



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
REPLY BRIEF**

BUCHANAN INGERSOLL & ROONEY PC

Geoffrey G. Grivner (#4711)
Kody M. Sparks (#6464)
500 Delaware Avenue, Suite 720
Wilmington, DE 19801
Telephone: (302) 552-4200
Facsimile: (302) 552-4295

*Attorneys for Plaintiff-below/Appellant
William West*

Dated: December 6, 2022

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

NATURE OF PROCEEDINGS.....1

STATEMENT OF FACTS8

A. West’s “Agreement” to Litigate in Delaware.....8

B. The Applicable Forum Selection Clause9

C. West Litigates Extensively in the Delaware Superior Court.....10

D. The Case Is Transferred to the Delaware Court of Chancery11

E. The California Court Refuses to Enforce the Controlling Forum Selection Clause11

F. Whether Appellees Withdraw Their Transfer Request12

G. The Delaware Superior Court Rejects West’s Attempts to Dismiss the Delaware Case13

H. The Parties Proceed to Try the Breach of Contract Claim Before A jury in the Delaware Superior Court.....14

ARGUMENT16

I. The Delaware Superior Court’s Order Continuing Jurisdiction After Transfer.....16

 C.1. Whether the Delaware Superior Court Was Divested of Jurisdiction16

 C.2. Whether the Transfer Order Was A Final Order.....17

II. The Delaware Superior Court’s Refusal to Allow Voluntary Dismissal18

 C.1. Plain Legal Prejudice18

 C.2. The McWane Doctrine21

CONCLUSION.....22

TABLE OF AUTHORITIES

Cases

Draper v. Paul N. Gardner Defined Plan Tr., 625 A.2d 859
(Del. 1993)..... 18, 19, 20

Mahani v. Walls, 2001 WL 1223189 (Del. Super Ct. Sept. 21, 2001).....17

McWane, Inc. v. Lanier, III, 2015 WL 399582 (Del. Ch. Jan. 30, 2015).....21

Werb v. D’Alessandro, 606A.2d 117 (Del. 1992)17

This Reply Brief sets forth Appellant William West's arguments in reply to each corresponding subsection of the nature of proceedings, the statement of facts, and the argument contained in the Appellees' Answering Brief.

NATURE OF PROCEEDINGS

Appellees mischaracterize the nature of these proceedings by asserting that (i) West fought tooth and nail for the jury trial below, (ii) West voluntarily dismissed his breach of fiduciary duty claim, (iii) only after West lost below, West argues that the trial should not have occurred, (iv) by this appeal, West does not identify any error that occurred at trial, (v) by this appeal, West makes representations to this Court that are inconsistent with the record, (vi) West asks this Court to give him a do-over in California, (vii) the Delaware Superior Court kept the case after the dismissal in favor of the Delaware Court of Chancery, (viii) the Delaware Superior Court had the ability to reconsider its' dismissal in favor of the Delaware Court of Chancery despite the language in the transfer statute and despite the fact that no motion to reconsider was ever filed or decided below, (ix) there is clearcut contractual language requiring the litigation of the contractual claims in Delaware, (x) West made his own decision to file this lawsuit in Delaware, and (xi) the

Delaware Superior Court considered the appropriate factors within the context of the plain legal prejudice standard.¹

First, West did not fight tooth and nail for the jury trial below. From November 28, 2016, when West filed the initial complaint in the Los Angeles Superior Court, West has fought tooth and nail to have all of his interrelated claims heard before a single jury. Once the California Court (Judge Lyons) granted the Appellees' motion to stay in favor of the Delaware forum selection clause in the Securityholders' Agreement, West sought to have all of his claims heard in the United States District Court for the District of Delaware. West then voluntarily dismissed the federal case for want of personal jurisdiction and filed all of his claims in the Delaware Superior Court seeking a jury trial. At the outset of the Superior Court case, West asked for Judge Johnston to be appointed as a vice-chancellor so that all of his claims could be decided by one tribunal. Appellees opposed, and West's request was never acted upon.

In January 2019, after the Superior Court had dismissed his claim for breach of fiduciary duty, West amended the Delaware complaint adding the interrelated tort claims. Then, after the Superior Court enforced the forum selection clause in the Securityholders' Agreement and transferred the entire case to the Delaware Court of

¹ Addressing each of Appellees' mischaracterizations of the nature of these proceedings herein, West makes assertions all of which are fully briefed with record citations in West's Opening Brief.

Chancery, West did not refile in the Court of Chancery but sought the lifting of the stay in the California court. After the California court lifted the stay, without a motion or a hearing, the Delaware Superior Court began to proceed even though the case had been transferred to the Delaware Court of Chancery. West objected and moved to maintain the transfer order stating that he “is unwilling to proceed in any court without including all of his claims.” After the Superior Court entered its’ September 1, 2020 order continuing to exercise jurisdiction (without hearing West’s motion to maintain the transfer and without any motion for reconsideration of the transfer order), West defeated two attempts by Appellees to reimpose the California stay order and an appeal of the California court’s lifting of the stay, to preserve his right to have all of his claims heard before a singular jury.

Indeed, the primary issue litigated in California was that the claims are interrelated and should be heard together. West then unsuccessfully moved the Delaware Superior Court two times for dismissal in favor of having all of his claims heard before a single tribunal at one time, and he filed an unsuccessful request for an interlocutory appeal and an unsuccessful motion for reargument. Finally, when the Delaware Superior Court proceeded on a singular truncated claim for breach of the applicable employment contract, West reasserted that he believes the entire case should be heard together. Therefore, the record is replete with West’s insistence on

one fair trial on all issues and he most certainly did not fight tooth and nail for the unfair truncated trial below.

Second, West did not simply voluntarily dismiss his breach of fiduciary duty claim. Rather, on June 13, 2018, the Delaware Superior Court determined that West's breach of fiduciary duty claim must be dismissed and transferred to the Delaware Court of Chancery. Rather than filing the dismissed claim West voluntarily dismissed it, because transferring it would have deprived him of his right to a jury trial.²

Third, as set forth above, West did not wait until after he lost below to argue that the trial should not have occurred. West argued against the truncated trial at every possible instance. Appellees' hollow attempt to paint West as a sore loser should therefore be summarily rejected by this Court.

Fourth, Appellees' assertion that West does not argue that any error occurred at trial begs the whole question presented; to wit: because of the fundamental errors committed by the Delaware Superior Court – by (i) sua sponte deciding to continue to exercise jurisdiction over the case after it ordered the transfer to the Delaware Court of Chancery, and (ii) not allowing West to voluntarily dismiss the Delaware “continued” case in favor of proceeding to a jury on all claims – West suffered an

² On October 15, 2020, when the California court denied Appellees' initial motion to stay, Judge Cowan commented on West's decision to voluntarily dismiss the breach of the fiduciary claim as not a real strategic decision but a Hobson's choice.

unfair trial below. As set forth in West's Opening Brief in his nature of proceedings, the only (partial) claim the Superior Court would try was the contractual termination.

The Opening Brief states:

Even though fiduciary duty was in the contract, the Court instructed the parties not to discuss those issues in front of the jury. 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 and being instructed not to tell the whole truth 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 mess and is still figuring out what if anything he can pursue in California.

Fifth, Appellees boldly assert, without any support, that by this appeal, West makes representations to this Court that are inconsistent with the record. This is false.

Sixth, Appellees argue that West asks this Court to give him a do-over in California. As set forth above, the last thing West seeks is a do-over of the trial below. West herein, as at all times before, seeks a fair trial on all of the interrelated claims before a single jury, whether in Delaware or California.

Seventh, Appellees assert that the Delaware Superior Court simply kept the case after the dismissal in favor of the Delaware Court of Chancery. However,

simply keeping the case after the dismissal is the gravamen of the fundamental error below.

Eighth, Appellees then argue that the Delaware Superior Court had the ability to reconsider its' dismissal in favor of the Delaware Court of Chancery. However, the language in the transfer statute does not allow the transferring court to do anything after the transfer order. And there was no motion to reconsider in any event.

Ninth, Appellees argue that there is clear-cut contractual language requiring the litigation of the contractual claims in Delaware. At the January 20, 2020, hearing the Superior Court held that the Securityholders' Agreement controls, and it designates the Court of Chancery. 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 litigate his claims in separate courts, rather than pursuing them in a single California forum. 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, there simply is no enforceable agreement requiring litigation in Delaware.

Tenth, Appellees wrongfully assert that West made his own decision to file this lawsuit in Delaware. As discussed above, this simply is false.

Eleventh, Appellees argue that the Delaware Superior Court considered the appropriate factors within the context of the plain legal prejudice standard. To be clear, even though the plain legal prejudice standard was fully briefed each time it considered dismissal below, the Delaware Superior Court never applied the standard. Beyond this fundamental error, as briefed in West's Opening Brief, each factor that the Superior Court actually considered when it denied dismissal was proven to be mistaken: (i) that the forum selection clause in the Securityholders' Agreement requires litigation in the Delaware Superior Court when it does not, (ii) that the Superior Court can try mixed questions of law and fact before a jury when it cannot, (iii) that the Superior Court thinks the claims can be bifurcated when it had already determined that they cannot and when the California court had already determined that all the claims were interrelated and that the fiduciary claim was the gist of the action, and (iv) that the California court had decided that it would try whatever Delaware did not try when it never decided that.

STATEMENT OF FACTS

A. West's "Agreement" to Litigate in Delaware

Appellees definitively state that it is a fact that West agreed to litigate his claims in Delaware. This is simply false. As briefed fully in West's Opening Brief: (i) the only agreement that was adjudicated below to apply to all of West's claims was the Securityholders' Agreement, and (ii) by the Securityholders' Agreement, West did not agree to litigate his claims in the Delaware Superior Court. 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 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 the "CPA", A2587-2639). (*Id.*) The two remaining agreements (Equity Award Agreement the "Award Agreement", A2798-2802, and Equity Incentive Plan, the "EIP", A2515-2528) 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. Also, Judge Cowan decided that it is unclear whether the California forum selection clause in the CPA can be enforced in this case. (A1512-1513.)

B. The Applicable Forum Selection Clause

Appellees then state that by his initial California complaint he tried to circumvent the applicable forum selection clause. As set forth in Judge Lyons's 2017 decision, West argued that agreements other than the Securityholders' Agreement applied. (A1503-1517.)³ No Court has determined whether these other agreements apply if the forum selection clause in the Securityholders' Agreement does not apply. Appellees then state that West did not move to reconsider or appeal the stay order.

However, once the Delaware Superior Court transferred all of West's claims to the Delaware Court of Chancery where he would have no jury trial, West moved the California court to lift the stay, and it did. (A2399.) In his July 29, 2020, decision Judge Cowan determined that it did not matter that West had not appealed or moved to reconsider Judge Lyons's decision and that the CPA (A2587-2639) "which was executed concurrently with the Securityholders' Agreement and provides for a

³ West argued that the EIP (A2515-2528) and the Award Agreement (A2798-2802) apply. Neither of these agreements has a mandatory forum selection clause.

California forum rather than a Delaware forum, was not before Judge Lyons.”
(A2400.)⁴

C. West Litigates Extensively in the Delaware Superior Court

Appellees state that West litigated extensively in the Delaware Superior Court. While this is true, at all times while he litigated extensively in the Delaware Superior Court West believed that he was entitled to a jury trial. As Judge Cowan pointed out in his July 29, 2020, decision, “because there was no indication that West knew that the federal action would be dismissed, it was not clear from the Securityholders’ Agreement forum selection clause that West would be forced to proceed without a jury in the Court of Chancery. (A2402.) Judge Cowan concluded that “there is no reason to expect West to have foreseen this issue before ACRE sought to strike the jury demand.” (*Id.*) Appellees filed their motion to strike the jury demand on January 3, 2020, the eve of the Delaware trial. (A1005-1235.) So, to be clear, West did litigate his claims before the Delaware Superior Court extensively, until he learned that he would not have a jury trial in Delaware. Indeed, on January 20, 2020, the Delaware Superior Court denied West’s right to proceed to a jury. (A1244.)

⁴ Similarly, no court has determined whether the CPA applies if the Securityholders’ Agreement cannot be enforced.

D. The Case Is Transferred to the Delaware Court of Chancery

While Appellees state that, on January 20, 2020, the Delaware Superior Court transferred the case to Chancery, Appellees fail to mention all of the specific findings that the Superior Court made: (i) 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), that this is a case of “mixed question of law and equity” (A1291), (iii) that this case cannot be tried without reference to the Securityholders’ Agreement (A1277), (iv) that the case cannot be bifurcated (A1287), and (v), that the Securityholders’ Agreement falls within the Delaware LLC Act, Title 16, § 18-111 (A1288).

E. The California Court Refuses to Enforce the Controlling Forum Selection Clause

Appellees state that by moving to lift the California stay order West sought to abrogate the mandatory forum selection clause in the Securityholders’ Agreement designating either the Delaware federal court or the Delaware Court of Chancery as the exclusive forum. This is true. And the California court lifted the stay to preserve West’s right to a jury trial on all of his claims. (A2394-2403, 1503-1517, 297.) The California court decided that the enforcement of the forum selection clause in the Securityholders’ Agreement in Delaware violated West’s right to a jury trial. (*Id.*)

F. Whether Appellees Withdraw Their Transfer Request

Appellees state that after California lifted the stay order, they informed the Superior Court that they withdrew their transfer request. This is false. Appellees cite page 2 of their July 20, 2020 letter to the Delaware Superior Court (A1319). However, the letter says that Appellees informed Judge Cowan in California that they “would request that the motion to transfer be withdrawn so that we may proceed with a jury trial in Delaware.” (*Id.*) However, by the letter, Appellees do not actually withdraw their request to transfer. Nothing in the record shows that Appellees actually did withdraw their request to transfer.⁵ And, even if they had, their request had already been ruled upon by the Delaware Superior Court on January 20, 2020 (A1289), six months before Appellees discussed withdrawing their request for transfer.

In their Answering Brief, Appellees reason that this approach clears “the way for a jury trial in the Delaware Superior Court because it would be consistent with ... Judge Johnston’s ruling that the forum selection clause is fully enforceable.” However, the applicable forum selection clause is in the Securityholders’ Agreement, and it designates the Delaware federal court or the Delaware Court of Chancery, not the Delaware Superior Court. (A.2706-2270.)

⁵ West misstated the record on this issue in his Opening Brief on page 16.

Appellees then state that West never moved for rehearing or appeal of the Delaware Superior Court's September 1, 2020, order retaining jurisdiction. However, West moved to maintain the transfer, and three months later, on December 9, 2020, the Superior Court denied West's motion. (A1710 – 1714.) West moved for an interlocutory appeal. (A1724-1733.) The Delaware Superior Court denied the request. (A1790-1793.)

G. The Delaware Superior Court Rejects West's Attempts to Dismiss the Delaware Case

Most egregiously, Appellees state that the Delaware Superior Court found 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 the various agreements and in the court where he had filed this lawsuit and litigated for four years.” Appellees first cite the Delaware Superior Court's December 1, 2021 order denying West's motion for reargument of the denial of dismissal (A2175-2177) in support of their statement that Judge Johnston applied the plain legal prejudice standard. However, nothing in the cited order even mentions the plain legal prejudice standard or its factors. The Superior Court merely conclusively states (i) that West submits that it overlooked material facts (¶¶ 2 and 3), (ii) the court's understanding of the law on reargument (¶4), and (iii), that it did not overlook anything (¶5). (*Id.*)

Appellees then cite the September 27, 2021, hearing transcript where the Delaware Superior Court discusses denying West's motion for dismissal (A1847,

1849). Page 49 of the transcript is the only place in the entire record on appeal where the Delaware Superior Court mentions the words plain legal prejudice (A1847). The Superior Court mentions that all of the effort and expense for trial preparation has been done “in this jurisdiction.” The Superior Court never finds or even discusses whether these efforts or expenses will be wasted. And Appellees fail to mention that Judge Cowan in the California case determined (on October 15, 2020, almost one year prior to the September 27, 2021, Delaware Superior Court hearing and order) that he was not going to relitigate issues that were decided in Delaware and that any further discovery required for the fiduciary duty claim is not an undue or disproportionate burden on ACRE (A693, 2421).

Appellees cite page 51 of the transcript (A1849) to support their claim that the Delaware Superior Court found 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 the various agreements and in the court where he had filed this lawsuit and litigated for four years.” However, nothing on page 51 of the transcript supports their statement in any way. In fact, nothing anywhere in the record supports this proposition.

H. The Parties Proceed to Try the Breach of Contract Claim Before A jury in the Delaware Superior Court

Finally, Appellees mislead this Court by quoting West’s counsel out of context. Appellees state that “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’ or the tortious interference claim being tried in California” (A2040, 2046). Appellees here are citing the transcript of the May 10, 2022, pretrial conference before the Delaware Superior Court. Before the pages cited by Appellees, on page 14 of the transcript, counsel for West unequivocally states: “You know, we believe this case should be, frankly, in California...” (A2191). So, later on, on page 15 of the transcript, when counsel for West says that he has no issue with wrongful termination being tried in California as quoted by Appellees, this does not mean that he consents to the trial of the breach of contract claim in Delaware as implied by Appellees.

Appellees then cite page 63 of the transcript to indicate that West’s counsel agreed to try the tortious interference claims in California while the breach of contract claim would be tried in the Delaware Superior Court (A2240). However, West’s counsel clearly was postulating at the request of the court and said: “I do think it *could* be tried in another jurisdiction” (emphasis added, *id*). Appellees also cite page 69 of the transcript to indicate that West’s counsel agreed to try the tortious interference claims in California while the breach of contract claim would be tried in the Delaware Superior Court (A2246). However, West’s counsel does not discuss the tortious interference claim on page 69 as cited by Appellees (*id*).

ARGUMENT

I. The Delaware Superior Court's Order Continuing Jurisdiction After Transfer

C.1. Whether the Delaware Superior Court Was Divested of Jurisdiction

Appellees argue that the Delaware Superior Court was never divested of jurisdiction after it granted Appellees' motion to transfer all of the pending claims to the Delaware Court of Chancery because West never effectuated the transfer. However, the issue raised in West's Opening Brief is not the effect of West not effectuating the transfer; rather, the issue is what power the transferring court has over the transferred case after it orders the transfer under the transfer statute, 10 *Del. C.* §1902. Appellees do not challenge that the transfer statute falls under the article that governs the power, jurisdiction, and operation of the Delaware courts. Also, Appellees do not challenge that under the Delaware statutory scheme, after the transfer, the transferring cannot do anything until and unless the election to transfer is made by the affected party. If the legislature wanted the transferring court to retain jurisdiction after it transferred a case, it would have been so proscribed. Appellees state that West cites no authority; however, West relies upon the express language of the transfer statute. It is Appellees who cite no authority for their argument that the transferring court can do anything after transfer except what the statute says it

can do. By the transfer order, the Delaware Superior Court said nothing about retaining jurisdiction over the case. (A1244.)

C.2. Whether the Transfer Order Was A Final Order

Next, Appellees argue that the Delaware Superior Court's transfer order was not a final order. From there, Appellees assert that the Superior Court could properly revisit it. First, this argument ignores the transfer statute (discussed above). Second, under Appellees' cited precedent, the transfer order is a final order. Appellees cite *Werb v. D'Alessandro*, 606A.2d 117, 119 (Del. 1992) for the proposition that for the transfer order to be a final order, it must leave "nothing for future determination." Under the express language of the transfer statute, nothing was left for future determination by the Delaware Superior Court; indeed, its judicial labor was over, as nothing was left but for West to refile in the Delaware Court of Chancery. The Delaware Superior Court simply had no power to further consider or decide anything after it transferred West's case to the Delaware Court of Chancery. Under *Mahani v. Walls*, No. Civ. A. 97C-10-139, 2001 WL 1223189, at *1 (Del. Super Ct. Sept. 21, 2001) there simply were "no further steps" for the Delaware Superior Court to take "to enable [it] to adjudicate the cause on the merits".

Also, Appellees' Answering Brief does not address the ever glaring procedural irregularity raised in West's Opening Brief, to wit: that, by the September 1, 2020 order (A1305-1306) the Delaware Superior Court *sua sponte* vacated the

transfer order without briefing or a hearing. As set forth above, Appellees never even withdrew their motion to transfer, there was no rehearing, and there was no motion to vacate.

II. The Delaware Superior Court's Refusal to Allow Voluntary Dismissal

C.1. Plain Legal Prejudice

As set forth in subsection G above, when deciding whether to allow West to voluntarily dismiss his claims in favor of proceeding in California, the Delaware Superior Court never applied the four *Draper v. Paul N. Gardner Defined Plan Tr.*, 625 A.2d 859, 863 (Del. 1993) factors to determine whether Appellees suffered plain legal prejudice. As set forth in West's Opening Brief on pages 36 through 38, it is abundantly clear that if the Superior Court had applied the *Draper* factors to the instant case, there was no plain legal prejudice to Appellees.

Appellees argue that the *Draper* factors are neither exclusive nor mandatory. While this Court in *Draper* determined that it is appropriate for the court to consider the factors (*Draper*, 625 A.2d at 863-64), and while the record is clear that the Delaware Superior Court did not consider any of the factors when it twice denied West's request for voluntary dismissal,⁶ under all of the authority cited by Appellees at pages 24 through 26 of the Answering Brief, the Superior Court was required to

⁶ There were two hearings on West's requests for voluntary dismissal: December 9, 2020 (A1669-1723) and September 27, 2021 (A1799-1853).

find that Appellees would suffer clear legal prejudice if the case was dismissed. The Delaware Superior Court below failed to find any actual prejudice to Appellees if the requested dismissal in favor of proceeding in the California case had been granted.

Appellees argue that the Delaware Superior Court below considered the following “non-*Draper*” factors demonstrating clear legal prejudice: (i) that West’s requests for dismissal were “an opportunistic and untimely maneuver”, (ii) that the requested dismissals would vitiate the contractual forum selection clause, (iii) that West should not have let the case go on so long taking court resources, (iv) that West’s voluntary dismissal of the breach of fiduciary duty claim was an acknowledgment that the claims could be decided separately, (v) that the effort and expense have been expended in Delaware, and (vi), that Delaware has an interest in deciding questions of Delaware substantive corporate law. Factors (i) through (v) were briefed extensively in West’s Opening Brief.⁷ Factors (i) and (iii) concerning

⁷ On page 37 of West’s Opening Brief, West addresses the issue of his purported delay raised in factors (i) and (iii). On page 42 of West’s Opening Brief, West extensively addresses the inapplicability of the forum selection clause to the Delaware Superior Court’s jurisdiction raised in factor (ii). On page 42 of West’s Opening Brief, West addresses the issue of voluntarily dismissing the breach of fiduciary duty claim raised in factor (iv). In the California court’s October 15, 2020, decision, Judge Cowan found that West had no real choice in dismissing the breach of fiduciary duty claim, as discussed on pages 19 and 20 of West’s Opening Brief. On pages 36 and 37 of West’s Opening Brief, West addresses the issue that effort and expense have been expended in Delaware raised in factor (v).

West’s “delays” were also extensively addressed by Judge Cowan in his July 29, 2020, decision and his October 15, 2020, decision. “West promptly raised the issue here and in the Delaware Superior Court once it became clear that the case would proceed without a jury if he did not act, and there is no reason to expect West to have foreseen this issue before ACRE sought to strike his jury demand.” (A2437.) Beyond referencing the non-*Draper* factors (i) through (v), neither the Delaware Superior Court nor Appellees explain how these factors constitute plain legal prejudice to Appellees if the Delaware Superior Court case were dismissed in favor of West proceeding on all the interrelated claims before one tribunal in California.

The final non-*Draper* factor raised by Appellees is that Delaware has an interest in deciding questions of Delaware substantive corporate law raised in factor (vi). However, the Delaware Superior Court did not consider this “factor” when it denied West’s various requests for dismissal. While this *post hoc* factor discusses Delaware’s interest, it does not address prejudice to Appellees. To the extent Appellees are attempting to argue that their rights would have been prejudiced, Appellees assume that the California courts cannot properly apply Delaware law when the applicability of Delaware law is required by a contract. This Court in *Draper* rejected the same argument: it could not be presumed that California courts would not apply Delaware law where Delaware law was clearly applicable. *Draper*, 625 A.2d at 824-25.

C.2. The McWane Doctrine

Appellees argue that *McWane, Inc. v. Lanier, III*, No. CIV.A. 9488-VCP, 2015 WL 399582, at *10 (Del. Ch. Jan. 30, 2015) does not apply because in this case there is a controlling forum selection clause. However, the only controlling forum selection clause, in this case, is set forth in the Securityholders' Agreement. (A1277, 1288, 2395, 2398, 2431). The Securityholders' Agreement omits the Superior Court from a selected forum. As such, the controlling forum selection clause, in this case, cannot properly act to prevent the Superior Court from applying *McWane*. The controlling forum selection provision neither selects the California Superior Court nor the Delaware Superior Court. As such, logic dictates that the controlling forum selection displaces neither forum.

CONCLUSION

For the foregoing reasons, this Court should set aside the verdict and grant West's requests to end the Delaware litigation either by setting aside the Delaware Superior Court's September 1, 2021, order continuing the Superior Court's exercise of jurisdiction over West's case or by reversing the Superior Court's orders denying West's motions for voluntary dismissal without prejudice. In the alternative, West asks this Court to set aside the verdict and fashion a remedy whereby all of his claims may properly be decided in Delaware with deference to West's right to a jury trial.

BUCHANAN INGERSOLL & ROONEY PC

DATED: December 6, 2022

WORDS: 5,007

By: /s/ Geoffrey G. Grivner

Geoffrey G. Grivner (#4711)

Kody M. Sparks (#6464)

500 Delaware Avenue, Ste. 720

Wilmington, Delaware 19801

Telephone: 302.552.4207

Facsimile: 302.552.4295

geoffrey.grivner@bipc.com

kody.sparks@bipc.com

OF COUNSEL:

BIRD, MARELLA, BOXER, WOLPERT,
NESSIM, DROOKS, LINCENBERG &
RHOW, P.C.

Ekwan E. Rhow

Timothy B. Yoo

Kate S. Shin

Alexander H. Tran

1875 Century Park East, 23rd Floor
Los Angeles, CA 90067
(310) 201-2100

erhow@birdmarella.com

tyoo@birdmarella.com

kshin@birdmarella.com

atran@birdmarella.com

*Attorneys for Plaintiff-below/Appellant
William West*