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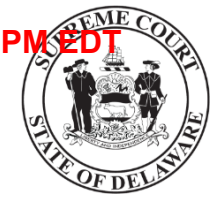

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DR. THOMAS MARKUSIC, **DR. MAXYM POLYAKOV**, **NOOSPHERE VENTURE PARTNERS LP**, and **FIREFLY AEROSPACE, INC.**, Plaintiffs-Below/ Appellants, v. **MICHAEL BLUM, PATRICK JOSEPH KING**, **LAUREN MCCOLLUM**, **STEVEN BEGLEITER**, **GREEN DESERT N.V.**, **SWING INVESTMENTS BVBA**, **BRIGHT SUCCESS CAPITAL LTD.**, and **WUNDERKIND SPACE LTD.**, Defendants-Below/ Appellees,	C.A. No. 383,2021 Court Below: Court of Chancery of the State of Delaware C.A. No. 2019-0753-KSJM

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT[1]

Plaintiffs filed this action because Defendants threatened to bring two sets of claims in two different jurisdictions arising out of the same nucleus of operative facts in an attempt to litigate the same case twice. Indeed, counsel for Defendants explicitly stated that "we will plan to ultimately file our fiduciary-based claim in Delaware. However, [the forum selection clause] does not prevent our clients from pursuing their direct fraud and tortious interference claims in California, which they plan to do." (*See* A00025; A00036; A00066; A00085.) But for that threat, Plaintiffs would not have filed suit.

In their Answering Brief (cited as "AB"), Defendants erroneously argue that the forum selection clause at issue permits claim spitting (it doesn't), that the California court is a more appropriate forum (it isn't), and that Plaintiffs have waived arguments (they haven't), but Defendants conspicuously do not contest that their pleadings in the two different jurisdictions are nearly identical. Defendants have ignored Delaware's aversion to claim splitting and well-established principles of authority and proper pleading. Moreover, Defendants' arguments are not consistent with the California court's orders, which have deferred to the Delaware courts on three separate occasions. In fact, their Answering Brief raises many of the same

[1] Capitalized terms have the same meaning as in Plaintiffs-Below/Appellants' Corrected Opening Brief (referred to as their "Opening Brief" and cited as "OB").

arguments Defendants raised in their motions in the California action, which the California court rejected. This Court should do the same.

Defendants have now doubled down on their harassment of Plaintiffs stating that "[i]f the Requested Declarations are ultimately granted …, the buck will not stop with the Delaware courts. Rather, Appellants must seek supplemental relief from the California court, asserting collateral estoppel, seeking an anti-suit injunction, et cetera, with respect to Appellees' affirmative claims there." (AB at 37.) Far from denying a scheme to file duplicative litigation in multiple jurisdictions based on the same set of operative facts, Defendants admit that they intend to double down on it. As a practical matter, the ruling of the Court of Chancery effectively endorsed that plan. Correcting the error below is necessary to maintain the consistency of Delaware law, to avoid the possibility of inconsistent judgments, and to prevent the type of gamesmanship in which Defendants engaged.

ARGUMENT

I. DEFENDANTS' ACTIONS, NOT PLAINTIFFS' ACTIONS, ARE INCONSISTENT WITH THE RULE AGAINST CLAIM SPLITTING AND COMPULSORY COUNTERCLAIMS

Contrary to the arguments asserted in Defendants' Answering Brief, Plaintiffs did not deprive Defendants of their choice of forum in which to bring their claims. As explained in Plaintiffs' Opening Brief, the outcome in this case is not dependent on Plaintiffs' decision to file a lawsuit in Delaware. Rather, had Plaintiffs not filed this action, and Defendants filed first in California and then filed their fiduciary and other claims in Delaware, the outcome would be the same. The two complaints would still arise from the same operative facts and would still be logically related. In that scenario, Defendants would similarly be required to assert all their claims in the only forum that could hear all the claims at issue: Delaware.

A. The Record Evidence Exposes Defendants' Intent To Split Their Claims Between Two Jurisdictions Despite The Fact That Both Sets Of Claims Derive From A Common Nucleus Of Operative Facts

The parties do not dispute that "[o]n June 27, 2019, Appellees sent Appellants a letter enclosing a draft complaint to be filed in the California Superior Court." (AB at 2; A00024-25.) The draft complaint alleged counts for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and three others. (A00462-A00482.) Contrary to the assertion in their Answering Brief, Plaintiffs never filed a complaint in California containing these claims. (A00424-A00428; A00498-A00527.)

Plaintiffs responded by letter on July 19, 2019, pointing out that the forum selection clause mandated the Delaware Court of Chancery as the sole and exclusive forum for any action asserting a claim of breach of fiduciary duty by any director or officer of Old Firefly. (A00484-A00496.) Thereafter, Defendants' counsel threatened that "we will plan to ultimately file our fiduciary-based claim in Delaware. However, [the forum selection clause] does not prevent our clients from pursuing their direct fraud and tortious interference claims in California, which they plan to do," *even though both sets of claims admittedly arose from the same nucleus of facts and circumstances*. (*See* A00025; A00036; A00066; A00085.)

After months of unsuccessful negotiations between the parties, on September 19, 2019, Plaintiffs filed the Complaint. (AB at 13; A00017-A00054; Ex. A, p. 3.) On November 22, 2019, Defendants answered the Complaint and asserted the Counterclaims against Plaintiffs. (A00015; A00055-A00120.) Defendants contend that they asserted counterclaims "to preserve their rights" but did not condition such counterclaims on (or even reference) a dispute related to the appropriate forum. (*See* AB at 13; A00055-A00120.)

On October 3, 2019, Defendants filed a complaint in the California Superior Court, but it was not "the complaint that they had shown Appellants in June 2019," as alleged in the Answering Brief. (AB at 14; A00424-A00428; A00498-A00527.) Rather, the complaint that was filed asserted claims for fraud, aiding and abetting in

fraud, fraudulent inducement, negligent misrepresentation, tortious interference with prospective economic advantage, and statutory and common law unfair competition pursuant to the California Business and Professional Code, and it was amended on December 5, 2019. (A00424-A00428; A00498-A00527.)

The undisputed facts show that Defendants threatened to split their claims between two jurisdictions by bringing some claims in Delaware and some in California, even though both sets of claims arose from the same nucleus of facts and circumstances. (A00025; A00035-A00036; A00066; A00083-A00084; A00462-A00482; A00484-A00496.) Plaintiffs did not deprive Defendants of a chosen forum in Delaware. Instead, by their own admission, *Defendants always intended to bring claims before the Court of Chancery*—which they did. (A00025; A00035-A00036; A00066; A00083-A00084; A00462-A00482; A00484-A00496.) Contrary to the Court of Chancery's narrative, Defendants explicitly threatened and then asserted duplicative sets of claims based on the same operative facts in two different jurisdictions, *one of which was always going to be Delaware*. (A00025; A00035-A00036; A00066; A00083-A00084; A00462-A00482; A00484-A00496.)

Moreover, Defendants do not dispute (or even address the issue) that the operative facts are the same in the Delaware and California complaints. Nor can they. A basic comparison shows extensively overlapping allegations, which span from late 2013 when Markusic approached potential investors to participate in his

aerospace startup company (A00104; A00505), through the creation of New Firefly (A00111; A00517), as well as the operations of New Firefly (A00112; A00517-A00518). The California court has made the same observation, stating that "[b]y all appearances, the factual allegations in Blum et al.'s [California Complaint] in this case and Blum et al.'s Delaware Counterclaims appear identical, although the asserted causes of action in the two cases differ." (A00531; Ex. A, pp. 3-4.)

B. The Forum Selection Clause Does Not Permit Defendants To Split Claims Based On Identical Facts Between Two Jurisdictions

To distract from the fact that the operative complaints are nearly identical, Defendants argue that the forum selection clause permits claim splitting. That is simply not true.

Here, Defendants do not dispute that there is a logical relationship between the claims asserted in the Delaware action and those asserted in the California action. The two complaints overwhelmingly share issues of fact and law that would involve presentation of the same evidence. Nor do Defendants dispute that the California action was filed *after* the Delaware action had commenced. And Defendants do not argue that Delaware is an improper forum, which would be disingenuous given the existence of a Delaware forum selection clause, Delaware's connection with this dispute, and the fact that Defendants answered in Delaware and asserted both fiduciary and non-fiduciary counterclaims affirmatively invoking the Court of Chancery's jurisdiction on the merits. (A00112-A00118; Ex. A, p. 3.)

Given the facts recited above, Defendants were bound by Court of Chancery Rule 13(a), which requires that "a pleading shall state as a counterclaim any claim, *which at the time of serving the pleading* the pleader has against any opposing party, *if it arises out-of-the-transaction or occurrence* that is the subject matter of the opposing party's claim …." Ct. Ch. R. 13(a) (emphasis added). Contrary to Defendants' argument, the forum selection clause does not provide that the parties may violate the rule related to compulsory counterclaims (or the rule against claim splitting). (*See* Ex. A, p. 2.)

Further, the authority cited by Defendants on this point is unavailing. With respect to *Zohar II 2005-1, Ltd. v. FSAR Holdings, Inc.*, 2017 WL 5956877 (Del. Ch. Nov. 30, 2017), Defendants rely on a footnote that discusses whether the interests of non-party entities had been adequately represented by a party to the case. (AB at 20.) The *Zohar* footnote is irrelevant. Similarly, Defendants' citation to Federal Practice and Procedure is misplaced. (AB at 20.) That treatise merely states that the compulsory counterclaim rule does not require a party "to file a compulsory counterclaim *in an improper forum to avoid having the claim barred in a proper forum*." Fed. Prac. & Proc. § 1412 (3d ed) (emphasis added). But of course, Delaware is a *proper* forum, not an improper one. Defendants cannot contend otherwise given that they filed both fiduciary and non-fiduciary counterclaims in the Delaware action. The same goes for Defendants' citation to the Restatement

(Second) of Judgments, as the parties did not agree to contract around the rule against claim splitting or the rule related to compulsory counterclaims. (*See* AB at 20.) There is nothing in the forum selection clause that remotely purports to reflect such an agreement.

Moreover, the *McWane* Court's observations regarding the "wasteful duplication of time, effort, and expense that occurs when judges, lawyers, parties, and witnesses are simultaneously engaged in the adjudication of the same cause of action in two courts," *McWane Cast Iron Pipe Corp. v. McDowell–Wellman Engineering Co.*, 263 A.2d 281, 283 (Del. 1970), are relevant considerations when analyzing forum selection clauses. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Trustwave Ltd.*, 2017 WL 7803921, at *2-3 (Del. Super. Ct. Dec. 21, 2017) ("[L]itigating such related conduct in two different forums would risk conflicting results, duplicative damage awards for a single loss, and undue expense, making the 'efficient administration of justice' unlikely."); *see Ashall Homes Ltd. v. ROK Entm't Group*, *Inc.*, 992 A.2d 1239, 1251-52 (Del. Ch. 2010) (considering *McWane*'s efficiency factors, the purpose of which is "to minimize claims splitting," when analyzing whether two forum selection clauses required dismissal based on venue). Federal courts considering competing forum selection clauses also have considered similar factors. *See Mitek Sys., Inc. v. United Servs Auto. Ass'n*, 2012 WL 3777423, at *2 (D. Del.) ("If both the present case and the [first-filed] Texas

action go forward, the potential for 'conflicting results, confusion, expense, and waste of judicial resources' would undermine judicial efficiency.") The California court considered these factors when it stayed the California action to "best promote judicial economy and efficiency by avoiding the prospect of simultaneously-pending lawsuits in two courts involving identical facts and closely related (but not identical) claims," and avoiding the possibility of inconsistent rulings. (A00530-A00531.)

In sum, the Court should not give legitimacy to Defendants' baseless argument that the only reason there is litigation in two forums is because of Plaintiffs' actions. In their Answering Brief, Defendants argue that they can split claims that arose under the same facts and are not bound by the forum selection clause for non-fiduciary claims. As such, this is an important dispute to resolve via declaratory judgment because Defendants threatened to—and then did—assert as claims in California what were compulsory counterclaims here under the forum selection cause and otherwise.

II. APPELLANTS ADDRESSED EACH OF THE BASES ADDRESSED BY THE COURT OF CHANCERY RELATED TO THE DECLARATORY JUDGMENT ACT

A. Even Though Defendants Have Waived Arguments Related To The California Court Being The More Appropriate Forum, It Is Not

Principles of comity do not favor resolving this dispute in California. Plaintiffs' argument to the contrary is flatly wrong.

As a fundamental matter, in response to the Delaware complaint, Defendants answered the Delaware complaint and asserted counterclaims here. If Plaintiffs felt Delaware was an inappropriate forum compared to California, they could have made a motion before that the Court of Chancery to challenge the adjudication of claims between the parties in Delaware. They did not. Instead, they submitted to the jurisdiction of the Delaware court on both fiduciary and non-fiduciary claims, rendering this point moot.

In any event, Delaware is a more appropriate forum than California. Old Firefly is a Delaware corporation that was headquartered and had its principal place of business in Texas, and Delaware has a greater interest in issues surrounding corporate functions of its own business entities than California. (*See* A00018.) Six of the eight Defendants are based outside of California—Blum is in Nevada, Begleiter is in New York, Green Desert N.V. is in Curacao, Swing Investment BVBA is in Belgium, Bright Success Capital Limited is in Hong Kong, and Wunderkind Space Limited is in Cyprus. (B5.) Similarly, New Firefly is also a

Delaware corporation headquartered in Texas, and Markusic resides in Texas. (B6-B7.) Further, the issues in this litigation involve alleged breach of fiduciary duty, issues related to whether the claims are direct or derivative, and actions that Markusic took and duties he had as an officer and director of a Delaware corporation. Delaware law issues abound. California ones do not.

As the California court itself determined, Delaware is the more appropriate forum for the resolution of this dispute. (A00635-A00636.) Plaintiffs engaged in forum shopping without regard for the forum selection clause, the applicable law, or the actual domiciles of the parties. For these reasons, this Court should have no doubt about reversing the lower court's ruling and putting an end to this dispute.

B. Any Argument That Litigating In Delaware Will Diminish Defendants' Substantive Rights Is Inaccurate

Defendants incorrectly argue that they will be denied their right to a jury trial if the Declarations are granted because the Court of Chancery does not hold jury trials. Defendants' argument is based on fundamentally inapplicable cases. In the cited cases, the actions were filed in California then sent to jurisdictions where jury trials were unavailable. Here, the Delaware action was filed first, Defendants *answered* that action *and* filed counterclaims here, Defendants' California action followed on the heels of the Delaware action, and the California court stayed the California action for the policy reasons discussed above. Tellingly, this issue was

of no concern to Defendants until after their Delaware counterclaims were dismissed. Moreover, no rights will be lost by granting the Declarations.

The case law cited by Defendants is not persuasive. For example, Defendants identify *Handoush v. Lease Fin. Grp., LLC*, 41 Cal. App. 5th 729, 733 (2019), as a purported example of an instance where a California court held that "enforcing the forum selection clause would violate plaintiff's constitutional (and substantive) rights because New York law would not necessarily provide a jury trial given the waiver." (AB at 30.) In *Handoush*, the plaintiff first filed in California, and defendant won a motion to dismiss based on a forum selection provision, and plaintiff appealed. *Handoush,* 41 Cal. App. 5th at 732-733. The court of appeals found that enforcing the forum selection clause "would be contrary to California's fundamental public policy protecting the jury trial right and prohibiting courts from enforcing predispute jury trial waivers." *Id*. at 734-35, 741. Here, unlike in *Handoush*, there is no contractual jury waiver at issue, making *Handoush*'s facts wholly inapplicable. Further, the Old Firefly Investors affirmatively chose to litigate some of their claims in Delaware. They then chose to bring some other claims arising from the exact same nucleus of operative facts in California and want to litigate them there after losing with respect to their Delaware counterclaims. That is, they seek to have a second bite at the apple in California. That is exactly the situation that the doctrine against claim-splitting does not allow.

Defendants made these exact same arguments (and others) before the California court. (B43-B47.) The California court, however, was not persuaded, and denied Defendants' motion to lift stay. (A00696-A00697.) The California court opined that "[t]he cases Blum et. al. cites (*Grafton Partners L.P. v. Superior Court*, 36 Cal. 4th 944, 956 (2005) (the right to a jury trial may be waived in civil cases only as provided in Code Civ. Proc. § 631(d)); *Handoush v. Lease Fin. Group., LLC*, 41 Cal. App. 5th 729, 736 (2019) ("the waiver methods specified [§ 631] are exclusive") do not change the Court's conclusion …. Rather, the issue here is whether the Court should lift the stay now, even though proceedings on overlapping issues in Delaware are continuing. Doing so would guarantee simultaneously-pending cases in two courts, involving the same parties, the same facts, and overlapping claims—a scenario that is strongly disfavored." (A00696-A00697.)

For obvious reasons, voluntarily availing oneself of a forum in which a jury trial is not available and then proceeding to litigate those claims waives any argument arising from a supposed loss of the right to a jury trial in California. This is not a case in which claims were properly in California and then the plaintiff was forced to proceed in another jurisdiction. On the contrary, this action was properly first filed in Delaware.

C. Plaintiffs Addressed Each Of The Grounds Addressed By The Court Of Chancery Denying The Declarations

Defendants argue that Plaintiffs failed to address the ground that the certain declarations are "not ripe because [they] do not speak to … active controvers[ies]" because they were disposed by the Court of Chancery through a previous order. (AB at 42-43.) To the contrary, Plaintiffs address these arguments in the section of their Opening Brief entitled "The Declarations are Active Controversies." (OB at 43-46.) Therein, Plaintiffs address this ground for denial head on. In brief, Plaintiffs state that the Court of Chancery did not divest itself of an actual controversy when it resolved the issue in dispute in the litigation in favor of the party that brought the request for declaratory relief. (OB at 45.) This is especially true under the "law of the case doctrine" and the fact that at the time that the Complaint in the Delaware action was filed, there was indisputably an actual controversy regarding the Old Firefly Investors' allegations of breach of fiduciary duty and aiding and abetting against Plaintiffs.

The Opening Brief also argues that it cannot be the law in Delaware that a court somehow divests itself of an actual controversy when it resolves the issue in dispute in the litigation in favor of the party that brought the request for declaratory relief. (OB at 45.) That does not constitute the lack of an actual controversy—on the contrary, it *decides* the controversy in favor of the plaintiff. (OB at 45.) At that point, an affirmative ruling on the request for declaratory relief is appropriate. (OB

at 45-46.) Here, the Court of Chancery determined the issue underlying certain of Plaintiffs' requests for declaratory relief in favor of Plaintiffs, and it should have proceeded to issue appropriate final relief based upon that ruling. (OB at 46.)

Next, the determination of whether there is an actual controversy incorporates the analysis of whether the declaration would result in a hypothetical or advisory opinion. In other words, these issues are two sides of the same coin. *See Homeland Ins. Co. of New York v. Corvel Corp.*, 2011 WL 7122367, at *3 (Del. Super. Ct. Nov. 30, 2011) ("Because of the nature of the relief provided in a declaratory judgment action and to avoid issuing advisory opinions, an actual controversy must exist between the parties to a declaratory judgment action."); *Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. 1964)). And, in the November 2 Order, the Court of Chancery mentioned the specific concepts of "hypothetical" or "advisory" opinions only in passing to state that the court could not issue a declaration as to every possible cause of action that Defendants might at some point assert. (Ex. A, p. 7.)

Plaintiffs addressed the issue as part of its discussion related to actual controversies. (OB at 35-56.) Moreover, Plaintiffs explicitly addressed the issue related to broadness of certain Declarations. Plaintiff stated in its Opening Brief that they do not "'seek[] a broader declaration that *any* claim brought against Markusic would be derivative in nature.' Rather, Plaintiffs sought a determination as to the

direct-or-derivative nature of claims that were asserted in the California complaint (or the Delaware action)." (OB at 15.)

Plaintiffs' Opening Brief expressly addressed each of the grounds that were discussed (or simply referenced) in the November 2 Order. The argument that certain issues were "waived" is erroneous and unavailing.

CONCLUSION

Respectfully, the November 2 Order of the Delaware Court of Chancery should be reversed and this case should be remanded for further proceedings consistent with this Court's Order.

DATED: March 18, 2022

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