisdiction After It Entered The Order Transferring The Case To The Court Of Chancery**

Beyond ignoring West's request to be heard and otherwise disregarding mandatory process and procedure, the Superior Court's September 1, 2020 Order is in derogation of 10 *Del. C.* § 1902, which governs the power, jurisdiction, and operation of the Delaware courts.

Under the Delaware statutory scheme, upon transfer, the only action proscribed is for the "affected party" (West) to file "a written election to transfer" in Chancery, and for West to "discharge[] all costs accrued in the first court (the Superior Court) and make[] the usual deposit for costs in the second court." 10 *Del. C.* § 1902. Under this statutory scheme, the "first court" (the Superior Court) does not actually transfer the case and does nothing until the election is made and the costs are paid.

There is no authority for the first court (the Superior Court) to do anything once the transfer order is rendered. Once the election is perfected by plaintiff (West), only the prothonotary, clerk, or register of the first court (and not the judge) have the authority to act after transfer: "[all or part of the papers filed, or copies thereof, and a transcript of the entries, in the court where the proceeding was originally instituted shall be delivered in accordance with the rules or special orders of such court, by the prothonotary, clerk, or register of that court [the first court] to the prothonotary, clerk or register of the court to which the proceeding is transferred (to the Court of Chancery)." *Id.*

After the plaintiff elects (by filing the complaint in the second court and paying all required costs and deposits), and after the prothonotary, clerk, or register of the first court delivers all or part of the papers filed, or copies thereof, and a transcript of the entries, to the prothonotary, clerk or register of the second court, thereafter, “[t]he latter court shall thereupon entertain such applications in the proceeding as conform to law and to the rules and practice of such court, and may by rule or special order provide for amendments in pleadings and for all other matters concerning the course of procedure for hearing and determining the cause as justice may require.” *Id.*

The Superior Court had no power to “continue to exercise jurisdiction” after the order of transfer because the claims are no longer with the first court and the right to elect to re-file the claims lies solely with West. Under this statute, neither Defendants nor the Superior Court had any power or right to affect the transferred case after the transfer order was entered and before West elects by re-filing the complaint in the second court.

Logic dictates that the transferring court can no longer continue to adjudicate claims after the transfer order is entered; if this were not true, the entire statutory scheme would be meaningless. And the controlling statute certainly does not allow it. Finally, because the statute does not give the transferring court any power and authority to proceed in any fashion with a case after the transfer order is rendered,

any subsequent adjudication by the transferring court is a nullity. This was expressed in West's application for an interlocutory appeal, to attempt to preserve judicial resources. (A1728.) West attempted to raise this serious problem with the Superior Court in numerous hearings and motions but to no avail.

**II. THE SUPERIOR COURT ERRED WHEN IT DID NOT ALLOW THE PLAINTIFF TO VOLUNTARILY DISMISS THE CASE IN FAVOR OF PROCEEDING TO A JURY TRIAL ON ALL ISSUES IN CALIFORNIA**

**A. Question Presented**

Whether the Superior Court erred when it denied West's multiple motions for voluntary dismissal without prejudice? (Preserved at A2191-2192.)

**B. Scope of Review**

This Court reviews trial court decisions regarding whether to allow a plaintiff to voluntarily dismiss a case on an abuse of discretion standard. *See Draper v. Paul N. Gardner Defined Plan Trust*, 625 A.2d 859, 863 (Del. 1993).

**C. Merits of Argument**

**1. The Court Departed From The Essential Requirements of Law**

**a. There Was No Determination Of Plain Legal Prejudice To Defendants Preventing Dismissal**

Because Defendants had answered the amended complaint, in this case, Superior Court Rule 41(a)(2) required West to move the Court for leave to voluntarily dismiss the complaint. Whether to grant leave of court for voluntary dismissal is a matter for the discretion of the trial court. *Lunn v. United Aircraft Corp.*, 26 F.R.D. 12, 18 (D. Del. 1960). The decision of the trial court will not be overturned except by a showing of an abuse of discretion. *Husband (B.E.M.) v. Wife (D.A.M.)*, 428 A.2d 1148, 1150 (Del. Super. Ct. March 27, 1981). To defeat the

Rule 41(a)(2) motion, defendants are required to satisfy the burden of demonstrating “plain legal prejudice.” *Draper*, 625 A. 2d at 863 (Del. 1993).<sup>5</sup> It is not a bar to a court-granted dismissal that the plaintiff may obtain some tactical advantage thereby. *In re Marriott Hotel Properties II Limited Partnership Untitled Holders Litigation*, 1997 WL 589028 at \*6 (Del. Ch. Sept. 17, 1977) (citing 9 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 2364, at 282-83).

Courts look to four factors with respect to “plain legal prejudice” by the granting of a motion for a voluntary dismissal:

- (1) The defendants’ effort and expense in preparation for trial;
- (2) Excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action;
- (3) Insufficient explanation for the need to take a dismissal; and
- (4) The fact that a motion for summary judgment has been filed by the defendant.<sup>6</sup>

*Draper*, 635 A.2d at 864. Importantly, the Superior Court abused its discretion because – despite being requested by West to employ the plain legal prejudice

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<sup>5</sup> Superior Court Rule 41 and Chancery Rule 41 are identical to Federal Rule of Civil Procedure 41. As such this Court in *Draper* (interpreting Chancery Rule 41) looked to federal precedent when it analyzed Rule 41(a)(2) and set forth the elements for determining “plain legal prejudice.” *Draper*, 635 A. 2d at 864.

<sup>6</sup> This fourth factor is inapplicable here because West is not moving for voluntary dismissal to avoid a pending motion for summary judgment. As such, Defendants are not suffering plain legal prejudice.



standard (A1669-1723; A167-476; A1854-2174) – it did not even address the standard adopted by this Court in *Draper*. There were two hearings on West’s requests for voluntary dismissal: December 9, 2020 (A1669-1723) and September 27, 2021 (A1799-1853). While the Superior Court explains the misguided and factors it considered (*infra*, Section II C 2 below) when it denied West’s right to voluntarily dismiss (itself from the “quagmire”, in favor of proceeding to an orderly knowable jury trial on all of the “interrelated” issues and claims in the parallel case, when the applicable form selection clause does not apply to either court), it never held Defendant to the requisite legal standard. This constitutes an abuse of discretion. *See McNair v. State*, 900 A.2d 398, 401 (Del. 2010) (“[a]n abuse of discretion occurs when a court has exceeded the bounds of reason in light of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice”) Here, even if the Superior Court had applied the recognized rules of law and practice, Defendants would not have met their burden by demonstrating any articulated factor to establish cognizable legal prejudice:

First, when considering Defendants’ effort and expense, “[i]n order to justify the denial of voluntary dismissal without prejudice, [] defendants must show that they have invested a substantial amount of time and effort which will be wasted by dismissal....” *Marriott*, 1997 WL 589028 at \*7. At the October 15, 2020 California hearing on Defendants’ initial motion for stay, Judge Cowan said that “We’re not

going to relitigate issues that were decided in Delaware, trust me.” (A693.) Also, as Judge Cowan suggests: “The fact that the case is not trial-ready [in California] is mitigated by the discovery already conducted in Delaware; any further discovery required for the fiduciary duty claim is not undue or disproportionate burden on ACRE.” (*Id.*) As such, none of Defendants’ amount of time and effort would have been wasted by the requested dismissals. Indeed, the California Case is duplicative, therefore, none of Defendants’ time and effort here was wasted.

Second, the record before this Court is devoid of anything even indicating that West is guilty of excessive delay and lack of diligence in prosecuting the Delaware case. To the extent West did not prosecute the breach of fiduciary duty claim here, Judge Cowan ruled that he did not prosecute it because, if he had, he would have compromised his right to a jury determination. (*Id.*) Unequivocally, West’s choice not to prosecute the fiduciary duty claim in Delaware was not because he lacked diligence causing an excessive delay.

Third, this case does not involve an “insufficient explanation for the need to take a dismissal.” West sought voluntary dismissal without prejudice in favor of a duplicative action in another forum where his inviolate right to a jury trial is sacrosanct, and where what will be tried by the jury is known. Also, in parallel cases, “the plaintiff has the right to choose which action will proceed,” and the plaintiff accomplishes this choice by voluntary dismissal under Rule 41(a)(2). *Draper v.*

*United States Steel Corp.*, 64 F.R.D. 365, 366 (E. D. Pa. 1974), *Konovalova v. Cessna Aircraft Co.*, 2008 WL 28110541 (D. Kan., July 7, 2008).<sup>7</sup>

Under Delaware law, a plaintiff has the **right** to a voluntary dismissal without prejudice as long as the defendant does not suffer plain legal prejudice. Because Defendants did not meet their burden under any applicable *Draper* factor, and because the Superior Court did not properly consider the “plain legal prejudice” analysis (and merely focused on the misplaced and misunderstood factors set forth in Section II C 2 below) this Court should reverse the Superior Court’s denial of West’s various motions for voluntary dismissal without prejudice. If the Superior Court below had applied the proper analysis, West would have been entitled to voluntarily dismiss this case without prejudice in favor of the California forum.

**b. The Superior Court Should Have Deferred to the First-filed Action**

The procedural history of this case extensive to say the least, but ultimately the Superior Court was faced with parallel litigation involving the same parties in two different jurisdictions. While not the typical “race to the courthouse,” this Court’s ruling in *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering*

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<sup>7</sup> This Court looks to federal precedent when analyzing Superior Court Rule 41. *See supra* n. 6.

*Co.*, 263 A.2d 281 (Del. 1970) is nevertheless applicable. The Superior Court neglected to engage in this analysis, however.

In *McWane*, this Court held “[w]e think that the Superior Court abused its discretion” by “freely” exercising discretion in to proceed in favor of a prior filed proceeding. *McWane*, 263 A.2d at 282-84. The Court reasoned that the Superior Court acted “without due regard for comity and for the orderly and efficient administration of justice in the two courts.” *Id.* at 282. Delaware courts post-*McWane* regularly defer in favor of allowing the plaintiff to proceed in the first filed action. *See, e.g., United Engines v. Sperry Rand Corp.*, 269 A.2d 221, 223 (Del. 1970); *Carvel v. Andreas Holdings Corp.*, 698 A.2d 375, 378 (Del. Ch. 1995); *Goldman v. Aegis Corp.*, No. 6463, 1981 WL 17033, \*2, (Del. Ch. Aug. 3, 1981).

“Before the Court may dismiss or stay an action filed in Delaware on first-filed grounds, it must first analyze the particular circumstances of the case under the dual principles of comity and a plaintiff’s right to select the jurisdiction in which to bring the action.” *United Phosphorus, Ltd. V. Micro-Flo, LLC*, 797 A.2d 1208, 1213 (Del. Sup. Ct. 2001). The *McWane* test is whether (1) there is a prior action pending in another jurisdiction, (2) the parties and issues involved are the same, and (3) the prior court is capable of doing prompt and complete justice. *Id.* at 1213-14.

There is no question in this case that West satisfies the *McWane* criteria. First, the California Case is a prior action, and the California Case is the original action

commenced by West in 2016. The general rule is that “litigation should be confined to the jurisdiction in which it first commenced.” *Id.* at 213.

Second, the parties and issues are exactly the same because these are duplicative, parallel actions.

Third, there is no question that the California Court is capable of doing prompt and complete justice. Under the agreements at issue, Delaware law (has already and will inevitably be) applied to some of the claims. Delaware will defer to California’s ability to apply Delaware law, and the Court should not “presume that the California courts will not apply Delaware law” when it is clearly applicable. *Draper*, 635 A.2d at 867; *see also, e.g., Transamerica Corp. v. Reliance Ins. Co. of Ill.*, 1995 WL 1312656, \*9 (De. Ch. Aug. 30, 1995) (“there is no reason to believe that the California court is incapable of accurately interpreting and applying Delaware’s law to the parties’ contract to the extent that Delaware law is applicable”).

Defendants argued below that the *McWane* doctrine does not apply here because *McWane* is not controlling when the parties displace it by contract. Defendants then stated that both the California Court and this Court have decided that the Delaware forum selection provisions are enforceable. Defendants are wrong. At the January 20, 2020, hearing the Superior Court held that the Securityholders’ Agreement controls, and it mandates the Court of Chancery. (A1287.) The only judicially determined controlling forum selection clause, in this

case, has no application in the Delaware Superior Court. Judge Cowan in California recognized the applicability of the Securityholders' Agreement too. He decided that the Delaware forum selection provision does not apply because enforcement of the provision would be "unfair" to West, reasoning that there is no purpose in forcing West to separately litigate his claims in separate courts, rather than pursuing them in a single California forum. (A1512-1513.) Because Judge Cowan decided that the Delaware forum selection provisions do not apply, and because he decided that it is unclear whether the California forum selection clause in the CPA can be enforced, the *McWane* preference favoring the first-filed action applies here, as there simply is no enforceable agreement displacing it.

Therefore, the Court below should have granted West's motion for voluntary dismissal without prejudice in favor of the prior-filed California Case. *See Lisa, S.A. v. Mayorga*, 993 A.2d 1042, 1047 (Del. 2010) (same plaintiff filed prior action in a jurisdictionally competent court and the prior case was "functionally identical" to the later-file Delaware action).

Despite extensive briefing instigated by West, the Superior Court never addressed *McWane* and its applicability to this case. (A1669-1723; A1799-1853.) This too constitutes an abuse of discretion under the standard expressed by this Court in *McNair*. (*Ibid.*)

2. **Each Basis For The Courts Refusal To Allow Dismissal Was Wrong**

a. **The Initial Motion For Voluntary Dismissal**

On December 9, 2020, the Superior Court denied West's first attempted voluntary dismissal. Incorporating the transcript order from January 20, the Court stated that a primary basis for the denial was the January 20 ruling concerning the forum selection clause and Delaware's strong interest in the governance of Delaware LLCs. (A1711.) The transcript order says that the mandatory forum selection clause in the Securityholders' Agreement controls and is being enforced. (*Id.*) The Court also found that the Securityholders' Agreement falls within the Delaware LLC Act, 16 *Del C.* § 18-111. (A1288.) However, as discussed earlier, the forum selection clause in the controlling Securityholders' Agreement does not support the Superior Court's denials of the requested voluntary dismissals. Therefore, the Court's reliance on the January 20 decision on the controlling forum selection clause "exceeds the bounds of reason in light of the circumstances under *McNair* and its progeny. As such, the Superior Court's reliance on the inapplicable forum selection as a stated justification for denying West's request for voluntary dismissal – in favor of a first filed parallel proceeding where all his claims will be tried together before a jury ensuring the protection of West's fundamental right – is an arbitrary abuse of discretion.

The Superior Court also denied dismissal at this juncture because the California appellate court had not decided Defendants' appeal of Cowan's decisions

lifting the stay. (A1715.) But this proved to be an irrelevant factor in the Court's decision to deny dismissal because once the Court learned that Defendants lost their appeal, Judge Johnson still denied dismissal. (*See infra*, Section II C 2.)

At the time of the December 9, 2020 hearing, the Superior Court was still under the illusion that it could try the mixed questions of law and equity that are interrelated with fiduciary duties. The Court stated how fiduciary issues would be resolved at trial: the jury would decide certain factual questions and the judge would decide what constitutes a breach of fiduciary duty. (A1713.) Judge Johnston clarified that "whether something is a breach of fiduciary duty, in Delaware is, a legal question, and "it may well be that the same is true in California." But the Court's misunderstanding that it could conduct a trial on the pending claims (even after she got rid of West's breach of fiduciary duty claims) turned out not to be a deciding factor in its decision to deny dismissal. Because later, when the California Court (Judge Brazile) answered the Court's question (and advised that breach of fiduciary duty is a fact question for the jury to decide under California law) the Superior Court still denied dismissal. (*See infra*, Section II C 2.) So, despite articulating it at the hearing on the dismissal, this fiduciary duty issue was not a real factor in the Court's decision to prevent West from voluntarily dismissing what is left of his case before the Delaware Superior Court. The fiduciary duty *red hearing* likewise exceeds the bounds of reason and proves that the decision to deny dismissal



was indeed arbitrary, and an abuse of discretion. Applying these arbitrary factors and not addressing the fully briefed applicable legal standards demonstrates that the Superior Court both exceeded reason and ignored recognized rules of law when it denied the West's requested dismissal.

**b. Plaintiff's Renewed Motion For Voluntary Dismissal**

The Superior Court denied West's renewed motion for dismissal at a hearing on July 21, 2021, stating that it will not allow dismissal because West "voluntarily dismissed" the "fiduciary duty portion" (A1847) and she "think[s] that these claims can be bifurcated" [], even though it is going to be "tricky" to keep the breach of fiduciary duty claims out of the employment claims (*Id.*). However, these newer reasons for denying dismissal are likewise arbitrary and misinformed. The Court had already decided that the claims could not be bifurcated at the January 20, 2020, hearing when it transferred the entire case to the Court of Chancery. (A1287.) And the Court dismissed West's fiduciary duty claim against his will. (A1589.) Judge Johnston again reiterated her January 20, 2020 finding that the forum selection clause in the Securityholders' Agreement is enforceable, and that she would not rule any differently. (*Id.*) Again, that clause mandates Chancery and forms no basis for denying dismissal. None of the Superior Court's considered factors expressly influencing her decision to again deny dismissal have any merit whatsoever.

**c. Plaintiff's Motion For Reargument Of The Continued Denial Of Dismissal**

On October 14, 2021, West tried to set straight more misinformation that the Superior Court had enumerated as factors for the continued denial of West's requested dismissals. (A1854-2174.) West listed the misunderstandings: (i) that the California Court said it would try whatever Delaware does not (California never said that; it had decided that the claims were interrelated and had to be tried together and that the "gist" of all the claims evoked fiduciary duties), and (ii) that the Superior Court did not know that the California Court already determined that Defendants suffer no harm by having the trial in California. (*Id.*) The reargument also clarified the Court's misunderstanding about how the dismissal of the West's fiduciary claim was in fact involuntary. (*Id.*) Having addressed all of the Court's reasons for continually disavowing West's "right" to voluntary dismissal when Defendants failed to demonstrate plain legal prejudice, the Court, nonetheless denied the requested reargument with no hearing and no explanation. (A2175-2177.)

**CONCLUSION**

For the foregoing reasons, this Court should set aside the verdict and grant the West's requests to end the Delaware litigation either by setting aside the September 1, 2021 order continuing the Superior Court's exercise of jurisdiction over West's case, or by granting West's motion for voluntary dismissal without prejudice.

BUCHANAN INGERSOLL & ROONEY PC

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