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IN THE SUPREME COURT OF THE STATE OF DELAWARE

APPLIED ENERGETICS, INC., a Delaware corporation, *Plaintiff Below-Appellant*, v. GUSRAE KAPLAN NUSBAUM PLLC, a professional limited liability company, and RYAN WHALEN, an individual, *Defendants Below-Appellees*.	No. 178, 2024 On Appeal from C.A. No. N23C-07-200 EMD (CCLD) in the Superior Court of the State of Delaware

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal presents the question whether Delaware courts will police the tortious behavior of out-of-state attorneys admitted *pro hac vice*. Specifically, will Delaware allow out-of-state attorneys to commit litigation misconduct relating to the very lawsuit in which they have appeared *pro hac vice*, so long as they commit that tortious conduct outside of Delaware?

This is the Opening Brief of Plaintiff Below/Appellant Applied Energetics, Inc., a Delaware corporation ("AE" or "the company") in support of its appeal from the Civil Opinion (the "Opinion"), dated April 16, 2024 (Ex. A), issued by the Honorable Eric M. Davis, Judge, in the Superior Court of the State of Delaware (the "Superior Court") in Civil Action No. N23C-07-200 EMD (CCLD) ("Action"). The Opinion dismissed the Action on personal jurisdiction grounds as to both Defendants Below/Appellees Gusrae Kaplan Nusbaum PLLC, a professional limited liability company ("Gusrae") and Ryan Whalen, an individual ("Whalen") (Gusrae and Whalen collectively "Defendants"). AE timely appealed on May 2, 2024. *See* Supr. Ct. Dkt. 1 (Notice of Appeal).

By rule, *pro hac vice* admission is conditioned on the attorney's consent to the Register of Chancery as agent for service of process "for ***all actions***, including disciplinary actions, that may arise out of the practice of law under this Rule ***and***

any activities related thereto . . . ." Del. Ct. Ch. R. 170(c)(iv) (emphasis added).[1] The Delaware Supreme Court's authority over *pro hac vice* attorneys is therefore co-extensive with Delaware's personal jurisdiction over "all actions" arising from "any activities related thereto." If, for example, an out-of-state *pro hac vice* attorney were to bribe a witness, or intentionally destroy material evidence, or commit any other tortious conduct designed and intended to gain an improper litigation advantage in the Delaware court proceeding to which they have been admitted *pro hac vice*, the Delaware Supreme Court would have jurisdiction to discipline that attorney even if the tortious conduct was committed out-of-state.

Defendants Gusrae (a law firm) and Whalen (an attorney and member of Gusrae) reside and are licensed in the State of New York. Whalen appeared on a *pro hac vice* basis as counsel of record in two successive and related cases in the Court of Chancery, each of which alleged that Defendants' client, George Farley, breached his fiduciary duties to AE by issuing himself 25 million shares of the company while serving as its sole director.

While AE's second lawsuit was pending, Defendants frivolously and maliciously sued the company and related parties (including its counsel of record) for federal securities fraud in the United States District Court, Southern District of

[1] The Superior Court has a substantively identical rule, with reference to a different official. Del. R. Civ. P. Super. Ct. 90.1.

New York ("SDNY") ("Securities Fraud Action"). Defendants did so with the intent to gain a litigation advantage in AE's pending lawsuit in Delaware.[2] Specifically, Defendants knew AE was dependent upon raising capital from investors to fund its litigation against Farley. A-10, 41-42. Thus, Defendants sued AE for federal securities fraud in a highly watched court, knowing that AE would have to disclose the suit to potential investors. *Id.* Defendants also knew AE was a military contractor, which would have to disclose the suit to governmental contracting agencies. A-16. Defendants further intended to create a conflict between AE and its counsel of record. A-10.

Based on the foregoing, AE brought this Action against Defendants for maliciously prosecuting the Securities Fraud Action, alleging it was designed to thwart AE's ability to prosecute its then-pending lawsuit against Defendants' client Farley. The Superior Court dismissed the Action for lack of personal jurisdiction, [3] based on the finding that Defendants' malicious prosecution of the Securities Fraud

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[2] Defendants' malicious intent, the Securities Fraud Action's lack of merit, and Defendants' liability generally, is assumed true for purposes of the personal jurisdiction challenge that is the subject of this appeal. *Munoz v. Vazquez-Cifuentez*, 2019 WL 669935, at *5 (Del. Super. Ct. Feb. 18, 2019).

[3] The Superior Court did not address any other argument presented in Defendants' motion to dismiss ("Motion to Dismiss").

Action occurred in New York, and did not have a sufficient "nexus" to Defendants' *pro hac vice* admission in Delaware.

In granting Defendants' Motion to Dismiss, the Superior Court erred for three reasons. First, a party who intentionally directs tortious conduct toward a resident of another state, intending to cause harm in that other state, is subject to that state's personal jurisdiction. *Calder v. Jones*, 465 U.S. 783, 789-90 (1984). That is particularly so here, since Defendants' maliciously-prosecuted Securities Fraud Action had a sufficient "nexus" with Defendants' litigation activities in Delaware *pro hac vice*. Second, Defendants took at least one overt act within Delaware to prosecute the Securities Fraud Action: serving AE's registered agent for service of process in Delaware. Ex. B & C. Under *Sample v. Morgan*, 935 A.2d 1046, 1057 (Del. Ch. 2007),[4] this overt act within Delaware establishes personal jurisdiction. Third, alternatively, the Superior Court should have given AE leave to conduct jurisdictional discovery, rather than dismiss the Action.

Appellant respectfully requests this Court reverse the Superior Court, hold that Delaware has personal jurisdiction over Defendants, and permit this Action to proceed to the merits. Alternatively, this Court should reverse and direct the

[4] Cited by *Matthew v. Fläkt Woods Grp. SA*, 56 A.3d 1023, 1028, n. 8 (Del. 2012).

Superior Court to grant AE leave to conduct limited jurisdictional discovery regarding the foregoing issues.

SUMMARY OF THE ARGUMENT

1. The Superior Court had personal jurisdiction over Defendants, given the nexus to their intentional tortious conduct directed at AE in Delaware, as well as their consent to the Register in Chancery as their agent for service of process. Del. Ct. Ch. R. 170(c)(iv).

2. Defendants' effectuation of personal service on AE via its registered agent, within Delaware, was a sufficient in-state act for personal jurisdiction under the Long-Arm Statute.

3. Alternatively, the Court should reverse and direct the Superior Court to give AE leave to conduct limited jurisdictional discovery.

STATEMENT OF FACTS[5]

A. Defendants Represent Farley *Pro Hac Vice* in Defense of the 2017 *Superius Securities* Shareholder Derivative Lawsuit Filed in the Delaware Court of Chancery.

AE at all times relevant has been a Delaware corporation in the business of applied energy systems. A-15-16. In March 2015, George Farley ("Farley") became AE's principal executive and financial officer. A-16. Around January 2016, following various resignations, Farley was left as AE's sole director and officer. *Id.*

Around February 2016, Farley executed resolutions to issue to himself 25 million shares of AE common stock at $0.001 par value per share. A-16-17. Farley then "gifted" 20 million of those shares to AnneMarieCo, LLC, an investment vehicle nominally owned by Farley's wife and children. *Id*.

Farley also issued 10 million shares to Stein Riso Mantel McDonough LLP ("Stein Riso"), the law firm assisting Farley with the share issuance, and 28 million total shares to other insiders and Farley associates, all for the same par value of $0.001 per share. A-17. Before Farley issued those 63 million shares, AE had approximately 92 million shares outstanding. *Id.*

[5] As appropriate, background facts are drawn from the Complaint in the Action and documents incorporated by reference therein, as well as Defendants' Motion to Dismiss, AE's Opposition, any supporting documents, and those facts and documents of which AE seeks judicial notice.

Following Farley's self-dealing transactions, in January 2017, certain AE shareholders filed a derivative suit against Farley for breach of fiduciary duty in the Court of Chancery, *Superius Securities Group, Inc., et al. v. George Farley, et al*., Case No. 2017-0024 (the "2017 Delaware Action"). A-17.

Farley retained Defendants to represent him individually in defending the 2017 Delaware Action. A-18. Whalen, as a member of Gusrae, appeared *pro hac vice* to represent Farley. *Id.* Defendants did not represent AE at that time; Farley did not retain any attorney to represent the company, and no attorney made an appearance on its behalf. *Id.*

In defending Farley in the 2017 Delaware Action, Defendants were ethically required to investigate the facts and law underlying Farley's misconduct. A-18; *see* Del. R. Prof. Cond., Preamble, ¶ 2, and Rule 1.1. Defendants twice moved to dismiss the operative complaints in that action. *Id.* Each motion argued that Farley had not engaged in any wrongdoing. *Id.*

The 2017 Delaware Action was voluntarily dismissed in July 2017, which entitled Farley to indemnification by AE, per Delaware General Corporation Law section 145(c)(1). A-18-19.

B. Other AE Shareholders Initiate A Proxy Contest to Remove Farley as Director, Who Retains Defendants to Represent the Company; Defendants Negotiate to Be Paid in Company Stock.

In January 2018, after the 2017 Delaware Action was voluntarily dismissed, a different group of shareholders initiated a proxy contest with the Securities and Exchange Commission ("SEC") to remove Farley as a director and officer. A-19-20. The proxy materials suggested that shareholders should vote to remove Farley for cause, primarily for the conduct alleged in the 2017 Delaware Action. A-20.

In response, Farley hired Defendants to now represent ***AE*** (not Farley personally) in connection with the proxy contest. A-20. No independent attorney or representative of AE was involved in negotiating Defendants' engagement. *Id.* Rather, these discussions and negotiations occurred exclusively between Farley, purporting to act for AE, and Whalen, for Defendants. *Id.*

In January 2018, Defendants commenced their representation of the company. A-22. At that time, Defendants claimed they had not been paid in full for their prior representation of Farley in the 2017 Delaware Action. *Id.* After agreeing to represent AE and performing work, Whalen, for Defendants, negotiated with Farley to be paid in AE stock—at a 50% discount to the then-public trading price, without an independent valuation appraisal, and without independent company counsel (A-22-23)—in lieu of cash for the unpaid 2017 Delaware Action defense fees ***and*** for fees then incurred in their representation of the company in the proxy contest. *Id.*

In March 2018, Farley requested that AE's stock transfer agent, Continental Stock Transfer & Trust Company ("Continental"), issue the above shares to Defendants. A-24. Continental advised it could not issue the shares absent a signed opinion letter from AE's securities counsel, which was sent shortly thereafter. *Id.* Whalen asked for status of the share issuance and urged the transaction be completed quickly, given Farley was on the verge of being removed as officer and director of AE. A-24-25.

On March 8, 2018, Continental collectively issued over 1.2 million AE shares to Defendants. A-25. That same day, AE removed Farley, with cause, from the Board of Directors, via over 58% shareholder consent. A-25. Days thereafter, AE's new CEO terminated Defendants' services. *Id.*

C. AE Files the 2018 Delaware Action Against Farley.

In July 2018, AE filed the suit *Applied Energetics, Inc. v. George Farley, et al.*, Case No. 2018-0489 (Del. Ch.) (the "2018 Delaware Action"). The suit asserted multiple causes of action against Farley and AnneMarieCo relating to the above misconduct. A-25.

Despite their conflict in having represented AE in connection with the proxy solicitation contest, Defendants represented Farley *pro hac vice* in the 2018

Delaware Action. A-26.[6] In January 2019, the Court of Chancery issued a preliminary injunction prohibiting Farley from selling or transferring his 25 million shares of stock pending trial. *Id.* On January 24, 2019, the Court of Chancery issued an order setting a preliminary injunction bond amount of $582,377.26. A-26-27. Defendants knew AE was required to deposit this amount in an account as collateral for the bond surety, making the funds unavailable for operations or its prosecution of the 2018 Delaware Action. *Id.*

In June 2019, AE moved to modify the preliminary injunction bond: to reduce or eliminate the bond because its public share price had since risen significantly, warranting a recalculation. A-27. Farley (via Defendants) opposed. *Id.* In the opposition, Defendants repeatedly claimed the company was unable to raise capital via sales of its treasury stock, and was on the verge of bankruptcy. *Id.* Defendants knew that if some or all of the bond was released, AE would use the cash to fund the 2018 Delaware Action. *Id.* In fact, Defendants argued the bond should be increased ***ten-fold*** to $5,706,448. *Id.* Both the company's motion and Defendants' request to increase the bond were denied. *Id.*

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[6] AE moved to disqualify Defendants due to their conflict in having just represented AE in the proxy solicitation contest. A-26, 202. The Court of Chancery denied the motion as untimely (though it was filed a mere two weeks after Defendants were granted *pro hac vice* status), but expressly made no determination whether Defendants were conflicted. *Id.*

D. Defendants Claim They Cannot Sell Their Stock Because of A Pre-Litigation Demand Letter.

By March 25, 2019, AE's stock price had risen from approximately $0.08 per share to nearly $0.15 per share, and continued to substantially rise thereafter. A-27. That same day, an attorney representing Defendants requested AE's transfer agent, Continental, remove the restrictive legend on Defendants' shares so they could be publicly sold. *Id.*

In June 2019, Defendants' securities broker, Glendale Securities ("Glendale"), on Whalen's behalf, sold 100,000 of the 497,084 shares held by Whalen at approximately $0.32 per share. *Id.* Continental then advised Whalen that AE's outside securities counsel had advised she "could provide no legal basis or produce a TRO to stop us from processing the transfer." *Id.* Continental advised Whalen "the transfer was done" and the share certificates would be mailed; on June 25, 2019, the sale cleared at $0.32 per share. *Id.*

On June 24, 2019, Enterprise Counsel Group ("ECG"), lawyers representing AE *pro hac vice* in the 2018 Delaware Action, sent Defendants a letter (the "Demand Letter") demanding that Defendant rescind the "stock-for-fees" transaction and return their AE shares. A-28, 49. As stated in the Demand Letter, ECG reviewed the company's document file and could not find any (1) written notice from Defendants advising AE of the conflicts of interest if Defendants acquired shares during the proxy contest, (2) written advisement the company obtain independent

legal counsel, (3) waiver of Defendants' conflicts of interest resulting from their conflicted representation and receipt of AE shares, or (4) independent valuation of the stock prior to Defendants accepting the shares. *Id.*

Based on the above, ECG opined in its Demand Letter that Defendants had violated the New York Rules of Professional Conduct ("NYRPC") and, as a result, the prior transfer of stock to Defendants "is rescindable, and AE hereby elects to rescind it." A-29. Critically, the Demand Letter did ***not*** state that the shares were not validly issued: rather, it explained the share issuance was "rescindable" at the company's election due to Defendants' violations of the NYRPC. *Id.*

The next day, on June 25, 2019, Whalen emailed AE's securities counsel, forwarding the above-referenced June 20, 2019 email from Continental and asked securities counsel to "confirm if it is accurate as to your representations to Michael [Mullings] that [AE] could provide no legal basis to stop the processing of the transfer." A-30. Though the question was only directed to AE's securities counsel, Whalen included Continental and Glendale on his email and asked securities counsel to "'reply all' your response." *Id.*

The next day—five days after AE's transfer agent delivered the certificates for Whalen's June 17, 2019 stock sale, and one day after the sale cleared—O'Hara "replied all" to Whalen's June 25, 2019 email and attached the Demand Letter. A-30.

After receiving the Demand Letter, Glendale continued its attempts to sell more of Defendants' stock. A-31, A-110. Specifically, on June 28, 2019, Glendale wrote Continental: "Has the issuer provided a legal basis that would prevent the transfer of Ryan Whalen's shares if we were to sell shares today?" *Id.* On July 9, 2019, six days ***after*** Defendants filed their (frivolous) Securities Fraud Action on July 3, 2019 (discussed below), Glendale again wrote Continental, forwarding its June 28 email: "Are you able to make the requested attestation below?" A-109.

On July 9, 2019, Continental forwarded Glendale's June 28 and July 9, 2019 emails to AE's securities counsel, and stated, "It appears another sale is imminent." A-31, A-109. That same day, AE's securities counsel responded with AE's position: the company "has grounds to rescind the share issuance to [Defendants] approved by Farley. [AE] has elected to rescind the share issuance. Notwithstanding this election, the shares are issued and owned by [Defendants] and they have the power to sell them, but they do so at their own risk and liability if they do not fulfill [AE's] election to rescind." *Id.*

E. Defendants File the Securities Fraud Action Against AE and Others and Effect In-State Personal Service on AE; Various Other Litigation Ensues.

On July 3, 2019, Defendants filed the Securities Fraud Action in the SDNY, Case No. 1:19-cv-06200-DCF, against AE; all directors and officers of the company, individually; the company's securities counsel; and Benjamin Pugh, ECG attorney

and signatory of the Demand Letter. A-32, A-115-117. None of the defendants (save AE's securities counsel) were New York residents. *Id.* Defendants brought causes of action for violations of Sections 10(b) and 20a and Rule 10b-5 of the Exchange Act, interference with prospective business relations, and libel per se. *Id.*

At its core, the Securities Fraud Action alleged Defendants were unable to sell more shares after their broker Glendale received the Demand Letter, and in unspecified "reliance" thereon, refused to sell any more of Defendants' stock before the trading price fell. A-33-34. As shown above, this allegation was false: Glendale did not refuse to do business with Defendants or refuse to process more sales of stock after receiving the Demand Letter. Defendants also complained regarding the company's SEC filings made ***after*** Defendants acquired their shares, and after the successful proxy solicitation removed Farley as a director and officer, which SEC filings accurately disclosed that the company's prior management (*i.e.*, Farley) had issued shares to Defendants. A-34. Defendants claimed the filings were fraudulent because: "Had AE disclosed that it did not believe the Shares issued to Plaintiffs were validly-issued—which it could have done as early as March 2018—Plaintiffs would have immediately obtained prompt judicial relief to declare that the Shares were properly-authorized to Plaintiffs and are not rescindable . . . ." *Id.*

On July 11, 2019, Defendants effected personal service of process in the Securities Fraud Action (summons, complaint, and other documents) on AE's

registered agent Prentice Hall Corporation in Wilmington, Delaware. Ex. B. That same day, the individual that effected service, Denorris Britt, apparently notarized his signature before a Delaware Notary Public, and Defendants filed the Affidavit of Service in the Securities Fraud Action.[7] Ex. B & Ex. C, p. 12, ECF No. 38.[8]

On July 19, 2019, Glendale sent an unsolicited email to Continental, stating: "Currently the shareholder Gusrae Kaplan Nusbaum PLLC is in a dispute with the Issuer and the shares cannot be transferred. Given the current circumstances can you please send cert# 1109 back to our clearing firm Wilson Davis & CO to be held. [¶] Feel free to call to discuss." A-32 & 112. This email was sent only after Defendants filed the Securities Fraud Action, seemingly of Glendale's own volition (or possibly at Defendants' behest to shore up their false allegations), and not in response to any correspondence. *Id.*

In October 2019, AE and the other defendants in the Securities Fraud Action moved to dismiss the complaint on substantive and personal jurisdiction grounds. A-35. The first paragraph of AE's motion stated: "As the letter from the ECG Defendants makes clear, neither [AE] nor the ECG Defendants claimed that [AE]

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[7] Per the Affidavit of Service's header. *See United States v. Delgado*, 2020 WL 4353177, at *7 & n. 8 (W.D. Tex. Jul. 29, 2020) (header confirms when document entered on court's electronic docket).

[8] As addressed below, AE requests that the Court take judicial notice of the Civil Docket in the Securities Fraud Action. Ex. C.

did not validly issue [AE] stock to Plaintiffs. Rather, the ECG Defendants explained why, in their opinion, [AE] had the right to rescind the transaction with its former attorneys." *Id.* The motions to dismiss were fully briefed and under submission as of January 10, 2020. *Id.*

In the meantime, AE continued to prosecute the 2018 Delaware Action against Defendants' client Farley. A-37. Despite the frivolous Securities Fraud Action, the company continued to raise capital to fund the action by selling treasury shares and obtained loaned funds backed by stock warrants. *Id.* However, because the company's publicly traded stock price was depressed by at least 50% due to the Securities Fraud Action, AE was forced to issue far more stock to investors for the same amount of cash. *Id.*

In September and October 2020, AE settled the 2018 Delaware Action and separate litigation against Stein Riso, the law firm that assisted and advised Farley in connection with his self-dealing issuance of shares to himself and others. A-37. AE reported these settlements in publicly available 8-K filings. *Id.*

F. AE Sues Defendants for Malpractice, Seeking Rescission of the "Stock-For-Fees" Transaction; Defendants Resume Efforts to Sell Their AE Stock.

On January 15, 2021, AE sued Defendants in the SDNY, Case No. 1:21-cv-00382, for malpractice and ethics rule violations, seeking to rescind Defendants' stock-for-fees transaction with the company. A-37. This lawsuit alleged the same

facts and legal conclusions as the Demand Letter, i.e., that Defendants violated the NYRPC in their representation of AE during the January-March 2018 proxy solicitation contest. A-37. Defendants motion to dismiss the complaint was denied. *Id.*

In February 2021, the public trading price of AE's stock dramatically rose, from about $0.30 per share to $0.75 per share by month's end. A-38. Consequently, Defendants began attempting to sell more of their stock—although their pending Securities Fraud Action depended upon the (false) allegation that Defendants' broker, Glendale, refused to do business with Defendants. *Id.* On February 19, 2021—in response to a February 8, 2021 inquiry on Defendants' behalf—AE's securities counsel advised: "First, the company is prepared to promptly approve a request under Rule 144's safe harbor, under which your clients seem to satisfy all requirements. If you resubmit the request with a proper Rule 144 opinion, the company will approve, assuming everything is correct and in order with the submission." *Id.*

After several months of correspondence regarding what exemption from registration applied to Defendants' shares, AE and Continental approved relying on SEC Rule 144. A-38. Defendants sold their remaining AE shares through Glendale about May and June 2021. *Id.* Throughout this correspondence, there was no

mention of the Demand Letter or AE's pending lawsuit against Defendants seeking rescission of the stock issuance to Defendants. *Id.*

On August 5, 2021, Defendants voluntarily dismissed the Securities Fraud Action, while AE's motion to dismiss was pending, because Defendants knew it lacked legal and factual merit, and the improper purpose of filing the Securities Fraud Action—to interfere with the company's ability to raise capital to fund the 2018 Delaware Action—was moot due to that case's settlement. A-39.

On August 4, 2021, the day before Defendants voluntarily dismissed the Securities Fraud Action, AE's stock closed at $.78 per share; the day of the voluntarily dismissal, the stock closed at $.81 per share; and the day after (a Friday), the stock closed at $.85 per share. *Id.* On August 11, 2021, less than one week after the voluntary dismissal, the company's stock closed at $1.51 per share, nearly double the previous week; it continued to steadily climb thereafter. *Id.*

On September 7, 2021, Defendants filed ***yet another*** lawsuit against AE, and the same individual defendants sued in the Securities Fraud Action, in New York state court. *Gusrae Kaplan Nusbaum PLLC,* et al. *v. Applied Energetics, et al.*, Case No. 158265/2021 (the "NY State Court Action"). A-39. It alleged a single cause of action for libel per se, also based on the Demand Letter. *Id.* The complaint admitted, "After the submission of the motion to dismiss [in the Securities Fraud Action],

events occurred that made the Federal claims no longer viable[,]" but did not articulate what the "events" were. *Id.*

On September 7, 2021, AE's stock price closed at $1.62 per share. By October 2021, the stock price closed at $2.19, and never closed below $2.00 per share until late January 2022, butt rose again to regularly trade above $2.00 per share by mid-March 2022. *Id.* On November 15, 2021, AE disclosed the NY State Court Action in its SEC 10-Q filing. *Id.* The foregoing shows the market trading of the company's stock considered only the Securities Fraud Action significant, not Defendants' state law tort claims. *Id.*

In October 2021, AE moved to dismiss the NY State Court Action. A-40. The motion was granted on the merits, including a finding that the Demand Letter was "pure opinion based upon disclosed facts and it was done in anticipation of litigation" and therefore privileged. *Id.* On May 27, 2022, the company filed a form 8-K disclosure concerning the dismissal.[9] *Id.* That same day, the stock price closed at $2.13 per share. *Id.*

G. Relevant Procedural History of This Action.

On July 26, 2023, AE filed the instant Action, alleging Defendants maliciously prosecuted the Securities Fraud Action with the intended effect to

[9] Defendants appealed the dismissal of the NY State Court Action, but never filed their opening brief. A-41. By operation of law, the appeal was dismissed February 6, 2023. *Id.*

require AE to disclose the lawsuit to all potential investors and government agencies, hoping to limit its ability to raise capital and acquire government contracts to fund the 2018 Delaware Action. A-9-11, 37, 41, & 45. Defendants also intended to create a conflict of interest between AE and its 2018 Delaware Action counsel of record. A-10.

On September 11, 2023, Defendants filed a motion to dismiss the Action under Rule 12(b)(2) for lack of personal jurisdiction, and Rule 12(b)(6) for failure to state a claim ("Motion to Dismiss"). A-187. On October 25, 2023, AE filed its Answering Brief in Opposition to the Motion to Dismiss. A-443. Defendants thereafter received leave to add a claim-splitting argument, and on December 1, 2023, filed their Reply Brief in Support of Defendants' Motion To Dismiss. A-628 & 633. On December 22, 2023, Plaintiff filed its Sur-Reply Brief in Further Opposition to Defendants' Motion to Dismiss. A-690.

On January 19, 2024, the Superior Court heard oral argument on the Motion to Dismiss, and took the matter under advisement. A-712. On April 16, 2024, the Superior Court issued its Opinion granting Defendants' Motion to Dismiss. Ex. A. This timely appeal followed. A-1.

REQUEST FOR JUDICIAL NOTICE

Pursuant to Delaware Rules of Evidence ("Rules of Evidence" or "DRE") 201 and 202(d), AE requests the Court take judicial notice of the following documents and facts in connection with this appeal:

1. The Affidavit of Service filed by Defendants in the Securities Fraud Action on July 11, 2019. **Ex. B**.

2. The Civil Docket of the Securities Fraud Action. **Ex. C**. In particular, the following entry on page 12, ECF No. 38:

> AFFIDAVIT OF SERVICE of Summons and Complaint,. AE, Inc. served on 7/11/2019, answer due 8/1/2019. Service was accepted by Lynanne Gares. Document filed by Ryan J Whalen; Gusrae Kaplan Nusbaum PLLC. (Whalen, Ryan) (Entered: 07/11/2019)

3. The fact that on July 11, 2019, Defendants effected personal service of summons and complaint in the Securities Fraud Action on AE's registered agent in Delaware.

The Rules of Evidence permit the Court to take judicial notice of adjudicative facts at any stage of the proceeding. Del. R. Evid. 201(a) & (d). The facts contained in the foregoing documents are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned, and judicial notice is regularly taken of such documents. *See Wirth v. Top Bail Sur., Inc.*, 2021 WL 1407359, at *5 (Del. Super. Ct. Apr. 14, 2021) (judicial notice of federal court filing

and notarized affidavit) and *Wal–Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320, n.28 (Del. 2004) (judicial notice of court records from another jurisdiction).

Further, judicial notice of the foregoing documents is appropriate under Rule 202(d), in that they undermine and conflict with assertions made by Defendants in these proceedings. *See In re Rural Metro Corp. Shareholders Litig.*, 2013 WL 6634009, at *8 n. 3 (Del. Ch. Dec. 17, 2013). Namely, the foregoing directly refutes Defendants' claims that this Action "does not involve conduct that occurred in Delaware" and that the "relevant conduct occurred ***only*** in New York". A-647 (emphasis added). Defendants' effectuation of service upon AE in Delaware, as established by the foregoing documents and facts, flatly contradicts Defendants' assertions.

Judicial notice of the foregoing is appropriate and warranted, as whether Defendants engaged in in-state jurisdictionally relevant conduct is central to these proceedings. Defendants have an opportunity to be heard as to the propriety of judicial notice and to respond to AE's associated arguments in any Answering Brief Defendants may file.

ARGUMENT

I. THE SUPERIOR COURT HAD PERSONAL JURISDICTION, GIVEN THE NEXUS TO DEFENDANTS' INTENTIONAL TORTIOUS CONDUCT DIRECTED AT AE IN DELAWARE, AS WELL AS DEFENDANTS' CONSENT TO THE REGISTER IN CHANCERY AS THEIR AGENT FOR SERVICE OF PROCESS.

Question Presented

Whether Defendants' intentional infliction of harm upon AE in Delaware via the maliciously prosecuted Securities Fraud Action had a sufficient "nexus" to Defendants' *pro hac vice* admission to support personal jurisdiction. A-461-65; 747-48, 752, 774.

Standard and Scope of Review

"The question of *in personam* jurisdiction involves mixed questions of fact and law." *Uribe v. Maryland Automobile Insurance Fund*, 115 A.3d 1216 (Table), 2015 WL 3536574, *1 (Del. May 21, 2015) (citing *Plummer v. Sherman*, 861 A.2d 1238, 1242 (Del. 2004) (internal quotes omitted)). This Court "will accept the trial judge's findings of fact so long as they are the product of an orderly and logical deductive process and are supported by the record." *Id.* (citing *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)). Questions of law (e.g., whether the exercise of

jurisdiction satisfied due process) are reviewed de novo. *Id.*; *Hercules, Inc. v. Leu Trust & Banking, Ltd.*, 611 A.2d 476, 480-81 (Del. 1992).

Merits of the Argument

The Superior Court erred in finding it could not exercise personal jurisdiction over Defendants. There was a sufficient "nexus" between Defendants' *pro hac vice* admission in the 2018 Delaware Action and their malicious prosecution of the Securities Fraud Action, which was intended to cause harm to AE in Delaware. 10 *Del. C.* § 3104; *LaNuova D & B, S.p.A. v. Bowe Co.*, 513 A.2d 764, 768 (Del. 1986). That is particularly so given Defendants' consent to the Register of Chancery as agent for service of process for "all actions" arising from "any activities related" to Defendants' *pro hac vice* admission; the instant Action being within the scope of that consent. Del. Ct. Ch. R. 170(c)(iv).

A. Defendants' Intentional Tortious Conduct Directed at AE in Delaware, via the Securities Fraud Action, Had a Sufficient Nexus to Defendants' *Pro Hac Vice* Admissions.

When determining whether personal jurisdiction may be exercised over a nonresident, Delaware courts engage in a two-step analysis: they "first determine that service of process is authorized by statute and then must determine that the exercise of jurisdiction over the nonresident defendant comports with traditional due

process notions of fair play and substantial justice."[10] *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch .2007).

Delaware's Long-Arm Statute allows for personal jurisdiction over a nonresident who:

> (1) Transacts any business or performs any character of work or service in the State; (2) Contracts to supply services or things in this State; (3) Causes tortious injury in the State by an act or omission in this State; (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State; (5) Has an interest in, uses or possesses real property in the State; or (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.

10 *Del. C.* § 3104(c).

Critically, the Long-Arm Statute is written in the disjunctive ("or") such that if any factor is satisfied, personal jurisdiction exists. Further, this Court has interpreted Delaware's Long-Arm Statute "to confer jurisdiction to the maximum extent possible under the Due Process Clause" of the United States Constitution. *Hercules Inc.*, 611 A.2d at 480-81. Personal jurisdiction comports with due process

[10] For economy, AE addresses the "minimum contacts" analysis of the due process inquiry in Section II.B *post*, and incorporates those arguments as fully set forth herein.

where a nonresident defendant's contacts with the forum are sufficient to allow it to "reasonably anticipate" having to defend itself in a Delaware court. *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 443 (Del. 2005).

In dismissing the Action, the Superior Court concluded that filing and maliciously prosecuting a lawsuit in New York, intended to harm a Delaware corporation and the Delaware lawsuit the corporation was then prosecuting, was not a sufficient "Delaware-specific act[]" to warrant personal jurisdiction over Defendants. Opinion, p. 4. This finding does not comport with the United States Supreme Court's holdings regarding the Due Process Clause, and does not comport with the holdings of cases in other states that have found personal jurisdiction over defendants who maliciously prosecuted a lawsuit in a different state intending to harm a resident of the forum state.

The United States Supreme Court has stressed that individuals must "reasonably anticipate being haled into court" when their intentional, allegedly tortious, out-of-state actions were expressly aimed at causing harm to a resident of the forum state. *Calder*, 465 U.S. at 789-90. In *Calder*, the defendants were accused of libel in an article they wrote and edited in the state of Florida. *Id.* at 785-86. The article was published nationally, including in California, where the plaintiff resided. *Id.* The Supreme Court held that California courts could assert personal jurisdiction over the defendants as a result of the "effects of their Florida conduct in California."

Id. at 789 (internal quotes and citations omitted). "[T]he brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California[,]" which was "the focal point both of the story and of the harm suffered." *Id.*

The *Calder* defendants were not accused of "mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California." *Id.* Since the defendants knew the plaintiff's injury would be felt in the state where she lived and worked, the defendants could "reasonably anticipate being haled into court there" to answer for the statements in their article. *Id.* at 790 (internal quotes and citations omitted). "An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." *Id.*

Calder is on point and replete with parallels to this Action. Here, AE's assumed-true allegations are that Defendants maliciously prosecuted the Securities Fraud Action in New York with the express intent to disrupt the company's prosecution of the 2018 Delaware Action, in Delaware, AE's corporate home. A-14; *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (noting that the state of incorporation is a "paradigm[] all-purpose forum[]" for corporate party). Having intentionally directed harm to AE in Delaware, to affect AE's prosecution of the

very pending case for which they had been admitted *pro hac vice*, Defendants can clearly expect to answer for those harms in Delaware.

AE has identified no Delaware case regarding personal jurisdiction over a non-resident defendant for maliciously prosecuting a lawsuit filed in another state. Courts in other states, however, have addressed the issue. The Second Circuit has held that personal jurisdiction existed under New York's long-arm statute over non-resident defendants who had allegedly maliciously prosecuted a lawsuit in France. *Hanly v. Powell Goldstein, L.L.P.*, 290 F. App'x 435, 437-38 (2d Cir. 2008). *Hanly* held it was reasonably foreseeable that the plaintiff's allegations that the defendants acted unprofessionally and criminally in France would have an effect in New York where one plaintiff practiced law and another plaintiff was incorporated. *Id*. Here, the assumed-true allegations of the Complaint include that Defendants engaged in substantial interstate commerce via their successive *pro hac vice* appearances before the Delaware Court of Chancery in the 2017 and 2018 Delaware Actions, and that AE suffered injuries in Delaware. A-14, 18 & 26.

Another case found New York could exercise personal jurisdiction over the plaintiff's malicious prosecution claim where the allegedly maliciously-prosecuted lawsuit was filed in Florida. *Rothstein v. Carriere*, 41 F.Supp.2d 381, 386 (E.D.N.Y. 1999). The alleged malicious prosecution involved the defendant's allegedly false statements to law enforcement in order to receive leniency for criminal charges. *Id*.

at 383-84. The false statements allegedly caused a criminal indictment against the plaintiff in Florida, but the subsequent malicious prosecution lawsuit was filed in New York. *Id*. at 382 & 384. The plaintiff was a New York resident and the defendant a California resident; the plaintiff alleged he suffered both physical and economic harm in New York. *Id*. at 385.

The *Rothstein* court applied the same legal analysis as in *Hanly*, finding the defendant knew the plaintiff resided and conducted business in New York and that defendant's false statements would affect the plaintiff's business there. *Id*. at 385-386. The defendant could reasonably foresee his alleged false statements made to instigate a criminal prosecution of plaintiff would have consequences in New York. *Id*. Thus, New York could exercise personal jurisdiction over the plaintiff's malicious prosecution claim.

A Massachusetts court held it could exercise personal jurisdiction over the defendants in a malicious prosecution lawsuit arising from a criminal proceeding filed in New York. *Darcy v. Hankle*, 54 Mass. App. Ct. 846, 848, 852 (2002). The plaintiff resided in Massachusetts, while the defendant appeared to reside in New York, and his business was there. *Id*. at 847. The plaintiff alleged harm centered in Massachusetts. *Id*. at 849. Under Massachusetts law, an act or omission causing tortious injury occurring outside of Massachusetts may form the basis for personal jurisdiction where the party: (1) regularly does business in the state; (2) engages in

a persistent course of conduct in the state; or (3) derives substantial revenue from goods used or consumed or services rendered in the state. *Id*. at 849.

The court found that the defendant regularly conducted business in Massachusetts. *Id*. at 851-52. The court further found the defendant could have anticipated that his conduct in New York would affect the plaintiff in Massachusetts and that the sort of damage stemming from the defendant's conduct was the type of tortious injury supporting personal jurisdiction. *Id*. at 849-850. The court further found the exercise of personal jurisdiction comported with due process. *Id*. at 851-52.

Here, although there are no Delaware cases directly on point, Defendants appeared as counsel *pro hac vice* in Delaware twice: to litigate the 2017 Delaware Action and the 2018 Delaware Action AE filed against Defendants' client Farley. A-14. Whalen personally traveled to Delaware for multiple hearings and multiple depositions in the 2018 Delaware Action. A-489-90. Additionally, while Defendants' lawsuit was maliciously prosecuted in New York, Defendants expressly aimed their activities at disrupting AE's prosecution of its 2018 Delaware Action. A-18. Defendants' intended the Securities Fraud Action to deprive AE of capital to keep litigating the 2018 Delaware Action. A-10. Although AE was able to raise enough money to fund the litigation, thus thwarting Defendants' plans, this does not

change that Defendants intended and directed the harm to occur in Delaware. A-10-11.

In addition, by virtue of Defendants' Delaware *pro hac vice* admissions in the 2017 and 2018 Delaware Actions, Defendants consented to the Register of Chancery as their agent for service of process for "***all actions***" arising from "***any activities related***" to Defendants' admissions. Del. Ct. Ch. R. 170(c)(iv) (emphasis added). Accordingly, Defendants "could reasonably expect to be haled" into Delaware courts to answer for allegations of wrongdoing related to the action in which Defendants appeared *pro hac vice*. *Calder*, 465 U.S. at 789-90.

A number of outside jurisdictions have recognized personal jurisdiction over counsel previously admitted *pro hac vice* where the litigation relates to the previous admission. *See Nawracaj v. Genesys Software Systems, Inc.*, 524 S.W.3d 746, 754 (Tex. App. 2017) (holding that because plaintiff's *pro hac vice* attorney "agreed to be bound by the local rules of the Northern District of Texas and to comply with the standards of practice . . . , as well as the Texas Disciplinary Rules of Professional Conduct," attorney could foresee the possibility of related legal action in Texas); *Zahl v. Eastland*, 465 N.J. Super. 79, 104 (N.J. Super. Ct. App. Div. 2020) (holding most significant of contacts for purposes of exercising personal jurisdiction was the

pro hac vice admission, as attorney "clearly availed himself of the privileges and benefits of practicing law before the federal courts of this state").

Given the foregoing, the Superior Court erred in finding that it could not exercise jurisdiction over Defendants. The exercise of jurisdiction was consistent with Delaware's Long Arm Statute, due process, and analogous case law in light of Defendants' intentional direction of harm at AE in Delaware and that harm's nexus to Defendants' *pro hac vice* admission.

II. DEFENDANTS' EFFECTUATION OF PERSONAL SERVICE ON AE WITHIN DELAWARE WAS A SUFFICIENT IN-STATE ACT FOR PERSONAL JURISDICTION UNDER THE LONG-ARM STATUTE.

Questions Presented

Whether Defendants' effectuation of personal service of the summons and complaint in the Securities Fraud Action within Delaware constituted sufficient jurisdictionally relevant conduct to support personal jurisdiction under Section 3014(c)(1) or (2) of the Long Arm Statute.

AE generally preserved the question of the Superior Court's personal jurisdiction over Defendants based on their in-state acts. A-460-468. However, AE acknowledges it did not expressly argue below that Defendants' effectuation of personal service on the company's registered agent in Delaware conferred personal jurisdiction over Defendants.

Ordinarily, arguments must be made to the trial court to be presented for review. Del. Supr. Ct. R. 8. However, "when the interests of justice so require, the Court may consider and determine any question not so presented." *Id.* This exception is limited to "plain error requiring review in the interests of justice." *Shawe v. Elting*, 157 A.3d 152, 168 (Del. 2017) (internal quotes and citation omitted). "The doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their

character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice." *Id.* at 169 (internal quotes and citation omitted).

Here, the interests of justice support reaching this argument. It involves the "basic, serious and fundamental" question of the trial court's jurisdiction over Defendants. *Id.* Defendants' Motion to Dismiss expressly argued that Defendants had not engaged in ***any*** relevant in-state conduct in prosecuting the Securities Fraud Action. A-213-14. Defendants' jurisdictional arguments at the hearing on their Motion to Dismiss focused on the purported lack of any in-state act. *See* A-734-737. In finding an insufficient basis for personal jurisdiction, the trial court's Opinion expressly relied on the purported lack of a "Delaware-specific act giving rise to the claim" in this Action. Opinion, p. 5. The Court should therefore address the argument, given it is a central, potentially case-determinative issue, based on documents and facts not reasonably subject to dispute.

Standard and Scope of Review

"The question of *in personam* jurisdiction involves mixed questions of fact and law." *Uribe*, 2015 WL 3536574 at *1 (internal quotes and citation omitted). This Court "will accept the trial judge's findings of fact so long as they are the product of an orderly and logical deductive process and are supported by the record." *Id.* (citation omitted). Questions of law (e.g., whether the exercise of jurisdiction satisfied due process) are reviewed de novo. *Id.*; *Hercules,* 611 A.2d at 480-81. To

the extent a "plain error" standard of review applies, review is "limited to material defects which are apparent on the face of the record." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

Merits of the Argument

By effecting personal service on the company's registered agent in Delaware, Defendants perpetrated an in-state act triggering personal jurisdiction. The requirements of the Long Arm Statute are satisfied, as is the "minimum contacts" due process requirement. This Court should therefore reverse.

A. Defendants' Specific In-State Conduct Satisfies the Long Arm Statute.

"In ruling on a Rule 12(b)(2) motion, the Court may consider the pleadings, affidavits, and any discovery of record." *Ryan*, 935 A.2d at 265. AE "need only make a *prima facie* showing of personal jurisdiction" and the record is construed in the light most favorable to the plaintiff." *Id.* (internal quotes and citations omitted).

The Long Arm Statute (10 *Del. C.* § 3104) provides in relevant part as follows:

> (b) The following acts constitute legal presence within the State. Any person who commits any of the acts hereinafter enumerated thereby submits to the jurisdiction of the Delaware courts.
>
> (c) As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent:
>
> (1) Transacts any business or performs any character of work or service in the State; [or]

(2) Contracts to supply services or things in this State . . . .

The Long Arm Statute is a "single act statute" that enables the Court to exercise jurisdiction based on a single in-state act or transaction by the nonresident. *See Eudaily v. Harmon*, 420 A.2d 1175, 1180 (Del. 1980). "[T]he transaction of business or performance of work and contracting to supply services or things in the State, may supply the jurisdictional basis for suit [under the above provisions] only with respect to claims which have a nexus to the designated conduct." *LaNuova D & B, S.p.A.*, 513 A.2d at 768. In other words, "the Delaware-related conduct must form ***a source*** of the claim." *Sample*, 935 A.2d at 1057, n. 43 (emphasis added).

Here, AE has brought a single cause of action for malicious prosecution. A-41. That claim's elements include: "1) there must have been a prior ***institution or continuation of a proceeding*** against the plaintiff; [and] 2) such former proceedings against the plaintiff must have been initiated or pursued by the defendant in the action for malicious prosecution . . . ." *Pfeiffer v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 11506689, at *3 (Del. Com. Pl. Nov. 30, 2010) (citing *Beckett v. Trice*, 1994 WL 710874 (Del. Super. Ct., Nov. 4, 1994)) (emphasis added).

A "proceeding" is not limited to hearings, or even to events that occur before a tribunal. Rather, a "proceeding" is expansively defined to include "any procedural means for seeking redress from a tribunal or agency." BLACK'S LAW DICTIONARY (10th ed. 2014). The term "is more comprehensive than the word 'action,'" and

"may include in its general sense all the steps taken or measures adopted in the prosecution or defense of an action . . . ." *In re K.M.*, 2017 WL 1148198, at *2-3 (Del. Fam. Ct. Jan. 31, 2017) (internal quotes and citations omitted). The term may include "(1) the institution of the action; (2) the appearance of the defendant; [and] (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of *ne exeat* . . . ." *Id.* (internal quotes and citations omitted). The term includes "all the steps necessary to seek that relief." *Id.*

Service of summons is the mechanism for "obtaining jurisdiction over the person of a defendant" in a civil action. *McCoy v. Hickman*, 15 A.2d 427, 429 (Del. 1940). It is a "fundamental tenet of the law of Delaware . . . that *in personam* jurisdiction can be acquired by a court solely by the proper service of process, either actual or constructive . . . ." *Castelline v. Goldfine Truck Rental Serv.*, 112 A.2d 840, 842 (Del. 1955) (internal citations omitted).

Effectuation of jurisdiction in a civil action is a core and necessary step for its prosecution. Accordingly, service of summons on a party constitutes "a proceeding," as the term itself is used in the elements of a malicious prosecution claim as described in *Pfeiffer*. Alternatively, service of summons is a core and necessary part of the "continuation" of a civil action, given that jurisdiction in such a proceeding must be established before it can progress. Under either definition, Defendants' service of summons on AE constitutes either the institution or

continuation of a civil proceeding, satisfying both of the elements of a malicious prosecution action identified above. *Pfeiffer*, 2010 WL 11506689, at *3.[11]

Defendants' effectuation of service on AE in Delaware was therefore a jurisdictional act meeting the requirements of subsection (c)(1) or (c)(2) of the Long Arm Statute. Defendants' effectuation of service "set in motion a series of events which form the basis" for malicious prosecution: it was as a result of that service that AE was haled into court and forced to respond to Defendants' frivolous New York Securities Fraud Action. *LVI Grp. Invs., LLC v. NCM Grp. Holdings, LLC*, 2017 WL 3912632, at *5 (Del. Ch. 2017).

Defendants' effectuation of service has at least as close a nexus to AE's claims as cases involving subsection (c)(1) and/or (c)(2) of the Long Arm Statute. *See Sample*, 935 A.2d at 1057-58 (preparing Certificate Amendment and sending to agent in Delaware for filing) and *Clark v. Davenport*, 2019 WL 3230928, at *19 (Del. Ch. July 18, 2019) (filing of certificate of incorporation and creation of Delaware entity).

Defendants' effectuation of service in Delaware stands in clear contrast to cases where no in-state act supporting personal jurisdiction was found. *Cf. Altabef*

[11] Should the Court find the act of service itself is not embraced by the Complaint, AE should be given leave to amend its Complaint to include allegations regarding the same. A-483.

v. Neugarten, 2021 WL 5919459, at *13-*14 (Del. Ch. Dec. 15, 2021) (producing documents in litigation and providing advice regarding same insufficient); *LVI Grp. Invs., LLC*, 2017 WL 3912632, at *5 (signing corporate instrument outside state insufficient); *CLP Toxicology, Inc. v. Casla Bio Holdings LLC*, 2020 WL 3564622, at *14 (Del. Ch. Jun. 29, 2020) (holding interest in and receiving passive income from Delaware entity insufficient).

In sum, Defendants' relevant in-state conduct satisfies the Long Arm Statute, therefore creating a statutory basis for personal jurisdiction.

B. Defendants' Forum Contacts Constitute "Minimum Contacts" to Satisfy Due Process

The next inquiry is whether the exercise of personal jurisdiction would violate the Due Process Clause of the Fourteenth Amendment.[12] The focus is whether Defendants "engaged in sufficient 'minimum contacts' with Delaware to require [them] to defend [themselves] in the courts of this State consistent with the traditional notions of fair play and justice." *AeroGlobal Cap. Mgmt., LLC*, 871 A.2d at 440 (citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)). "[T]he nonresident defendant's contacts with the forum must rise to such a level that it should 'reasonably anticipate' being required to defend itself in Delaware's courts."

[12] The Superior Court declined to address this element, given its findings regarding the application of the Long Arm Statute. Opinion, p. 6.

Id. (citation omitted). Sufficient contact appears where "the defendant purposefully avails itself of the privilege of conducting activities within the forum State . . . ." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

Defendants' relevant contacts with Delaware are extensive. As discussed above, they include Defendants' effectuation of service of summons in the Securities Fraud Action on AE, in Delaware. As also detailed above and in AE's Complaint, Defendants represented parties in Delaware in multiple related actions, including the 2017 Delaware Action (A-18), and the 2018 Delaware Action (A-26). Further, AE presented an unrebutted declaration of its counsel, Benjamin Pugh, based on personal knowledge, that Defendant Whalen had made multiple physical and virtual appearances in connection with the 2018 Delaware Action. A-489-90.

Whalen, as a member of Gusrae, appeared *pro hac vice* in both the 2017 and 2018 Delaware Actions. A-18, A-26. Defendants could therefore clearly expect to be subject to jurisdiction in Delaware, having sought and obtained the privilege of such admission in order to represent parties in Delaware. As discussed above, Defendants' consent to service on the Register in Chancery also supports the exercise of personal jurisdiction. Del. Ct. Ch. R. 170(c)(iv) (emphasis added).

Defendants could also reasonably expect to be subject to jurisdiction in Delaware given their intentional disruption of AE's prosecution of the 2018

Delaware Action. A-10, A-37. Defendants, having purposefully directed harmful conduct at the forum, would have "fair warning" they would be subject to litigation in the forum for resulting injuries. *Burger King Corp.*, 471 U.S. at 472; *Calder*, 466 U.S. at 788-89.

Here, even if it assumed for purposes of argument that the entirety of Defendants' allegedly injurious conduct occurred in New York, AE suffered the resulting damages (e.g., interference with its prosecution of the 2018 Delaware Action) within Delaware. As in *Calder*, by virtue of Defendants' intentional injurious conduct directed at Delaware judicial proceedings, the exercise of jurisdiction is fully consistent with due process.

In light of all the foregoing, the Court's exercise of personal jurisdiction over Defendants comports with statutory and due process requirements. The Court should therefore so hold and reverse.

III. ALTERNATIVELY, THE COURT SHOULD REVERSE AND DIRECT THE SUPERIOR COURT TO GIVE AE LEAVE TO CONDUCT LIMITED JURISDICTIONAL DISCOVERY.

Question Presented

Whether the Superior Court erred by not providing AE leave to conduct jurisdictional discovery. A-460-461. If this issue is found not to be preserved, the ends of justice require that the issue be reviewed under the authorities discussed above. Case law is clear that, "As a plaintiff does have an evidentiary burden, [it] may not be precluded from attempting to prove that a defendant is subject to the jurisdiction of the court, and may not ordinarily be precluded from reasonable discovery in aid of mounting such proof." *Harris v. Harris*, 289 A.3d 310, 336 (Del. Ch. 2023) (citing *Hart Holding Co. Inc. v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 539 (Del. Ch. 1991) (internal quotes omitted, modification original). Review here is a matter of basic fairness, due process, and AE's ability to seek redress for the malicious prosecution to which it was subjected by Defendants.

Standard and Scope of Review

Jurisdictional discovery may only be precluded "where the facts alleged in the complaint make any claim of personal jurisdiction over defendant frivolous . . . ." *Id.* (internal quotes and citation omitted). "As long as the plaintiff has provided 'some indication' that the particular defendant is amenable to suit, then jurisdictional discovery is appropriate." *Id.* (internal quotes and citation omitted). Since the Court

independently evaluates the Complaint's allegations on a motion to dismiss, the standard of review is *de novo*. *See Spence v. Funk*, 396 A.2d 967 (Del. 1978).

Merits of the Argument

AE is "entitled to [jurisdictional] discovery if [its] assertion of jurisdiction is minimally plausible . . . ." *Munoz v. Vazquez-Cifuentez*, 2019 WL 669935, at *5 (Del. Super. Ct. Feb. 18, 2019). All of AE's "allegations of fact concerning personal jurisdiction are presumed true unless contradicted by affidavit." *Id.* (internal quotes and citation omitted). "The record is to be construed in the light most favorable to the plaintiff." *Id.* (citation omitted). Further, judicially noticeable information and documents are properly considered in evaluating a complaint on a motion to dismiss. *Hammer v. Howard*, 2021 WL 4935019, at *2 (Del. Super. Ct. Oct. 22, 2021).

Broadly, the Complaint alleges that Defendants maliciously prosecuted the Securities Fraud Action against AE, with the intention of lowering the company's stock price and interfering with the company's prosecution of the 2018 Delaware Action. A-10, 16, 41-42. AE's allegations as to Defendants' intentions and the resulting damages were not contradicted below by a substantive declaration based on personal knowledge. They are therefore presumed true for purposes of evaluating personal jurisdiction. *Munoz*, 2019 WL 669935, at *5. Judicially noticeable information further indicates that Defendants perpetrated a core, jurisdictionally-

relevant act by effecting personal service on AE's registered agent in Delaware. Ex. B & C, p. 12, ECF No. 38.

If the Court has any doubt regarding Defendants' intention to cause harm to AE in Delaware, Defendants' effectuation of personal service on AE in Delaware, or any other factual question, the Court should direct the Superior Court to afford leave to conduct limited discovery. Limited depositions of Defendants, requests for production, and written interrogatories should be sufficient to permit AE to make its minimal prima facie showing that jurisdiction is conferred by the Long Arm Statute. *Pandora Jewelry, Inc. v. Stephen's Jewelers, LLC*, 2012 WL 2371043, at *2 (Del. Com. Pl. June 22, 2012).

CONCLUSION

For all the reasons stated herein, Appellant respectfully requests that the Court reverse the Opinion in accordance with the arguments outlined in this appeal.

Dated: July 17, 2024

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