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Case Number 376,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN MCLAREN ,	:	
	:	
Defendant Below, Appellant	:	Case No. 376,2023
	:	
v.	:	Court Below: Court of Chancery of the State of Delaware
	:	C.A. No. 2020-0302-JTL
SMASH FRANCHISE PARTNERS LLC,	:	
	:	
Plaintiff Below, Appellee	:	
	:	

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Through this appeal, Appellant-Defendant Kevin McLaren ("McLaren") seeks to overturn the Court of Chancery's clear and unambiguous determination, reflected in both its July 14, 2023 Memorandum Opinion (the "Opinion," cited herein as Op., __ (B00557)) and its September 8, 2023 Order and Final Judgment (the "Final Order"), that "*[e]ach party will bear its own fees and costs.*" *B00625*, ¶ 7; *Op.,* 5, 65 (emphasis added). The Final Order was negotiated by the parties, submitted to the trial court, and entered without modifications. Nevertheless, McLaren asks this Court to award him attorneys' fees under the Delaware Uniform Trade Secret Act ("DUTSA"), relief he did not fairly seek below. Because the trial court ordered the parties to bear their own fees and costs, his appeal is without merit.

Appellant-Plaintiff, Smash Franchise Partners, LLC ("Plaintiff" or "Smash"), brought claims against McLaren, and defendants-below Todd Perri ("Perri"), Dumpster Devil, LLC ("Dumpster Devil"), and Kanda Holdings (collectively, "Defendants") for, among others, misappropriation of trade secrets under DUTSA. Smash's application for a preliminary injunction was denied because, without foreclosing ultimate success on the merits, the trial court found Smash had not shown a likelihood of success on the merits of its DUTSA claim. After a two-day trial, post-trial briefing and arguments, the trial court issued the Opinion and entered the Final Order, both of which declined to award any party attorneys' fees.

Before trial commenced, through the joint pre-trial order (the "Pre-Trial Order" or "PTO"), Smash notified Defendants that it would not pursue its DUTSA claim at trial. In post-trial briefing, McLaren admitted he was not entitled to fees under DUTSA. McLaren ignores this procedural history and instead attempts to present for the first time on appeal evidence and arguments supporting a DUTSA fee award.

McLaren also ignores that Defendants (including McLaren) requested a joint DUTSA fee award in the PTO. He ignores that Defendants presented evidence in their pre-trial brief to support their DUTSA fee claim. He ignores that his counsel questioned Justin Haskin ("Haskin"), founder of Smash, about why Smash brought its lawsuit. He also ignores that Defendants presented evidence in their post-trial brief to support their DUTSA fee claim. He further ignores that his counsel made an oral motion to dismiss McLaren during post-trial argument without requesting fees – an application the trial granted without an accompanying fee award. McLaren ignores that he never moved for reargument after post-trial oral argument or moved to reopen the judgment to include a DUTSA fee claim. He ignores that when the parties negotiated the Final Order, he never raised his DUTSA fee request and specifically agreed to the language that each party shall bear its own fees and costs. And he ignores that he represented to the trial court that he agreed with the Final Order's terms, which again expressly disclaim any fee award.

McLaren never presented arguments or evidence to support an individual DUTSA fee request. To the contrary, Defendants' post-trial briefing noted that McLaren was not named as a defendant under a claim providing for statutory fees, and for that reason, he only sought fees under the Court of Chancery's general equitable powers.

Even if McLaren had fairly presented a DUTSA fee request below, he makes no attempt in his opening brief ("Opening Brief") to demonstrate that the trial court abused its discretion in finding Smash lacked in bad faith in maintaining its DUTSA claim up to trial. Instead, he relies on evidence he admits he did not present below and argues, erroneously and illogically, that he did not have the opportunity to present that evidence below.

In short, the Court of Chancery's decision not to award fees under DUTSA is fully supported by the record, applies with equal force to McLaren, and was not an abuse of discretion. The trial court's decision should be affirmed.

McLaren also appeals the Court of Chancery's June 12, 2020, bench ruling denying Defendants' motion for a protective order and awarding Smash attorneys' fees based on Defendants' refusal to provide discovery (the "Discovery Order"). McLaren failed to perfect an appeal from the Discovery Order by neglecting to include the Discovery Order in his notice of appeal. This aspect of his appeal must, therefore, be dismissed.

In any event, McLaren's invitation for this Court to make different factual findings with respect to the Discovery Order misunderstands this Court's limited review on appeal and the corresponding deference accorded to the trial court. This Court should reject McLaren's new factual narrative and affirm the trial court's decision as a proper exercise of its discretion.

SUMMARY OF ARGUMENT

1. Smash denies McLaren's Argument I. The trial court denied McLaren's DUTSA fee request when it ordered all parties to bear their own fees and costs. Any alleged failure by the trial court to rule specifically on an individual DUTSA fee application from McLaren results from his failure to fairly present an individual DUTSA fee request to the trial court. The trial court's supposed failure to rule on McLaren's fee request also did not prejudice a substantial right of McLaren because McLaren was not guaranteed a fee award even if he successfully established Smash's bad faith. As a result, the trial court did not commit plain error.

Assuming McLaren had fairly presented an individual DUTSA fee request below, the trial court's supposed failure to rule on that request also would not have been an abuse of discretion. No abuse of discretion occurred where McLaren failed to make a clear application to the trial court for individual DUTSA fees.

2. Smash denies McLaren's Argument II. The trial court did not abuse its discretion by denying Defendants' DUTSA fee application because it reasonably found Smash did not act in bad faith. This determination applies equally to McLaren's DUTSA fee application. The trial court properly found Smash's pre-trial decision not to pursue its DUTSA claim was insufficient to establish bad faith. Further, as the trial court appropriately found, (a) its Injunction Decision did not foreclose Smash from ultimately succeeding on the merits, and (b) Smash harbored

a genuine belief that some of the information Perri obtained constituted trade secrets. McLaren fails to show that these findings amount to an abuse of discretion.

3. Smash denies McLaren's Argument III. McLaren did not include the Discovery Order in his Notice the Appeal. Furthermore, he failed to address the issue of the fee award against him in the body of his Opening Brief. As such, he has waived his ability to appeal the Discovery Order. Regardless, he fails to establish that the trial court abused its discretion in issuing the Discovery Order.

STATEMENT OF FACTS[1]

I. MCLAREN'S CONDUCT IN FURTHERANCE OF PERRI'S FRAUD.

In 2015, Haskin developed and founded a mobile trash compaction franchised business known as Smash My Trash. Op., 1.

McLaren teamed up with Perri to form Dumpster Devil, a business designed to compete with Smash. *Id.* Perri simultaneously expressed an interest in purchasing a Smash franchise and thereby gained access to detailed information about Smash's business. *Id.* Shortly thereafter, he decided to build Dumpster Devil with McLaren instead. *Id.* However, Perri continued to feign interest in purchasing a Smash franchise to gather additional information from Smash about its business. *Id.* The Court of Chancery found that Perri's conduct toward Smash was fraudulent, although it did not result in compensatory damages. *Id.,* at 5, 49.

McLaren suggests in his Opening Brief (cited herein as OB, __) that he did not participate in Perri's fraud (OB, 15-16, 27-28, 33-34); however, the Court of Chancery found otherwise. The trial court determined that McLaren "preferred that Perri join him in starting a competing business rather than buying a Smash franchise, and he worked with Perri to that end." Op., 6. The trial court further found that, after Perri signed Smash's non-disclosure agreement in December 2019, Perri began

[1] Except where otherwise noted, the following facts are drawn from the Court of Chancery's July 14, 2023 Memorandum Opinion and the record and filings below, which are contained in the parties' respective appendices (cited herein as "A/B __").

attending Smash's Founder Calls and Franchise Forum Calls and, around the same time, began communicating intensely with McLaren by phone and text, exchanging hundreds of text messages and talking on the phone for hundreds of minutes. *Id.,* at 11-16; *see e.g.,* B00112-332. During these early communications, "Perri and McLaren … discussed whether they could develop their own trash compaction business." Op., 12.

On December 11, 2019, after attending his first Founder Call, Perri was leaning against purchasing a franchise and told McLaren, "I'm wondering why I would work with either of these companies." Op., 14. By the afternoon of December 19, 2019, Perri had decided to work with McLaren to develop a competing business, Dumpster Devil. Op., 20. Nevertheless, Perri continued to feign interest in purchasing a Smash franchise so he could continue attending Smash's Founder and Franchise Forum Calls. *Id.,* at 20-21.

During the nearly two months Perri was attending Smash's Founder and Franchise Forum Calls (mostly surreptitiously), he communicated constantly with McLaren about building Dumpster Devil to compete with Smash. Perri and McLaren exchanged hundreds of texts and talked on the phone for hundreds of minutes. *See e.g.,* B00112-332.

Perri's fraudulent scheme climaxed when he developed a pitch deck utilizing information gathered from Smash that he and McLaren used to win an exclusive

distribution contract with Packmat, a seller of trash compaction equipment. Op., 26-27. By that point, Perri and McLaren had a product they could mount on a truck and sell. They set up Dumpster Devil to mirror as closely as possible a franchise model without technically being a franchise. *Id.,* at 26. Dumpster Devil competed directly with Smash and used underhanded tactics to attract customers who were otherwise interested in Smash. *Id.,* at 29-30.[2]

On April 23, 2020, upon realizing what McLaren and Perri had done, Smash filed its original complaint against Defendants seeking a permanent injunction and damages. (D.I. 1). Plaintiff also filed a motion for preliminary injunction. (D.I. 5).

II. THE RELEVANT PROCEEDINGS BELOW.

In June 2020, a discovery dispute arose regarding identification of the confidential information Defendants allegedly obtained, necessitating Smash to file a motion to compel, which was met by Defendants' motion for a protective order. (D.I. 46, 47). At a June 12, 2020 hearing, Defendants argued that Smash's disclosure of misappropriated confidential information "was too vague to adequately convey the scope of [Smash's] claim or distinguish it from matters of general knowledge in the industry." B00381-83.

[2] Dumpster Devil created a Google Adwords campaign using the "Smash My Trash" key words. Op., 29. Dumpster Devil's website detailed why Dumpster Devil's product was specifically better than Smash's. *Id*.

In a bench ruling, the trial court denied Defendants' motion for a protective order and entered the Discovery Order. B00388, 11:23-24. The trial court found that the motion for protective order "was more tactical than warranted" and that "[a]ny concern about confidential information is fully addressed by the confidentiality agreement, and so … the motion for protective order [was] unfounded." *Id.,* at 12:5-13. The trial court granted Smash's motion to compel and awarded Smash its fees and costs associated with bringing the motion. (D.I. 73).

The preliminary injunction proceedings culminated in a preliminary injunction hearing and the issuance of an opinion and order (the "Injunction Decision"). Op., 2, 31. The Injunction Decision found Smash had not established a likelihood of success on its claim for misappropriation of trade secrets under DUTSA. *Id.* However, the Injunction Decision also found Smash had a reasonable probability of success on the merits of its fraud and deceptive trade practices claims. *Id.,* at 2.

The Injunction Decision did not foreclose ultimate success on the DUTSA claim. B00365 ("As such, based on the *record to date*, Smash has not established a reasonable likelihood of success that it has a protectable trade secret…."); *see also*, Op., 64 ("The Injunction Decision was a preliminary ruling, and as this decision has shown, a court may revisit conclusions reached on a preliminary record when the case reaches the trial stage.").

After the Injunction Decision, the parties engaged in extensive discovery. As McLaren admitted in his pre-and post-trial briefs, the parties engaged in an unsuccessful mediation with the Honorable Andrea Rocanelli. B00437-38; B00533-34.

After the unsuccessful mediation, the parties began final trial preparations. On October 26, 2022, the parties submitted the proposed Pre-Trial Order, which the trial court entered on November 7, 2022. (D.I. 312). Through the PTO, Smash informed Defendants and the trial court that "at trial, Plaintiff will only *pursue* Count V…and Count VI… [and] will no longer *pursue* Counts I, II, III [(Misappropriation of Trade Secrets)] and IV…." B00461 (emphasis added).

In the PTO, Defendants listed as an issue to be adjudicated "[w]hether Defendants should be awarded attorneys' fees and costs under the [DUTSA]…." B00459. The relief Defendants sought included:

- "Awarding Defendant Kevin McLaren his costs, including reasonable attorneys' fees pursuant…to 6 *Del. C.* § 2004 [DUTSA]…." B00460.
- "Awarding Defendants Todd Perri, Kanda Holdings, Dumpster Devil, and Kevin McLaren the costs of these proceedings, including their attorneys' fees, pursuant to 6 *Del. C.* § 2004 [DUTSA]…." B00461.

On November 2 and 3, 2022, the parties filed pre-trial briefs. Defendants' pre-trial opening brief (the "Pre-Trial Brief") sought an award of fees. B00435-39.

Defendants contended that Smash brought its lawsuit and maintained its claims for as long as possible to put Dumpster Devil out of business. B00438-39. Defendants pointed to deposition testimony from Haskin and franchise broker Don Tarinelli. *Id.* They also pointed to the case's procedural history, including the Injunction Decision, to support their claim of Smash's bad faith. B00435-38. McLaren did not raise an individual application or make an individual argument for DUTSA fees specific to him. B00435-439.

A two-day trial ensued. (D.I. 318). McLaren's counsel attempted to elicit evidence of bad faith from Haskin. B00472, 111:1-113:3 (Haskin Cross). He specifically asked Haskin why he filed a complaint in which Smash claimed the FDD, pitch deck, and unit economics papers contained trade secret information and why he continued pursuing his trade secret claim. *Id.*

After the trial, Defendants submitted a post-trial answering brief ("Post-Trial Brief"). (D.I. 324). Defendants again raised a collective claim for fees under DUTSA and presented the same arguments as they did in their Pre-Trial Brief. B00435-39; B00532-36. Defendants also took the position that Smash's "dismissal" of its DUTSA claims did not negate Defendants' claim for fees, arguing: "[w]here the plaintiff voluntarily dismisses a claim without prejudice, the defendant is the prevailing party for the purpose of an award of reasonable attorneys' fees under the

Uniform Trade Secrets Act." B00536 (citing *K3 Enter. v. Luba Sasowski*, No. 20-24441-CIV-CAN, 2022 U.S. Dist. LEXIS 105028 (S.D. Fla. June 13, 2022)).

However, Defendants' Post-Trial Brief also advanced a separate argument for McLaren: "Although McLaren was not named in a count *that provides for statutory fee shifting*, he is nonetheless entitled to an award of fees under the Court's *general equitable powers*." B00536-37 (emphasis added). In other words, McLaren consciously elected not to present a DUTSA claim for attorneys' fees in post-trial briefing and instead expressly informed the Court that he was only seeking fees under the Court's "general equitable powers." *Id.*

The trial court held post-trial oral argument on April, 5, 2023. (D.I. 328). At the start of Defendants' presentation, defense counsel stated: "as a result of the dismissal of those counts, Kevin McLaren is not named as a wrongdoer or a participant in any way in the two remaining counts. And I would ask the Court, after now three years of litigation, to dismiss Mr. McLaren." B00552, 50:5-10. Counsel did not seek fees for McLaren in this oral application. *Id.*

McLaren never submitted a proposed order of dismissal. Instead, on April 21, 2023, the trial court entered its own order dismissing McLaren. (D.I. 329) (the "McLaren Dismissal Order"). The McLaren Dismissal Order does not address fees and costs. B00554-56. McLaren did not move for reargument on his motion to dismiss or move to reopen the judgment to include an award of fees.

The trial court issued its Opinion on July 14, 2023. Contrary to McLaren's position on appeal, the trial court *did* rule on McLaren's DUTSA claim for fees in the Opinion, stating:

> *Perri, McLaren, and Dumpster Devil sought their attorneys' fees and costs under DUTSA* on the theory that Smash pursued that claim without a good faith basis after the Injunction Decision, only to drop the claim on the eve of trial. Smash had a weak claim, *but it was not so weak as to warrant fee shifting*.
>
> *Neither side in this case deserves any relief*. … Perri and McLaren have not faired better [than Haskin]. The Court criticized their conduct in the Injunction Decision, and this decision has found that Perri engaged in fraud, albeit fraud that did not cause any compensable damages. *Through the financial and personal consequences of this extensively litigated case, each side has received its just deserts. Each side will bear its own costs.*

Op., 4-5 (emphasis added). In the Opinion's conclusion, the trial court reiterated this holding, stating: "Each party will bear its *own costs*." *Id.,* at 65 (emphasis added). Vice Chancellor Laster also specifically addressed Perri's claim for fees under DUTSA, writing: "Smash dropped its claim under DUTSA on the eve of trial, making *the defendants* the prevailing party…Under Section 2004 [of DUTSA], a prevailing party must show that the claim fits under one of the enumerated circumstances warranting an award of attorneys' fees." Op., 63 (emphasis added). Upon analysis, the Vice Chancellor found no such enumerated circumstances present in this case. *Id.,* at 63-64.

Specifically, the trial court determined Smash did not act in bad faith. *Id.,* at 64. It found that the "fact that a plaintiff drops a claim in the later stages of litigation is not sufficient to find bad faith under DUTSA." *Id.* (citing *Research. & Trading Corp. v. Pfuhl*, 1992 WL 345465, at *16 (Del. Ch. Nov. 18, 1992) (Allen, C.)). It further found that "[f]rom reading the Injunction Decision, one could surmise that Smash's claim under DUTSA was among its *weaker theories, but that does not mean the claim was frivolous.*" *Id.* (emphasis added). The Vice Chancellor also found that "Smash started out with *genuine belief* that some of the information that Perri received constituted trade secrets." *Id.* (emphasis added). And "[a]lthough Smash dropped its DUTSA claim on the eve of trial, that decision was part of Smash's effort to simplify the issues." *Id.* Finally, the trial court noted, "[t]he parties had recently engaged in an unsuccessful mediation, and Smash may have made the decision to refine its theories based in part on information gleaned from the mediation." *Id.,* at 64-65. The Vice Chancellor concluded that Smash did not act in bad faith in pursuing its DUTSA claims. *See id.,* at 4, 64-65.

The Opinion ordered the parties to "confer regarding a form of final order." *Id.,* at 65. In compliance with this directive, the parties negotiated a proposed final order and submitted it to the trial court on September 7, 2023, under a cover letter stating: "The proposed Order is acceptable to all parties to this action, and we respectfully request that it be entered." B00623.

On September 8, the Court of Chancery entered the Final Order. The Final Order expressly provides that "[e]ach party will bear its *own fees* and costs." B00625, ¶ 7 (emphasis added).

As with the McLaren Dismissal Order, McLaren did not move for reargument after the Final Order was entered, nor did he move to reopen the Final Order to include his DUTSA fees. Instead, he waited until this appeal to raise the issue of his purported individual entitlement to fees under DUTSA.

McLaren filed his notice of appeal on October 6, 2023 (the "Notice of Appeal"), appealing "from the Order and Final Judgment by the of the Court of Chancery, by Vice Chancellor J. Travis Laster dated September 8, 2023…." B00628. McLaren did not notice an appeal from the McLaren Dismissal Order or Discovery Order. *Id.* He did not attach the McLaren Dismissal Order or Discovery Order to his Notice of Appeal. (Supreme D.I. 1).

ARGUMENT

I. THE COURT OF CHANCERY DID NOT COMMIT PLAIN ERROR OR ABUSE ITS DISCRETION BY SUPPOSEDLY NOT RULING ON MCLAREN'S FEE REQUEST.

A. Question Presented

Did the Court of Chancery, despite ordering the parties to bear their own fees and costs, commit plain error or abuse its discretion by supposedly not ruling on McLaren's request for DUTSA attorneys' fees? *Op.,* 5, 65; B00625, ¶ 7.

B. Standard of Review

"Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." Del. Supr. Ct. R. 8. An issue or argument is not fairly presented below when a party with the burden of proof fails to present evidence or argue the required elements of their claim. *See Smith v. Del. State Univ.*, 47 A.3d 472, 479-80 (Del. 2012). A party is precluded from "attacking a judgment on a theory he failed to advance before the trial judge." *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678 (Del. 2013) (cleaned up). When the trial court has discretion to rule on an issue, that issue is not fairly presented when the appellant fails to move the court to rule on said issue. *See Montgomery Cellular Holding Co., Inc. v. Dobler*, 880 A.2d 206, 226 (Del. 2005).

The failure to fairly present an issue or argument below "constitutes waiver of the right to raise the issue [or argument] on appeal unless the error is plain." *Duphily v. Del. Elec. Co-op, Inc.*, 662 A.2d 821, 832 (Del. 1995) (cleaned up). "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Gifford v. 601 Christiana Inv'r, LLC*, 158 A.3d 885 (Table), 2017 WL 1134769, at *5 (Del. 2017).

Even if McLaren had fairly presented his fee request below, "[t]he standard of review of an award of attorney fees in Chancery is well settled under Delaware case law: the test is abuse of discretion." *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980).

C. Merits of Argument

McLaren argues on appeal that the trial court failed to rule on his DUTSA claim for fees. *OB*, 20-22. He claims that he raised an individual and separate DUTSA fee request in his pre- and post-trial briefing and in closing arguments. OB, 20-21. He argues that the trial court did not specifically reference his individual DUTSA fee request when it entered final judgment in McLaren's favor on Smash's DUTSA claim. OB, 21.

McLaren is mistaken. The trial court *did* rule on McLaren's fee application when it ordered the parties to bear their own fees and costs. Even if the Opinion and

Final order does not expressly address McLaren's DUTSA fee application, that is because McLaren did not fairly present the issue below. As a result, McLaren waived his right to appeal the issue.

Even if McLaren had fairly presented the DUTSA fee issue below, the trial court, did not abuse its discretion in its supposed failure to rule on McLaren's fee application because McLaren did not clearly present his DUTSA fee application to the trial court.

1. The Court of Chancery Ordered That Each Party Shall Bear its Own Fees and Costs.

The trial court unambiguously determined that all Defendants (including McLaren) were not entitled to their fees and ordered all parties to bear their own fees and costs. In the Opinion, the Court of Chancery directed that "[e]ach side will bear its own costs." Op., 5, 65. Consistent with this determination, the parties negotiated the proposed Final Order, which counsel jointly submitted to the trial court on September 7, 2023. B00623 ("The proposed Order is acceptable to all parties to this action, and we respectfully request that it be entered."). The trial court entered the Final Order the following day. (D.I. 333).

The Final Order unambiguously states: "Each party will bear its *own fees* and costs." B00625, ¶7 (emphasis added). Accordingly, McLaren's primary argument on appeal fails for lack of a valid premise – the trial court considered and denied his

request for fees. The Opinion and Final Order requiring the parties to bear their own fees and costs should be affirmed.

2. McLaren Waived his Right to Appeal any Non-Award of DUTSA Attorneys' Fees.

Even if the trial court did not expressly rule on McLaren's DUTSA fee request, he has waived his right to appeal the issue of DUTSA fees because he did not fairly present a request below. McLaren bore the burden of proving at trial his entitlement to a fee award. *Blue Hen Mech., Inc. v. Christian Bros. Risk Pooling Tr.*, 117 A.3d 549, 559 n.45 (Del. 2015). Because he did not fairly present the issue to the trial court, it has been waived on appeal, unless McLaren can demonstrate plain error on appeal. *Gifford*, 158 A.3d 885 (Table), 2017 WL 1134769, at *5.

McLaren cannot show that the trial court's denial of fees was "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process"; thus, McLaren has waived his right to appeal the issue. *Id.*

a. McLaren did not fairly present his DUTSA fee request to the trial court.

While McLaren requested DUTSA fees in the PTO, he failed to press that application at trial or post-trial. Indeed, he specifically disclaimed his entitlement to DUTSA fees in post-trial briefing. B00536-37 ("Although McLaren was not named in a count that provides for statutory fee shifting, he is nonetheless entitled to an award of fees under the Court's general equitable powers."). Also, at the opening of

the Defendants' post-trial oral argument, McLaren's counsel made the following oral application: "as a result of the dismissal of those counts, Kevin McLaren is not named as a wrongdoer or a participant in any way in the two remaining counts. And I would ask the Court, after now three years of litigation, to dismiss Mr. McLaren." B00552, 50:5-10. This was the full extent of McLaren's oral application for dismissal, which the Court of Chancery granted in the McLaren Dismissal Order.

McLaren did not submit a proposed order of dismissal that included a fee award. He did not move for re-argument of the McLaren Dismissal Order under Chancery Court Rule 59(f) or to open the judgment to include his fees under Chancery Court Rule 60. Through his counsel, he negotiated the Final Order, which provides that each side will bear its own fees. B00625, ¶ 7. In short, McLaren never afforded the trial court the opportunity to exercise its discretion as to whether to award McLaren fees under DUTSA, but the Court of Chancery nevertheless properly denied him fees.

In the PTO, under the heading of "Relief Sought by Defendants", McLaren requested an order "[a]warding Defendant Kevin McLaren his costs, including reasonable attorneys' fees pursuant to… 6 *Del. C. §2004*…." This is the only mentioned of request for fees under DUTSA that is specific to McLaren. Because McLaren did not pursue an individual DUTSA fee claim in pre-and post-trial briefing, at trial, or during closing arguments, he waived his request. *See Pope Invs.*

LLC v. Marilyn Abrams Living Trust, 2018 WL 3472191, at *1 n.3 (Del. July 18, 2018) (citing *Kosachuk v. Harper*, 2002 WL 176542, at *8 n.51 (Del. Ch. July 25, 2002) ("observing that where a party had sought an award of attorney's fees in the Pretrial order but did not pursue the award during trial or in the post-trial brief, the claim for an award had been waived")); *see, also, Braga Invs. & Advisory, LLC v. Yenni Income Opportunities Fund I, L.P.*, 2020 WL 5416516, at *2-3 (Del. Ch. Sept. 8, 2020) (finding defendant's attorneys' fees request was waived on the grounds that defendant, despite raising it in the pre-trial order, did not pursue its request in briefing).

On appeal, McLaren attempts to present arguments and evidence in support of the DUTSA fee application that he never fairly presented to the trial court. He now argues that he never received any supposedly confidential information from Perri and that Smash never offered any testimony or documentary evidence to refute this. *OB,* 27-28. As a result, McLaren now argues, Smash's DUTSA claim against McLaren had no merit because Smash cannot satisfy the element of acquisition of a trade secret. *Id.* This, it is argued, "is the essence of objective speciousness." *Id.,* at 29.

McLaren never raised these arguments below. Whether Perri shared Smash's information with McLaren was not identified in the Pre-Trial Order as one of the Defendants' issues to be resolved at trial. B00458-59, § B. McLaren never made the

argument in his Pre- or Post-trial Briefs. B00436; B00532. Thus, the argument and the supposedly supporting evidence were not fairly presented to the trial court for determination.

On appeal, McLaren also presents the following new evidence as grounds for this Court to find Smash's claim was subjectively specious: (a) that "Smash CEO Haskin told a franchise broker that 'I hope we don't land up competing with them, but if we do they should know we will relentlessly work to put them out of business'" (OB, 30); (b) that "Smash used the litigation as a weapon against Dumpster Devil[]" by "publicizing the lawsuit and us[ing] it to scare customers away from Dumpster Devil" (OB, 31); and (c) that Smash "'filed a very aggressive lawsuit against [Dumpster Devil] and are going after them with full force.'" (OB, 32). On appeal, McLaren argues that this evidence demonstrates Smash's subjective speciousness.

Again, McLaren never presented this evidence to the trial court. He did not include the evidence in his pre- or post-trial briefing. B00436-39; B00533-36. He did not mention it during post-trial oral argument. B00552, 50:5-10. Thus, the argument and purportedly supporting evidence was not fairly presented to the trial court.

McLaren further contends on appeal that "[b]ecause Smash dismissed the DUTSA claims before trial, Defendants had no opportunity to offer proof of Smash's bad faith." OB, 24. And because the "only Counts pursued at trial were for fraud

and for deceptive trade practice, evidence of bad faith would not have been relevant to the remaining counts. Had Defendants been accorded the chance to put on the entirety of their evidence of bad faith, they would have presented the full and updated universe of relevant facts." OB, 24; *also,* OB, 16 n. 3, 30, 30 n. 5. This argument concedes that McLaren did not fairly present the argument and supposedly supporting evidence below. Regardless, McLaren's position is contrary to the procedural posture below and unsupported by case law.

As an initial matter, nothing prevented McLaren from presenting evidence at trial of Smash's supposed bad faith. While McLaren informs this Court that Smash "dismissed" its claims prior to trial, that representation is inaccurate. Smash did not dismiss its DUTSA claim. Instead, the Pre-Trial Order states, "[a]t trial, Plaintiff will only *pursue* Count V…and Count VI…Plaintiff will no longer *pursue* Counts I, II, III and IV…." B00461 (emphasis added). Because the DUTSA claim was not dismissed, nothing prevented McLaren from presenting evidence of supposed bad faith to support a DUTSA fee application.

Indeed, further contradicting McLaren's position on appeal, Defendants *did* present evidence and arguments to the trial court regarding Smash's supposed bad faith, albeit collectively. At trial, McLaren's counsel questioned Haskin about why Smash filed a lawsuit claiming the FDD, pitch deck, and unit economics papers were trade secret information and why it continued to pursue the DUTSA claim. B00472,

111:1-113:3 (Haskin Cross). Defendants argued in their Pre- and Post-Trial Briefs that Smash brought its lawsuit and dragged it on for as long as possible to put Dumpster Devil out of business. B00438-39; B00534-36. In support, Defendants pointed to testimony from Haskin and Don Tarinelli, different evidence from that first raised on appeal *Id.* They also pointed to the case's procedural history. *Id.* Accordingly, not only did McLaren have the opportunity to present bad-faith evidence and arguments below; he also took advantage of the opportunity, and the Court of Chancery ruled against him. Op., 64-65; B00625, ¶ 7.

Finally, McLaren fails to advance any caselaw to support his contention that Plaintiff's decision not to pursue the DUTSA claim deprived him of the opportunity to present evidence of bad faith. OB, 23-37. To the contrary, in Defendants' Post-Trial Brief, Defendants took the position that "[w]here the plaintiff voluntarily dismisses a claim without prejudice, the defendant is the prevailing party for the purpose of an award of reasonable attorneys' fees under the Uniform Trade Secrets Act." B00536 (citing *K3 Enter. v. Luba Sasowski*, No. 20-24441-CIV-CAN, 2022 U.S. Dist. LEXIS 105028 (S.D. Fla. June 13, 2022)). This argument, advanced below, tacitly concedes that McLaren had the burden at trial of establishing bad faith to support a fee award under DUTSA. Having recognized his evidentiary burden below, McLaren should not be permitted to blame Smash for his failure to meet that

burden at the trial-court level; nor should he be permitted to introduce new evidence and arguments on appeal that were not fairly presented below.

McLaren also argues on appeal that his "investigation of the Smash franchise opportunity was entirely proper as a matter of law." OB, 33. The issue of whether McLaren's conduct in investigating "the Smash franchise opportunity was entirely proper as a matter of law" (*id.*) was not listed in the Defendants' Issues section of the PTO. B00458-59, § III B. Nor was this argument raised in Defendants' pre- or post-trial briefing B00436-39; B00533-36. As such, this argument was not fairly presented below.

In short, McLaren had every opportunity to press an individual claim for fees under DUTSA but chose not to do so. He therefore should not be permitted to ask this Court not only for reversal the trial court's decision, but also for a finding—based on new arguments and evidence—that he should be awarded DUTSA fees. Absent plain error, McLaren waived the appealability of his fee application.

b. The Trial Court's supposed failure to rule on McLaren's purported DUTSA application does not constitute plain error.

Assuming *arguendo* that the trial court failed to rule on a DUTSA fee application by McLaren that was not fairly presented, any such failure was not plain error because McLaren had no substantial right to fees under DUTSA, and the purported failure was not a manifest injustice.

To show plain error, the appellant must establish that the error complained of "clearly deprive[d] an [appellant] of a substantial right, or which clearly show manifest injustice." *Gifford*, 158 A.3d 885 (Table), 2017 WL 1134769, at *5.

McLaren had no substantial right to attorney's fees under DUTSA. Section 2004 of DUTSA states, "[i]f a claim of misappropriation is made in bad faith, … the court *may* award reasonable attorney's fees to the prevailing party." 6 DEL. C. § 2004 (emphasis added). An award of fees under DUTSA is entirely within the trial court's discretion. *Research & Trading Corp.*, 1992 WL 345465, at *15 ("the Trade Secrets Act leaves the issue of whether to award attorneys' fees to the sound discretion of the court."); *c.f., Simmons v. Del. State Hosp.*, 660 A.2d 384, 389 (Del. 1995) ("This Court has held that the word 'shall' in a statute authorizing attorney's fees is 'mandatory and leaves no room for the exercise of judicial discretion….'"). Even if a prevailing party establishes bad faith, the trial court may nonetheless exercise its discretion and deny an award of fees. *Research & Trading Corp.*, 1992 WL 345465,

at *15; *c.f., Simmons*, 660 A.2d at 389. Because there is no guarantee of an award of fees, McLaren's right to fees under DUTSA cannot be substantial.

Nor has a manifest injustice occurred. As established above, Defendants presented arguments and evidence on why they should be awarded fees under the DUTSA, but McLaren expressly disclaimed his entitlement to DUTSA fees in post-trial briefing. B00436-39; B00533-37; B00472, 111:1-113:3 (Haskin Cross); B00536-37. In addition, when moving to dismiss himself from the case, McLaren did not simultaneously seek fees under DUTSA. B00552, 50:5-10. McLaren also never presented a proposed order awarding him fees under DUTSA. And the Final Order, which McLaren negotiated and jointly submitted to the trial court, states that the parties (including McLaren) shall bear their own fees and costs. B00625, ¶ 7. McLaren never moved for re-argument or to set aside the McLaren Dismissal Order or the Final Order. There is no manifest injustice where McLaren had multiple opportunities to fairly present his DUTSA request to the trial court but failed to do so, and where the trial court properly exercised its discretion to deny fees in any event.

3. Assuming *Arguendo* the Court of Chancery did not Rule on McLaren's Request for DUTSA Fees, its Failure was not an Abuse of Discretion.

Even if the trial court did not rule on an individual DUTSA fee request by McLaren, and further assuming *arguendo* McLaren did not waive his request, the

trial court's purported failure to rule on his request would not constitute an abuse of discretion because McLaren never clearly put the issue before the trial court for adjudication.

Accepting *arguendo* McLaren's erroneous proposition that the Court of Chancery did not rule on his fee application, this Court would still review the trial court's failure to exercise discretion under an abuse of discretion standard. *SRO Hous. v. Dyce*, Cal. Rptr. 3d 394, 395 (Cal. App. Dep't Super. Ct. 2014) (reviewing trial court's failure to exercise discretion for abuse of discretion).

McLaren never clearly put an individual DUTSA fee request before the trial court. In the Pre-Trial Order, Defendants (including McLaren) listed the issue of fees as "[w]hether Defendants should be awarded attorneys' fees and costs under the Delaware Uniform Trade Secrets Act…." B00459, § B7. Defendants also sought an order "[a]warding Defendant Kevin McLaren his costs, including reasonable attorneys' fees pursuant to…6 *Del. C.* § 2004" (B00460, § D2), and "[a]warding Defendants Todd Perri, Kanda Holdings, Dumpster Devil, and Kevin McLaren the costs of the proceedings, including their attorneys' fees, pursuant to 6 *Del. C.* § 2004…." B00461, § D5.

In Defendants' Pre-Trial Brief, Defendants collectively urged an award of attorneys' fees under DUTSA without separating McLaren from his co-defendants or raising arguments and evidence specific to McLaren. B00435-39. However,

Defendants' Post-Trial Brief abandoned McLaren's pre-trial position and separated him from his co-defendants: "Although McLaren was *not named* in a count that *provides for statutory fee shifting*, he is nonetheless entitled to an award of fees under the Court's general *equitable powers*." B00536-37 (emphasis added). And in a further muddying of the waters, McLaren did not request DUTSA fees in his speaking motion to dismiss. B00552, 50:5-10.

McLaren did not follow his oral application for dismissal by submitting a proposed form of order awarding fees under DUTSA. He also did not move for reargument after the Court of Chancery did not award him fees in the McLaren Dismissal Order. To the contrary, he allowed opposing counsel to represent to the trial court that the proposed Final Order was acceptable to him. B00623. The negotiated Final Order unambiguously states: "Each party will bear its *own fees and costs*." B00625, ¶ 7 (emphasis added).

McLaren contends that a trial court's failure to rule on a discretionary issue properly placed before it constitutes an abuse of discretion. OB, at 21. In support, McLaren cites one Delaware case, *Bringhurst v. Harkins*. *Id*. This case is procedurally distinguishable, and McLaren misinterprets its holding. The main issue on appeal in *Bringhurst* was the trial court's denial of the defendant's motion for a new trial, not a fee application. *Bringhurst v. Harkins*, 122 A. 783, 786 (Del. 1923) ("The defendant below, appellant, moved for a new trial on the ground of after

discovered evidence. This motion was denied."). This procedural posture distinguishes *Bringhurst* from the instant case.

McLaren also misleading cherry-picks quoted language from the standard of review applied in *Bringhurst*. OB, at 21. The complete standard of review articulated in *Bringhurst* is as follows:

> While the granting of a new trial is always within the legal discretion of the court, and is not reversible, if such discretion is exercised, we take it to be the law of this state, as it is generally in other jurisdictions, that an exception will lie to the court's *refusal to grant a new trial* if there was an abuse of discretion, which means, a failure to exercise a sound, reasonable and legal discretion.

Bringhurst, 122 A. at 786 (emphasis added). The fully quoted standard means that this Court will not review a trial court's decision granting a motion for a new trial; it will review a trial court's decision *denying* a motion for a new trial. *Id.* The standard of review on such an appeal is abuse of discretion. *Id.*

Bringhurst does not stand for the proposition that a failure to rule on a discretionary issue is itself an abuse of discretion. This is because the *Bringhurst* trial court *did* exercise its discretion when it denied the appellant's motion for a new trial. *Id.,* at 785. Thus, the case does not support McLaren's position that a failure to rule on a discretionary issue is itself an abuse of discretion.

In short, McLaren failed to present the Court of Chancery with an opportunity to rule on a claim for fees under DUTSA. The trial court cannot have abused its discretion when McLaren did not clearly request the trial court exercise its discretion

to award him fees under DUTSA. As such, the Court of Chancery's Final Order and Opinion should be affirmed.[3]

[3] The denial of McLaren's request for fees under the Court's general equitable powers is not on appeal, as McLaren did not raise the issue in his Opening Brief. OB, 20, 23.

II. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION WHEN IT FOUND SMASH DID NOT ACT IN BAD FAITH, WHICH NEGATES MCLAREN'S DUTSA FEE CLAIM.

A. Question Presented

Whether the Court of Chancery abused its discretion in finding that Smash did not act in bad faith by maintaining its DUTSA claim until the entry of the Pre-Trial Order, negating McLaren's DUTSA Fee Claim? Op., 63-65.

B. Standard of Review

"The standard of review of an award of attorney fees in Chancery is well settled under Delaware case law: the test is abuse of discretion." *Sugarland Indus., Inc.*,420 A.2d at 149. This Court "will not overturn the Court of Chancery's factual findings unless they are clearly erroneous." *Bäcker v. Palisades Growth Capital II, L.P.,* 246 A.3d 81, 94 (Del. 2021).

"Application of [] facts to the correct legal standards are reviewed for an abuse of discretion." *Id.,* at 95 (cleaned up). "When an act of judicial discretion is under review the reviewing court may not substitute its own notions of what is right for those of the trial judge, if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *Geronta Funding v. Brighthouse Life Ins. Co.*, 284 A.3d 47, 59 (Del. 2022).

An arbitrary or capricious decision is one "which is unreasonable or irrational, or to that which is unconsidered or which is wilful and not the result of a winnowing

or shifting process. It means action taken without consideration of and in disregard of the facts and circumstances of the case…." *Liborio, L.P. v. Sussex Cty. Planning and Zoning Comm'n*, 2004 WL 2191052, at *3 (Del. Super. Ct. June 8, 2004).

The appellant bears the burden of establishing abuse of discretion. *See Rutman v. Kaminsky*, 226 A.2d 122, 125 (Del. 1967).

C. Merits of Argument

Not only did the Court of Chancery rule on and deny McLaren's fee request; the court's denial of fees was not an abuse of its discretion. While McLaren disclaimed entitlement to fees under DUTSA in post-trial briefing and failed to request fees when making an oral application for dismissal during post-trial oral argument, the Court of Chancery nevertheless performed a detailed analysis of Perri's claim for fees under DUTSA and ordered the parties to bear their own fees and costs. Op., 63-65. As McLaren tacitly admits in his Opening Brief (OB, 32-34), and as the trial court made clear elsewhere in the Opinion, this analysis would apply with equal force to McLaren's DUTSA fee application.

At the outset of its Opinion, the Court of Chancery explained the overarching analysis it had performed in deciding not to award any party (including McLaren) fees under DUTSA:

> *Perri, McLaren, and Dumpster Devil sought their attorneys' fees and costs under DUTSA* on the theory that Smash pursued that claim without a good faith basis after the Injunction Decision, only to drop

> the claim on the eve of trial. Smash had a weak claim, *but it was not so weak as to warrant fee shifting*.
>
> *Neither side in this case deserves any relief*. … Perri and McLaren have not faired better [than Haskin]. The Court criticized their conduct in the Injunction Decision, and this decision has found that Perri engaged in fraud, albeit fraud that did not cause any compensable damages. *Through the financial and personal consequences of this extensively litigated case, each side has received its just deserts. Each side will bear its own costs.*

Op., 4-5. In other words, the trial court—in an exercise of its discretion—found that Smash's litigation positions, coupled with Defendants' conduct, made any fee-shifting under DUTSA unwarranted. There is no question that this determination applied equally to Perri and McLaren. *Id.* (addressing the application for "attorneys' fees and costs under DUTSA" brought by "*Perri, McLaren, and Dumpster Devil* … on the theory that Smash pursued that claim without a good faith basis after the Injunction Decision, only to drop the claim on the eve of trial.")(emphasis added).

The Court of Chancery went on to separately analyze Perri's request for fees under DUTSA, McLaren not having pressed his claim for such relief in post-trial briefing and having already been dismissed upon an oral motion that did not include a request for DUTSA fees. Op., 63-65. In addressing Perri's claim, the trial court noted that the bad-faith standard applied. Op., 64 (citing 6 DEL. C. § 2004; *Incyte Corp. v. Fexus Biosciences, Inc.*, 2019 WL 2361535, at *2 (Del. Super. Ct. May 7, 2019)). Expanding on this analysis, the trial court examined whether Smash's DUTSA claim was "objectively specious" and whether Smash harbored subjective

bad faith. Op., 64 (quoting *Incyte Corp.*, 2019 WL 2361533, at *2). The trial court's analysis led it to conclude that the bad-faith test under DUTSA had not been met. Op., 64-65.

The trial court made the following determinations in support of its conclusion.

- "The fact that a plaintiff drops a claim in the later stages of litigation is not sufficient to find bad faith under DUTSA." Op., 64 (*citing Research. & Trading Corp. v. Pfuhl*, 1992 WL 345465, at *16).
- "From reading the Injunction Decision, one could surmise that Smash's claim under DUTSA was among its *weaker theories, but that does not mean the claim was frivolous*." *Id.*
- "Smash started out with *genuine belief* that some of the information that Perri received constituted trade secrets." *Id.* (emphasis added).
- "Although Smash dropped its DUTSA claim on the eve of trial, that decision was part of Smash's effort to simplify the issues." *Id.*
- "The parties had recently engaged in an unsuccessful mediation, and Smash may have made the decision to refine its theories based in part on information gleaned from the mediation." *Id.,* at 64-65.

The trial court's conclusion that the Defendants, including McLaren, were not entitled to fees under DUTSA was based upon the facts and circumstances of the case. The trial court considered those facts and circumstances and correctly applied

the applicable bad-faith test to them. In so doing, it considered both Smash's objective and subjective intent, as reflected in each of the factual findings set forth above. There is nothing to suggest that the trial court was unreasonable or irrational in declining to award fees under DUTSA.

On appeal, McLaren fails to establish that the Court of Chancery abused its discretion in declining to award McLaren (or Perri) fees under DUTSA. He ignores case law relied upon by the trial court (*Research & Trading Corp. v. Pfuhl*) and instead offers a case that does not support his position (*Nichols v. Chrysler Grp. LLC*).

McLaren is correct that *Nichols* stands for the proposition that a plaintiff may be found to have brought litigation in bad faith despite surviving a motion to dismiss. *See Nichols v. Chrysler Grp., LLC*, 2010 WL 5549048, at *4-5 (Del. Ch. Dec. 29, 2010). However, McLaren neglects to mention that the plaintiff in *Nichols* moved to strike the defendant's counterclaim for attorney's fees, and the court denied that motion because "a factual dispute exists between the parties on this point." *Id.*

The *Nichols* court did not grant the defendant's non-DUTSA fee request or find that the plaintiff had acted in bad faith. *Id.* Indeed, the court stated: "I express no opinion whatsoever as to whether Nichols, in fact, has acted in bad faith in any of the respects alleged by Chrysler. These allegation…remain to be determined as this litigation progresses." *Id.,* at *5.

By contrast, in *Research & Trading Corp.*, the Court of Chancery denied the defendant's request for fees under DUTSA, despite the plaintiff dropping their DUTSA claim *after trial on the merits*. *Research. & Trading Corp.*, 1992 WL 345465, at *16. The court found "the trade secret claims had some force and were not in my opinion advanced in bad faith. In any case the Trade Secret Act leaves the issue of whether to award attorneys' fees to the sound discretion of the court. I find this is not a case in which such an award of fees would be appropriate." *Id.* By electing not to pursue its DUTSA claim at trial, Smash was less deserving of an adverse fee award than the plaintiff in *Research & Trading Corp*. McLaren does not address this authority because it weighs heavily against finding an abuse of discretion by the trial court.

McLaren contends that the trial court was engaging in speculation when finding that the mediation may have influenced Smash's decision not to pursue the DUTSA claim at trial. OB, at 32-33. But McLaren raised the issue of mediation in his pre-and post-trial briefing. B00437-38 ("Defendants were forced to engage in years of discovery, exchange and review 85,000 documents, and participate in extensive but unsuccessful mediation with the Honorable Andrea Rocanelli."); *see also*, B00533-34. Having raised mediation in his briefs, McLaren should not be permitted to take the Vice Chancellor to task for relying on that fact in his Opinion. In any event, the Vice Chancellor relied on the mediation (in addition to other facts)

to make a requisite finding as to Smash's subjective good faith, which necessarily involves some degree of speculation. This was not an abuse of discretion.

Beyond these two issues, McLaren does nothing to address the remainder of the trial court's factual findings. Instead, McLaren relies on evidence he did not present below. OB, at 30-32, 27-29. McLaren claims that he could not present this evidence at trial because Smash "dismissed" its DUTSA claim before trial, and this evidence of bad faith would have been irrelevant. OB, at 30. However, as established above, Smash did not dismiss its DUTSA claim but instead elected not to pursue it at trial. B00461. Nothing prevented McLaren from presenting evidence to support a fee award under DUTSA at trial. Indeed, McLaren *did* present evidence of supposed bad faith in his pre-and post-trial briefing and through cross-examination of Haskin at trial. B00436-39; B00533-36; B00472, 111:1-113:3 (Haskin Cross). This Court should reject McLaren's effort to present new evidence for the first time on appeal.

McLaren's only remaining argument is the one he advanced in his Pre-and Post-Trial Briefs – that Smash's motive for the lawsuit was to put Dumpster Devil out of business. B00438; B00534; OB, 30-31. The trial court recognized Smash pursued an aggressive lawsuit against Dumpster Devil "in an effort to destroy a nascent competitor[,]" (Op., 4). Nevertheless, the trial court ultimately found Smash did not act in bad faith. Op., 64-65. McLaren's rehashed argument on appeal does

not overcome the deferential standard of review. Therefore, the trial court's Opinion and Final Order ordering each party to bear their own fees and costs should be affirmed.

Lastly, McLaren argues that Perri was merely conducting due diligence on Smash, which was not improper. OB, 34-37. McLaren does not connect this argument to *his* claim on appeal for DUTSA fees. He appears to be challenging the trial court's determination that Perri engaged in wrongful conduct. *Id.* But this issue was not noticed in McLaren's Notice of Appeal, and therefore it is waived. *See Americas Minig Corp. v. Theriault*, 51 A.3d 1213, 1264 (Del. 2012) ("This Court's rules specifically require an appellant set forth the issues raised on appeal…If an appellant fails to comply with these requirements on a particular issue, the appellant has abandoned that issue on appeal."). Additionally, McLaren lacks standing to pursue this appeal on Perri's behalf. *See Delaware Dept. of N. Res. & Envtl. Control v. Food & Water Watch*, 2469 A.3d 1134, 1138 (Del. 2021) ("…standing to appeal, requires the party seeking relief to have been aggrieved by the judgment." (cleaned up)). Perri was the prevailing party on the fraud claim, and the remaining claim was alleged against Dumpster Devil. B00625, ¶¶ 3-5. Therefore, the trial court's findings as to Perri's wrongful conduct are not before this Court.

III. THE DENIAL OF MCLAREN'S MOTION FOR A PROTECTIVE ORDER AND AWARD OF FEES IN SMASH'S FAVOR WAS NOT AN ABUSE OF DISCRETION.

A. Question Presented

Did the Court of Chancery abuse its discretion in denying McLaren's motion for a protective order and awarding attorneys' fees in favor of Smash? B00388-89; B00391-92.

B. Standard of Review

"The standard of review with respect to pretrial discovery rulings is abuse of discretion." *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1106 (Del. 2006); *Tavistock Civic Assoc., Inc. v. Owen*, 223 (Table), 2019 WL 6487282, at *2 (Del. Dec. 3, 2019) (reviewing trial court's grant of attorneys' fees related to appellee's motion to compel for abuse of discretion). "Such discretion is guided by the rule that discovery should be permitted unless the court is satisfied that the administration of justice will be impeded by such an allowance…our scope and standard of review derive from those principles." *Coleman,* 902 A.2d at 1106. (cleaned up).

C. Merits of Argument

As an initial matter, McLaren's appeal from the Discovery Order should be dismissed based on his failure to include that order in his Notice of Appeal. Where a notice of appeal is clear and unambiguous as to the order being appealed, the notice

is binding upon the appellant, and no other order or judgment may be brought up for review. *See Tromwell v. Diamond Supply Co.*, 91 A.2d 797, 802 (Del. 1952).

McLaren's Notice of Appeal states: "Kevin McLaren…does hereby appeal to the Supreme Court of the State of Delaware from the Order and Final Judgment by the of the Court of Chancery, by Vice Chancellor J. Travis Laster dated September 8, 2023…" B00628. The Notice clearly and unambiguously only appeals from the Final Order by identifying the "Order and Final Judgment" with the specific date of September 8, 2023. This cannot mean the Discovery Order, which occurred over three years prior to the Final Order. Thus, the Discovery Order is not properly before the Court on appeal and should be dismissed.

Regardless, the crux of McLaren's argument on appeal is that the trial court should not have denied his motion for a protective order because Smash did not identified confidential information with sufficient specificity to warrant discovery from McLaren. OB, 42-43. McLaren supports this argument with reference to statements made by the trial court well after the entry of the Discovery Order. *Id.* These post-ruling statements cannot form the basis for reversing the trial court's discovery ruling. *Getty Oil Co. v. Heim*, 372 A.2d 529, 534 (Del. 1977) ("As a matter of general practice this Court refuses to consider evidence which was not part of the record below."); *UnitedHealth Grp. Inc. v. Amalgamated Bank as Tr. for Longview Largecap 500 Index Fund*, 196 A.3d 885 (Table), 2018 WL 5309957, at *1 (Del. Oct.

26, 2018) ("We confine ourselves to the record before the Court of Chancery and do not take into account developments post-dating the Court of Chancery's decision….").

McLaren's remaining argument on appeal was properly rejected by the trial court. While McLaren quarrels with that determination, he makes no persuasive attempt to demonstrate that the trial court abused its discretion.

Specifically, McLaren argues (as he did below) that Smash's identification of confidential information in its interrogatory responses "was too vague to adequately convey the scope of its claim or distinguish it from matters of general knowledge in the industry." *Compare OB,* 44 *with B00382,* 5:16-18. Applying the test set forth in, *SmithKline Beecham Pharms. Co. v. Merck & Co.,* 766 A.2d 442, 447-48 (Del. 2000), the trial court found that Smash had made sufficient disclosures in its interrogatory responses to warrant discovery from McLaren. B00388, 11:22-12:4. On appeal, McLaren merely repeats this argument but does not attempt to establish that the trial court abused its discretion in rejecting the argument.

McLaren also fails to address or even mention the trial court's second reason for denying the motion for protective order – that the motion was a tactical ploy to obtain a strategic advantage rather than a genuine concern about the disclosure of confidential information. B00389, 12:5-6. The trial court reinforced this finding by noting that the confidentiality agreement between the parties fully addressed the

Defendants' concerns regarding confidential information. *Id.,* at 12:10-13. By failing to even address the trial court's findings, McLaren falls far short of demonstrating that the denial of the motion was an abuse of discretion.

While McLaren purports to challenge the granting of Smash's motion to compel and accompanying award of fees to Smash in his Opening Brief (OB, 38), he offers no argument in the body of the Opening Brief to support that aspect of his appeal. As such, his challenge is waived. *In re Boyd*, 99 A.3d 226 (Table), 2014 WL 3906773, at *2 (Del. 2014) ("To the extent Conaway raised the other issues below, his failure to argue the merits of those issues in the body of his opening brief constitutes a waiver").

Even if McLaren did not waive his appeal of the order granting Smash's motion to compel and awarding it fees by failing to supply any supporting argument, the trial court did not abuse its discretion. The trial court deemed McLaren's opposition to the fee application a "belated motion for reconsideration," which it promptly rejected as untimely. B00392. Further, McLaren's specific objections were so unfounded that the trial court did not consider a hearing on his opposition necessary. *Id.* Even if McLaren had supported his appeal with argument, nothing he could present to this Court would establish that the trial court abused its discretion by denying an untimely motion for reconsideration raising unfounded arguments.

CONCLUSION

For the foregoing reasons, Plaintiff- Below Appellee Smash Franchise Partners respectfully requests that this Court affirm the decisions of the Court of Chancery in all respects.

Dated: January 4, 2024

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