



IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM WEST,

Plaintiff-Below/Appellant

v.

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**

**APPELLEES' CORRECTED ANSWERING BRIEF**

November 21, 2022

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## **NATURE OF PROCEEDINGS**

For almost three years, Appellant/Plaintiff William West fought tooth and nail to have a jury trial in the Delaware Superior Court. He filed this lawsuit in the Court below, and then he opposed multiple attempts by the Appellees/Defendants (the “ACRE Parties”) to move this case to the Court of Chancery. West voluntarily dismissed his claim for breach of fiduciary duty in July 2018 so he could avoid the Court of Chancery’s “clean up” jurisdiction over all of his claims, pushed forward with extensive fact and expert discovery and dispositive motion practice in the Delaware Superior Court, and presented his case to a jury in a two-week trial. But now, after the jury returned a defense verdict, he argues that the trial should not have occurred in the Court where he filed the lawsuit.

West does not identify any error that occurred at the trial. Rather, he seeks to overcome his loss by making representations to this Court that are simply inconsistent with the record, and he asks this Court to give him a chance for a “do-over” in California. Unfortunately for West, the two appellate issues he identifies are easily disposed of under Delaware law.

First, West claims that the Delaware Superior Court lacked jurisdiction to reconsider a previous order transferring his case from the Delaware Superior Court to the Court of Chancery. At one point, the Superior Court had directed that the case be transferred to Chancery Court, but West never took the necessary steps to

effectuate the transfer. The case remained with Judge Johnston, who later concluded that the breach of contract claim was appropriately tried in her Court. West overlooks the fact that the initial transfer order was interlocutory, meaning that the Delaware Superior Court had the ability to reconsider it based on new developments in the litigation.

Second, West claims that the Delaware Superior Court should have granted his two requests to dismiss the action in the Delaware Superior Court without prejudice, which would have enabled him to litigate his breach of contract claim in California instead. West has argued at various times that his breach of contract claim should be litigated in California, notwithstanding a clearcut provision in the contract requiring the litigation of contractual disputes in Delaware and his own decision to file this lawsuit. Now, in a challenge to the exercise of the lower Court's discretion, he conflates permissive factors with the actual legal standard of "plain legal prejudice" to argue that the Delaware Superior Court failed to consider and apply the proper standard. However, the record shows that the Delaware Superior Court indeed considered the appropriate factors within the context of the "plain legal prejudice" standard. The Delaware Superior Court properly denied West's repetitive requests to void the contractual forum selection clause, and it properly rejected West's attempts to abandon his Delaware case without consequence after litigating here for almost five years.



It is not difficult to see what is going on here. West was dismayed when, after a two-week trial, the Delaware jury found unanimously that he was terminated for Cause. But West's unhappiness with the verdict is not a reason to pretend that the Delaware trial never happened or to give him another bite of the apple in California. The verdict and judgment below should be affirmed.

## **SUMMARY OF ARGUMENT**

- I. Argument I is denied. After West failed to take steps to effect a transfer of this case to Chancery Court, the Delaware Superior Court properly retained jurisdiction and proceeded with the trial in the forum where West filed his lawsuit.
  
- II. Argument II is denied. The Delaware Superior Court correctly rejected West's two attempts to dismiss his claims, finding that the ACRE Parties would suffer plain legal prejudice if West's claims were dismissed because of many factors, including the abrogation of the Parties' agreements to litigate in Delaware.

## STATEMENT OF FACTS

**A. West agrees to litigate disputes relating to his status as an executive and equity shareholder in Delaware.**

In 2012, West and Joseph Grillo founded Access Control Related Enterprises, LLC (“ACRE”).<sup>1</sup> A84, ¶ 34. Just over a year later, LLR<sup>2</sup> and other investors acquired a stake in ACRE in exchange for a [REDACTED] capital infusion. A1342; B3, ¶ 5. In connection with this capital infusion, at the June 3, 2013 closing, West signed multiple integrated contracts, which governed his relationship with ACRE and the other members, and unambiguously provided for litigation of disputes exclusively in Delaware (A734, ¶ 2):

| <b>Agreement<sup>3</sup></b> | <b>DE Choice-of-Forum Provision</b> |   |
|------------------------------|-------------------------------------|---|
| Severance Agreement          | A807, § 7.6                         | “Any legal proceeding arising out of or relating to this Agreement will be instituted in a state or federal court in the State of Delaware.”      |
| Non Competition Agreement    | A1140, § 13                         | “Any legal proceeding arising out of or relating to this Agreement will be instituted in a state or federal court in the State of Delaware . . .” |

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<sup>1</sup> For ease of reference, all appellees will be referred to herein collectively as the “ACRE Parties.”

<sup>2</sup> LLR Equity Partners IV, L.P., and LLR Equity Partners Parallel IV, L.P. will be collectively referred to as “LLR.”

<sup>3</sup> To inject confusion, West cites to a Contribution and Purchase Agreement with a different forum selection clause. West Opening Brief at 7. However, that agreement governed the sale of Mercury Security Products, LLC, by Frank Gasztonyi and Hing Hung (owners of Quicksilver Holdings, Inc.) to ACRE. See A1509. West did not sign that Agreement in his individual capacity, and none of West’s individual claims arise from or relate to the Contribution and Purchase Agreement. See id.; A94-109.

| Agreement <sup>3</sup>     | DE Choice-of-Forum Provision |   |
|----------------------------|------------------------------|---|
| Securityholders' Agreement | A967, § 7.11                 | “[A]ny suit, action or proceeding . . . shall be brought in the United States District Court for the District of Delaware or in the Chancery Courts of the State of Delaware, so long as one of such courts shall have subject matter jurisdiction . . .” |
| LLC Agreement              | A780, § 12.7                 | “[A]ny legal action or proceeding . . . shall be brought exclusively in the Chancery Court of New Castle County, Delaware or the courts of the United States of America for the District of Delaware...”  |

**B. West tries to circumvent applicable forum selection clauses, fails, and opts to litigate his claims in Delaware.**

West initially filed a lawsuit against the ACRE Parties in the Superior Court of California, Los Angeles County, asserting claims for breach of fiduciary duty, wrongful termination, conversion, and declaratory relief. A846. On February 14, 2017, the ACRE Parties filed a Motion to Dismiss, or to Stay the Action for Forum Non Conveniens, pursuant to the agreements governing West’s role as CFO/COO and equity holder that contained mandatory forum-selection provisions for any state or federal court in Delaware as described above (i.e., Severance Agreement, § 7.6 and Non Competition Agreement, § 13). A521. On April 12, 2017, the California Superior Court held that the governing Delaware forum selection clauses controlled. A1348; A514-A526. The California Superior Court stayed the action in its entirety until final judgment and the exhaustion of all appeals, or “until further notice of this court” (“2017 Stay”). A525. West never sought reconsideration of, or an appeal from, the California Superior Court’s 2017 Stay. A1-A67; A1349-A1350.

**C. West litigates extensively in the Delaware Superior Court, contesting all efforts to have the case heard in the Court of Chancery.**

After a brief attempt to litigate his claims in the United States District Court for the District of Delaware (which lacked subject matter jurisdiction) (see A865-A886), West filed a lawsuit in the Delaware Superior Court on November 14, 2017. A631-A664. West’s original and First Amended Complaint both cite to the Severance Agreement’s choice of forum provision for any “state or federal court in the State of Delaware.” A639, ¶ 22; A72-A110, ¶ 22.

On January 12, 2018, the ACRE Parties moved to dismiss West’s claims for lack of subject-matter jurisdiction or, in the alternative, to transfer to the Court of Chancery. A710-A732. The ACRE Parties contended that West’s claim for breach of fiduciary duty could be heard only in the Court of Chancery pursuant to Delaware law. Id. In opposition to the ACRE Parties’ Motion, West argued that he had the right to have his claims heard by a Delaware jury. A2465-A2466.

On June 13, 2018, the Superior Court granted the ACRE Parties’ Motion as to West’s claim for breach of fiduciary duty, but not as to the remaining claims. A278:3-A280:21. The Court held that the breach of fiduciary duty claim was subject to exclusive Chancery Court jurisdiction. Id. Again, West did not appeal from or seek reconsideration of the Delaware Superior Court’s ruling. Nor did he return to the California Superior Court to ask that the stay be lifted, or take any other steps in

Delaware to contend that this ruling would deprive him of his right to a jury trial. A1-A67; A1349-A1350.

Instead, he voluntarily dismissed his breach of fiduciary claim on July 24, 2018, so that he could continue to litigate his breach of contract and tort claims in the Delaware Superior Court. A887-A888. West then amended his Delaware complaint to add claims for breach of contract, tortious interference with a contract, tortious interference with prospective business relations, and breach of the implied covenant of good faith and fair dealing. See A72-A111.

On February 1, 2019, the ACRE Parties moved to dismiss some of West's claims and the motion was granted in part. B7-B64. West's claims for wrongful termination, breach of contract, tortious interference with prospective business relations, and declaratory relief survived dismissal. B63-B64.

After extensive discovery, the ACRE Parties moved for summary judgment. B65-B110. The Delaware Superior Court denied the ACRE Parties' Motion for Summary Judgment, but invited the Parties to file a short motion to address jurisdictional issues that were discussed in the Parties' briefing. A897. Specifically, the ACRE Parties contended that the case should be tried in Court of Chancery based on one of the controlling agreements, rather than in Delaware Superior Court, where it had been litigated. A894-A907.

**D. The Delaware Superior Court orders that the case be transferred to the Court of Chancery.**

The ACRE Parties filed a Renewed Motion to Dismiss for Lack of Subject-Matter Jurisdiction or, in the alternative, To Transfer to the Delaware Court of Chancery pursuant to 10 Del. C. § 1902 (the “Transfer Statute”), which was granted on January 29, 2020. A894-A907; A1600-A1668. Judge Johnston ordered that the case be transferred to the Court of Chancery (the “Transfer Order”). A1653:12-13 (“So, I am ordering that transfer right now and I’m granting the motion to transfer.”). The Delaware Superior Court explained, “The parties’ choice of forum is enforceable so long as the Court in which the forum is selected has jurisdiction,” and noted “that the Court of Chancery has at least permissive jurisdiction under Section 18-111.” A1651:16-21; A1651:21-A1652:8 (explaining that the litigation cannot be bifurcated to tried in a manner without reference to the Securityholders’ Agreement and that there is no “basis for invalidating the forum selection clause”). As the Delaware Superior Court explained, “[T]here is a great deal of interest in having LLC governance vested in the Court of Chancery and there are a lot of public policy reasons for that. And if the Court of Chancery decides that [the jurisdictional question under 6 Del. C. § 18-111] is an issue that is important for them to decide and they keep it, I have no problem with that . . .” A1657:22-A1658:10.

Under Delaware law, however, the transfer to Superior Court was not self-enforcing. It could only be effectuated if West took the necessary steps to file an

appropriate notice demanding the transfer pursuant to the Transfer Statute. See 10 Del. C. § 1902. Despite multiple requests from the ACRE Parties, West did not effectuate the transfer, did not seek reconsideration of the Transfer Order, and did not file an appeal in Delaware. A1352. Accordingly, the case remained in the Delaware Superior Court on Judge Johnston’s docket.

**E. West seeks relief from the California Superior Court and then seeks to abrogate the Parties’ contractual agreement to litigate in Delaware.**

Rather than challenge or appeal the Transfer Order, West asked the California Superior Court to lift the 2017 Stay on June 18, 2020, and also asked the Delaware Superior Court to implement a stay on June 30, 2020. A598-A623; A477-A486. West argued in California that a transfer to the Delaware Court of Chancery, which generally holds trials without a jury, would violate his constitutional right as a California citizen to a jury trial. A604-A605.

The California Superior Court agreed with West, at least in part, reasoning that “continued enforcement of the forum selection clause would operate as a pre-dispute jury trial waiver under [Handoush v. Lease Finance Group, LLC, 42 Cal. App. 5th 729 (2019)].” A1436. The Court further explained that it was “not reconsidering Judge Johnston’s Transfer Order. There is again no suggestion that Judge Johnston erred on any issue of fact or law and West is not requesting the Court block the transfer to the Court of Chancery.” A1433. It further framed the sole issue



before it as “whether [Delaware Superior Court] Judge Johnston’s decision, regardless of the merits, violates California public policy by ordering transfer to a court that does not conduct jury trials. Judge Johnston did not consider this issue—the Transfer Order is relevant only insofar as it would not prevent a jury trial.” A1433.

**F. The ACRE Parties withdraw their earlier transfer request and move to stay the California action, but California defers to Delaware.**

The ACRE Parties promptly addressed the very concern that West and the California Superior Court had raised. At a hearing on July 29, 2020 before the California Superior Court, counsel for the ACRE Parties proposed that they withdraw their earlier request to transfer West’s claims to the Delaware Court of Chancery, clearing the way for a jury trial in the Delaware Superior Court. A1443:26-A1445:8. This approach, as counsel explained, “would provide substantial judicial economy. It would be consistent with this [C]ourt’s ruling, as well as Judge Johnston’s ruling that the forum selection clause is fully enforceable, but for the public policy issue. And it would accommodate the public policy issue by allowing it to go to trial in front of a jury.” A1444:16-22. The California Superior Court made clear that while it was lifting the stay in that Court, the extent of any further proceedings in Delaware would be for the Delaware Superior Court to decide. A1447:9-A1449:18.

The next day, on July 30, 2020, the ACRE Parties sent a letter to the Delaware Superior Court that summarized the previous day's proceedings in California before a scheduled conference on August 20, 2020. A1318-A1320 (noting that the California Superior Court did not rule on the question of where this case should be tried and was giving the Parties an opportunity to confer among counsel and to appear before the Delaware Superior Court before proceeding further in California). The ACRE Parties informed the Court that they were withdrawing their request that the case be transferred to Chancery Court, and they asked the Delaware Superior Court to retain jurisdiction so that the parties could proceed with a jury trial in Delaware. A1319.

On August 20, 2020, the Parties participated in a telephonic status conference with the Court. A1305. The ACRE Parties confirmed their request to proceed with a jury trial in the Delaware Superior Court. A1306. The Delaware Superior Court granted the ACRE Parties' request and retained jurisdiction over the case ("Maintain-Jurisdiction Order"). A1305-A1306. The Delaware Superior Court reasoned that "[a]ll discovery and most pretrial proceedings have been completed. But for suspension of jury trials in connection with the COVID-19 pandemic, the case is otherwise ready for a pre-trial conference and trial." A1306. "The Court will issue an Order scheduling a jury trial in this case at the earliest practicable date when

such proceedings resume in Delaware.” Id. West did not seek reconsideration of the Delaware Superior Court’s Order, nor did he file an appeal.

With the Delaware Superior Court’s preservation of West’s right to a jury trial (A1305-A1306), the ACRE Parties filed a renewed Motion to Stay in the California Superior Court on September 18, 2020. A1463-A1478. They explained that the underlying rationale for the California Court’s decision to lift the 2017 Stay no longer existed (i.e., the transfer to the Court of Chancery), that the trial would be proceeding in Delaware before a jury, and that a continuation of the stay in California was necessary to enforce the forum selection clause to which the parties had agreed. A1467-A1473.

In response, West raised a new argument in the California Superior Court. A1489. He pointed to his voluntary dismissal of the breach of fiduciary duty claim two years earlier, in July 2018, and contended that he dropped the claim in Delaware only because of a concern that it would have forced his case into Court of Chancery. Id. He argued that he should not be forced to proceed any further in Delaware because such a trial would not include the fiduciary duty claim that he had dismissed in Delaware more than two years earlier. A1496-A1498.

In doing so, West contradicted earlier representations to the Delaware Superior Court: “[W]e are not making any allegations of breach of fiduciary duty against Defendants.” A1627:3-10. That claim, he said “has long since been

dismissed; and we have elected not to pursue” it. A1630:23-A1631:4. West added, “Your Honor maintains jurisdiction” and “we are ready to go to trial before your honor in a little over a month,” even without his then-dismissed claim for breach of fiduciary duty. A1632:9-16.

Nevertheless, on October 15, 2020, the California Superior Court denied the ACRE Parties’ Motion, again without attempting to decide how the Delaware court should proceed on the litigation pending before Judge Johnston. A1507-A1515. The Court found that “enforcement here would be unfair because Delaware is not a viable alternative forum to California for West’s breach of fiduciary duty claim.” A1511. The Court expressed a desire “to find out what Delaware does on [West’s forthcoming Motion to Maintain Transfer].” A1535:19-20. The Court added, “The court recognizes that it’s not allowed to interfere with a proceeding in a different state. The court recognizes they have a long history in that court; I’m not blind to that. And I recognize that this is a twist, as it were, at the end of a case.” A1531:6-10.<sup>4</sup> In other words, the California court deferred to the Delaware court about the handling of this case.

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<sup>4</sup> Contrary to West’s suggestions, the California Superior Court has never ruled that the claims that West has been litigating in Delaware since July 2018 must be heard in California, nor has the California Superior Court ever ruled that a jury trial could not proceed in Delaware. A1448:5-7 (“I don’t want to get involved in how Judge Johnston runs the Delaware case. That’s not my business.”); B118 at 5:8-9 (“How they handle things in Delaware is up to Delaware.”).

**G. Having refused to effectuate transfer, West fights extensively to have the case dismissed in Delaware, but the Delaware Superior Court rejects these attempts.**

As noted above, despite the Superior Court's ruling granting the ACRE Parties' Motion to Transfer on January 29, 2020, West had never elected to effectuate transfer to the Delaware Court of Chancery. More than seven months later, on August 31, 2020, West moved the Delaware Superior Court to maintain the Court's Transfer Order or to dismiss the case without prejudice so West could proceed in California. See A678. On December 9, 2020, the Superior Court denied the Motion. See A1710:5-A1714:16 (Judge Johnston emphasizing the "fact that the underlying case involves a Delaware LLC" in light of Delaware's "strong interest in governance of Delaware's LLCs," and confirming that "forum selection clauses control" and should be given "great deference," especially when sophisticated parties like West were aware or should have been aware of the process and procedures in the Court of Chancery); A1744:14-16 (Judge Johnston: "How about the forum selection clause? That is a pretty big right that the Parties contracted for."). West then moved for permission to file an interlocutory appeal, which was promptly denied by the Superior Court and this Court. A1724-A1733; A1790-A1793; West Opening Br. at 24.

Undeterred, West then renewed his Motion to Dismiss without prejudice in Delaware. A167. The Court denied West's Renewed Motion, finding that the

ACRE Parties would suffer plain legal prejudice if West were not required to litigate in the very location he agreed to do so in various agreements and in the court where he had filed this lawsuit and litigated for four years. A2175-A2177; A1847:7-A1849:1. The Delaware Superior Court reiterated, “So our trial date stands.” A1848:19-20. Dissatisfied, West then moved for reargument. A1854-A1867. Finding that the Court had not overlooked any controlling precedent or legal principle or misapprehended any material facts or law, the Delaware Superior Court denied West’s Motion. A2175-A2177.

**H. The Parties try the breach of contract claim in the Delaware Superior Court and the ACRE Parties are precluded from presenting evidence regarding West’s Breach of Fiduciary Duty at trial.**

With West’s voluntary dismissal of the breach of fiduciary duty claim (A887-A888), the parties proceeded to trial in the Delaware Superior Court on the breach of contract claim after West’s counsel represented that West had “no issue with the wrongful termination claim” (A2192:6-8) or the tortious interference claim (A2240:15-21) being tried in California. A2240:6-A2246:2. In connection with its ruling confining the trial to West’s breach of contract claim, the Superior Court granted West’s motion in limine and refused to allow the ACRE Parties to present evidence of breach of fiduciary duty as part of their defense to West’s breach of contract claim. See A2217:3-10. The Parties then tried the case before a jury from May 23, 2022 to June 2, 2022. A65. The jury unanimously found that West had

been properly terminated for “Cause,” as defined in the applicable agreements.  
A2259.

## ARGUMENT

### **I. The Superior Court correctly entered its Maintain-Jurisdiction Order.**

#### **A. QUESTION PRESENTED**

Whether the Delaware Superior Court could revisit the Transfer Order under the Transfer Statute when such an order was interlocutory and when West had failed to file a written election to transfer?

#### **B. SCOPE OF REVIEW**

The Delaware Supreme Court will review issues of statutory interpretation de novo. Salzberg v. Sciabacucchi, 227 A.2d 102, 112 (Del. 2020).

#### **C. MERITS OF THE ARGUMENT**

##### **1. The Delaware Superior Court was never divested of jurisdiction, because West never completed the necessary steps to effectuate the transfer.**

At the hearing on January 29, 2020, the Delaware Superior Court made three rulings. Judge Johnston (i) granted the ACRE Parties' Motion to Transfer the case from the Delaware Superior Court to the Delaware Court of Chancery; (ii) found that ACRE Parties' Motion to Dismiss for lack of subject-matter jurisdiction was moot; and (iii) found that the ACRE Parties' Motion to Strike Plaintiff's Demand for Jury Trial was not yet ripe for determination. B120. In granting the Motion to Transfer, the Court held that the case should be transferred to the Court of Chancery pursuant to a forum-selection clause in the Securityholders' Agreement providing for venue in that Court and because the Court of Chancery had permissive



jurisdiction. A1653:12-13 (“So, I am ordering that transfer right now and I’m granting the motion to transfer.”). A1651:16-A1658:6.

For the next eight months after the Court’s ruling, West never filed a written election to transfer the case to the Court of Chancery pursuant to the Transfer Statute. Instead, he moved to lift the 2017 Stay in the California Superior Court. A598-A627. On April 3, 2020, West informed the Delaware Superior Court that West did not intend to take any action in the Court of Chancery “until the issues raised in the motion to lift the stay [were] fully adjudicated by the California Courts.” B123. In fact, West never filed a written election pursuant to the Transfer Statute.

West claims that under the Transfer Statute, the Delaware Superior Court essentially divested itself of jurisdiction once it granted the ACRE Parties’ Motion to Transfer. West cites no authority for his argument, and nothing in the statute’s language actually supports West’s position. The Superior Court never ruled that it lacked jurisdiction; rather, it only granted the ACRE Parties’ Motion to Transfer. A1653:12-14 (“So, I am ordering that transfer right now and I’m granting the motion to transfer. I’m not considering a motion to dismiss.”). In doing so, the Delaware Superior Court found that the forum selection clause controlled and that the Court of Chancery had at least permissive jurisdiction. A1651:16-A1658:10. Because West never initiated the transfer process, his lawsuit remained on the Superior Court’s docket. West admits he never took the appropriate steps to do so, meaning

that the Superior Court was never divested of jurisdiction. This is further supported by the fact that approximately six months later, West asked the Delaware Superior Court to stay the proceedings. Thus, as explained above, the Delaware Superior Court never divested itself of jurisdiction.

**2. The Delaware Superior Court’s Transfer Order was not a “final” order within the meaning of Rule 60; rather, it was interlocutory and subject to change upon new developments, such as the California Superior Court’s lifting of the 2017 Stay.**

As explained above, the Transfer Order was not a final order within the meaning of Rule 60, which only applies to final judgments and orders. An order constitutes a final judgment where it “leaves nothing for future determination or consideration.” Werb v. D’Alessandro, 606 A.2d 117, 119 (Del. 1992) (citation omitted). Here, the Transfer Order was neither an adjudication on the merits, nor a final resolution of the case. Rather, it was a procedural decision in response to the ACRE Parties’ request to invoke the forum selection clause contained in one of the operative contracts. Had West actually filed the written election to transfer and subsequently taken steps to transfer the case to the Court of Chancery, the Parties would have continued the litigation there. Mahani v. Walls, No. Civ.A. 97C-10-139, 2001 WL 1223189, at \*1 (Del. Super. Ct. Sept. 21, 2001) (“An interlocutory order or decree is one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to

be taken in order to enable the court to adjudicate the cause on the merits.”) (citation omitted); Gallant v. Telebrands Corp., 35 F. Supp. 2d 378 (D.N.J. 1998); White v. Town of Elsmere, No. CIV.A. 82C-JN-36, 1985 WL 635621, at \*1 (Del. Super. Ct. Mar. 28, 1985) (“The addition of the qualifying word ‘final’ emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.”) (citation omitted). But West chose not to do that, leaving his case pending in Delaware Superior Court pending further review by Judge Johnston.

An interlocutory or a non-final order, like the Transfer Order, remains within the control of the Court until a final judgment is entered and can be revisited if warranted. Frank G.W. v. Carol M.W., 457 A.2d 715, 718 (Del. 1983) (Until a final judgment is entered, interlocutory rulings “remain[ ] within the control of the court.”) (citation omitted); Siegman v. Columbia Pictures Entm’t, Inc., No. Civ. A. No. 11152, 1993 WL 10969, at \*3 (Del. Ch. Jan. 15, 1993) (“Prejudgment orders remain interlocutory and can be reconsidered at any time, but efficient disposition of the case demands that each stage of the litigation build on the last, and not afford an opportunity to reargue every previous ruling.”) (citation omitted).

Here, the ACRE Parties informed the Delaware Superior Court that, in light of developments in the California Superior Court (namely, the lifting of the 2017 Stay), they would (i) withdraw their request to transfer to the Court of Chancery; and (ii) agree to a jury trial in Delaware to respect West’s right to a jury trial as well as the parties’ contractual agreement to litigate in Delaware. A1318-A1320. In light of these new developments, the Superior Court issued the Maintain-Jurisdiction Order, confirming that it would “continue to exercise jurisdiction over the case” and “schemul[e] a jury trial in this case at the earliest practicable date when such proceedings resume in Delaware [because of the COVID-19 pandemic].” A1305-A1306. By that point, all parties had consented to the Delaware Superior Court’s jurisdiction and had made it clear that they were not insisting on a non-jury trial in Chancery Court. West gave that consent when he filed in Superior Court, and the ACRE Parties consented when the California court concluded that West was entitled to have his claims heard by a jury. It was well within Judge Johnston’s authority and discretion to try a case over which the Court had labored through multiple motions and hearings, and which the parties had at various times agreed to have heard in Delaware.

**II. The Superior Court did not abuse its discretion in denying West’s two attempts to voluntarily dismiss his claims when it found that the ACRE Parties would suffer “plain legal prejudice.” QUESTION PRESENTED**

Whether the Superior Court abused its discretion in denying West’s two attempts to voluntarily dismiss his claims when the Court found twice that the ACRE Parties would suffer “plain legal prejudice”?

**B. SCOPE OF REVIEW**

This Court reviews the Delaware Superior Court’s denial of West’s two requests for a voluntary dismissal for an abuse of discretion. Draper v. Paul N. Gardner Defined Plan Tr., 625 A.2d 859, 863 (Del. 1993). Under that standard, this Court does not substitute its own judgment for the Superior Court’s exercise of discretion, but instead reviews whether the underlying facts and legal principles could reasonably support the Superior Court’s decision. Pitts v. White, 109 A.2d 786, 788 (Del. 1954).

**C. MERITS OF THE ARGUMENT**

**1. The Delaware Superior Court correctly held that the ACRE Parties would suffer plain legal prejudice in the event of a voluntary dismissal.**

In considering whether to grant a motion to dismiss without prejudice under Rule 41(a)(2), the Court must first inquire whether there would be any “plain legal

prejudice” to the ACRE Parties in the event of a voluntary dismissal. Draper, 625 A.2d at 863. In considering this standard, Delaware courts may look to various factors, including the following: (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. Id. at 863-864 (explaining that, when considering this standard, “[i]t is appropriate to look to various factors” including the four factors). In exercising its discretion, the Court must act in a way as to “secure substantial justice to both parties.” Id.

No one factor is dispositive, and the Court will balance all factors to come to a reasoned conclusion. Pereyron v. Leon Constantin Consulting, Inc., No. CIV.A. 20509, 2004 WL 3048945, at \*4 (Del. Ch. Oct. 21, 2004). Put differently, “plain legal prejudice” is shown “when actual legal rights are threatened or when monetary or other burdens appear to be extreme or unreasonable.” William Moore, 8 Moore’s Federal Practice § 41.40[16] (Lexis 2004) (hereinafter “Moore’s”); Westlands Water Dist. v. United States, 100 F.3d 94, 97 (9th Cir. 1996) (explaining that, within the context of a motion under the Federal-Rule counterpart of Rule 41(a)(2), “legal prejudice is just that—prejudice to some legal interest, some legal claim, some legal argument”).

Indeed, the four factors recited by West are illustrative, but not exclusive or mandatory. As explained by this Court in Draper, “It is appropriate to look to various factors” including the four noted above. 625 A.2d at 863-64; see also Conagra/Pilgrim’s Pride, Inc. v. Green, 954 A.2d 909, 2008 WL 2429113, at \*2 (Del. 2008) (explaining that a court, in its discretion, “*may consider*” these four factors); Pereyron, No. CIV.A. 20509, 2004 WL 3048945 at \*4 (explaining that the Court will balance all factors and “come to a reasoned conclusion”); ASX Inv. Corp. v. Newton, No. CIV. A. 13452, 1994 WL 240697, at \*2 (Del. Ch. May 18, 1994) (explaining that the “relevant factors in evaluating prejudice to defendants include” these four); Catibayan v. Fischer Eng’g & Maint. Co., No. 14060, 1997 WL 666969, at \*2 (Del. Ch. Oct. 17, 1997) (explaining that these four factors are “[i]ncluded among the factors to be considered”); Avaya, Inc. v. Charter Commc’ns Holding Co., LLC, No. CV 10568-VCN, 2016 WL 381261, at \*1 (Del. Ch. Jan. 29, 2016) (explaining that the court’s examination of the “plain legal prejudice” standard “involves considering factors such as” these four); Smith v. Pepco Holdings, Inc., No. CIV.A.N09C-02-099CLS, 2011 WL 2178628, at \*1 (Del. Super. Ct. May 25, 2011) (finding no “plain legal prejudice” but denying the motion to dismiss anyway because the court found a stay more appropriate).

West argues that the Delaware Superior Court erred when it did not allow him to voluntarily dismiss the case in favor of litigating in California, because the

Delaware Superior Court did not explicitly go through each of the four *factors* often cited as relevant under the “plain legal prejudice” standard. As this Court has made clear, however, a motion for voluntary dismissal like West’s focuses on whether the defendant would suffer “plain legal prejudice” as a result of a dismissal. Plain legal prejudice generally requires a showing of harm to some legal interest, claim or argument of the defendant. Westlands, 100 F.3d at 97.

The ACRE Parties demonstrated how they would be prejudiced by a dismissal without prejudice after more than four years of heated litigation featuring multiple motions, hearings and court appearance. Judge Johnston plainly recognized that prejudice and actively decided to avoid it. First and foremost, the Court emphasized such an opportunistic and untimely maneuver by West would vitiate the contractual forum selection clause, thus negating a critical element of a complex, integrated corporate transaction. Specifically, Judge Johnston stated:

I have already found, as you will see in my various rulings and you already know, that forum selection clauses control. The party’s freedom to contract, particularly when you involve sophisticated parties, is something that should be given great deference.

In this case, the Plaintiff either was aware of, or certainly should have been aware, when the Court of Chancery was listed as part of the forum selection clause, of the process and procedures in that court. There was no mystery about that; that is something that is very well-known. And Mr. West agreed to that forum selection clause at that time.



If he wanted an absolutely unfettered, unlimited, without question right to a jury trial, he never should have agreed to that forum selection clause, and certainly shouldn't have let this case go on in this court as long as it has, and taken all of the resources of this Court to keep deciding issue after issue after issue, and then ultimately say, well, I am not going to abide by the forum selection clause because I want a jury trial.

Therefore, I am denying the Motion to Dismiss without prejudice.

A1714:10-A1715:14; A1682:8-A1683:1 (explaining that it was “no secret” to West that his right to a jury trial “was at least in question by agreeing” to the Court of Chancery as a potential forum). As reflected by the Parties’ arguments and the Court’s ruling, the Superior Court considered the four factors, plus Delaware’s substantive interest in the freedom of contract, which should be given great deference especially when sophisticated parties are involved.

The unfairness of a dismissal so far into the litigation was also cited by Judge Johnston in denying West’s Renewed Motion to Maintain Transfer and Voluntarily Dismiss. The Court explained that:

All right. I am going to deny the motion, and I’m doing it for several reasons. The first is that, because the fiduciary duty portion was voluntarily dismissed, for whatever reason, three years ago, I view that as an acknowledgment that these claims can be decided separately, in theory.

So it is this -- and if you look at the factors that we consider, you need to demonstrate **plain prejudice** for a balancing test. And one is the effort and expense in preparation for trial. Obviously, it’s all been in this jurisdiction, and there has been extensive preparation and expense.

I do not find that either parties' conduct weighs in one way or another. I think, to some extent, there has been a change of strategy and position by both parties with regard to what portion of this case belongs where. I think that essentially evens out for purposes of this.

I don't think there is a need for dismissal, because I think that these claims can be bifurcated. Although, as I've stated, it would be better if they were tried together, and it is going to be tricky to keep the breach of fiduciary duty claims out of the employment claims.

But the overarching reason that I am keeping them here is that these sophisticated parties entered into what I have viewed and found to be a valid forum selection clause. And in order for me to dismiss this, I would have to find, as a matter of law, that that forum selection clause is void and meaningless. And I have in the past chosen and found that that forum selection clause is enforceable, and I am not going to rule any differently today.

So our trial date stands.

A1917:7-A1918:19 (emphasis added).

In short, Judge Johnston appropriately weighed the importance of a critical contractual provision, the consequences if that provision were to be discarded, and the unfairness to the ACRE Parties if the chosen forum were to be abandoned at the 11th hour after years of spirited litigation before a judge who had become quite familiar with the factual record and the myriad legal issues.

The Court of Chancery's opinion in In re Walt Disney Co. Derivative Litigation is helpful. No. 15452, 1997 WL 118402, at \*1 (Del. Ch. Mar. 13, 1997). There, the plaintiffs, after choosing to litigate in the Court of Chancery, asked that

Court to allow them to voluntarily dismiss their case under Chancery Court Rule 41(a)(2), because it was “more efficient and convenient to litigate” in California because of certain contacts and because they filed first in California. Id. at \*2. They also claimed that the defendants would not suffer plain legal prejudice, because no preparations had begun for trial, the plaintiffs had not delayed prosecution of the action, plaintiffs had an adequate explanation for seeking dismissal, and the pending motion by defendants could be heard just as easily in California. Id.

After discussing some tactical considerations by the plaintiffs (i.e., litigation convenience and efficiency in California) that were known at the time of filing in Delaware, the Court noted Delaware’s interest in deciding questions of Delaware’s substantive corporation law. Id. at 3. In exercising its discretion, the Court of Chancery found Delaware to be “especially appropriate as a forum to resolve questions of Delaware law *when a plaintiff has consciously and deliberately chosen this forum and when director defendants have willingly agreed to defend in this forum.*” Id. (emphasis in original). Accordingly, the Court of Chancery denied the motion to voluntarily dismiss as a matter of equity and fairness. Id. at \*3-4; AT&T Wireless Servs., Inc. v. Fed. Ins. Co., No. CIV.A. 03C-12-232WCC, 2005 WL 2155695, at \*5 (Del. Super. Ct. Aug. 18, 2005) (“Insurers have satisfied their burden of demonstrating plain legal prejudice from what is perceived as mere forum shopping to obtain a litigation advantage. Justice requires that AWS litigate in the

jurisdiction they have deliberately chosen and in which they have forced the defendants to proceed.”).

Like the courts in Disney and in AT&T, the Delaware Superior Court here emphasized the Parties’ enforceable agreements to litigate in Delaware – the very agreements under which West sought millions of dollars – and gave particular importance to West’s selection of the Delaware Superior Court as a forum, whether pursuant to the contracts providing for the Delaware Superior Court as a forum or to avoid filing in the Court of Chancery. The Court also noted the Parties’ extensive discovery and motion practice efforts, all of which had led to the brink of trial. Given the Delaware Superior Court’s careful consideration of these pertinent factors, any argument that the Delaware Superior Court abused its discretion lacks merit and West’s arguments to the contrary reflect nothing more than his dissatisfaction with the jury verdict. It is quite obvious that had the verdict been in his favor, he would be praising Judge Johnston’s exercise of discretion rather than challenging it.

**2. The McWane doctrine does not apply where the parties contracted for a specific forum: Delaware.**

West claims that, because of the McWane doctrine, this Court should defer to the California Court because West filed there first. But the McWane doctrine “is not controlling” when “the parties displace it by contract.” McWane, Inc. v. Lanier, III, No. CIV.A. 9488-VCP, 2015 WL 399582, at \*10 (Del. Ch. Jan. 30, 2015). Both the California Superior Court and the Delaware Superior Court have already held that

the multiple forum-selection provisions are enforceable, provided that West's right to a jury trial are respected, and accordingly, the McWane doctrine simply does not apply. Contrary to West's argument (West Opening Br. at 41), no court has decided that "the Delaware forum selection provisions," especially the Severance Agreement cited in West's First Amended Complaint at ¶ 22 (A80), do not apply.

Accordingly, for the reasons above, West's argument that the Superior Court erred lacks merit and his appeal should be dismissed.

### **CONCLUSION**

William West cannot avoid the consequence of his decisions. He requested and received a jury trial in the Delaware Superior Court. He cannot now – in the face of an unimpeachable defense verdict – ask this Court to reverse the jury verdict because of the two supposed "errors" he identifies. First, the Delaware Superior Court always had the authority to revisit its Transfer Order upon new developments. It did so appropriately after West declined to take the necessary steps to transfer this case to Chancery Court, and after West continued to oppose any attempts to have his claim decided in that court without a jury. Second, the Delaware Superior Court clearly found the ACRE Parties would suffer plain legal prejudice if West's two requests for voluntary dismissal were granted. West cannot establish any reversible error by the Delaware Superior Court, and this Court should therefore dismiss West's appeal and affirm the jury's verdict in favor of the ACRE Parties.

November 21, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Amy M. Dudash, do hereby certify that on November 28, 2022, a copy of the *Public Version of Appellee's Corrected Answering Brief* was served via *File & ServeXpress* on the following counsel of record:

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