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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

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NATURE OF PROCEEDINGS

This appeal presents a narrow question: Do the *pro hac vice* admissions of a non-Delaware attorney in two Delaware cases, now closed, make that attorney and his law firm subject to long-arm jurisdiction in Delaware in a future case that alleges malicious prosecution of a case filed in New York?

Applied Energetics, Inc. ("AEI") sued the law firm Gusrae Kaplan & Nusbaum, PLLC ("Gusrae") and one of its former attorneys, Ryan Whalen (together, "Defendants"), despite the fact that AEI alleges that (i) Defendants are "litigators in New York" who reside in New York (A-10), and (ii) AEI has a case pending against Defendants in New York, alleging malpractice and violation of the New York Rules of Professional Conduct (A-37). Furthermore, the underlying action with respect to which AEI claims malicious prosecution was filed in New York. A-32-35; A-41-46. Why did AEI file a second action against parties with whom it is already litigating? Presumably because AEI's claim for malicious prosecution is barred by New York's one-year statute of limitations.

In response to the Complaint (A-9-47), Defendants filed, and the parties briefed and argued, a motion to dismiss, which included several defenses. On April 16, 2024, the Superior Court issued an Opinion[1] granting Defendants' motion, based

[1] Ex. A to Appellant's Opening Brief ("OB") on appeal (Trans. ID 73703069) (the "Opinion").

solely on an absence of personal jurisdiction. The Court did not address the alternative arguments in support of the motion to dismiss. Opinion at 3.

The Superior Court summarized the basis for its holding as follows:

> The in-state jurisdictional acts AEI identifies under subsections (1) and (2) of Section 3104(c) are Defendants' *pro hac vice* appearances in the Court of Chancery actions. But the claim for malicious prosecution does not arise from these acts. While Defendants' legal services in connection with these actions preceded Defendants' decision to file the New York Action, it was the Defendants' act of filing the New York [Securities Fraud]Action that purportedly gave rise to AEI's claim for malicious prosecution.

Opinion at 9 (footnotes omitted).

We refer to an issue "properly before this Court" because in this appeal, AEI seeks to add arguments it did not make in Superior Court, based upon documents to which it did not refer in Superior Court. AEI acknowledges that doing so violates Supreme Court Rule 8, but claims that "the interests of justice" require this Court to consider its new arguments. It makes no showing that any such requirement exists and makes no attempt to explain why the arguments were not made below.

SUMMARY OF ARGUMENT

I. Denied. In connection with a claim of malicious prosecution of a lawsuit in New York, Plaintiff AEI has not established specific jurisdiction under 10 *Del. C.* § 3104 (c)(1) or (c)(2) based upon Defendants' prior *pro hac vice* applications in two prior cases in the Delaware Court of Chancery, both of which are now closed. AEI identifies no Delaware-specific act giving rise to the claim for malicious prosecution. The claim does not arise from Defendants' prior *pro hac vice* applications.

II. Denied. Plaintiff AEI has not established jurisdiction over Defendants by alleging that Defendants effected service of process in a New York federal court securities fraud action on AEI's Delaware registered agent. First, the argument is improper because it was not raised in Superior Court. Second, the argument fails for the same reasons as the first argument, regarding Defendants' *pro hac vice* applications, fails. Third, imposition of jurisdiction on that basis would violate due process.

III. Denied. Plaintiff AEI is not entitled to jurisdictional discovery. First, AEI failed to raise the issue in Superior Court. Second, it has failed to assert a plausible basis for personal jurisdiction. Third, it has not explained how such discovery would provide any additional basis to support jurisdiction.

STATEMENT OF FACTS

A. The Parties

AEI is a Delaware corporation in the business of marketing, developing and manufacturing products for the defense and security industry. A-16; A-200. Founded in 2002, AEI went public in 2004. A-200. After its stock peaked at $14.24 per share in 2006, it plummeted to $4.00 by late 2006 and by December 2008, it was trading at $.30 per share. A-200. The stock price rebounded for a short period, but by December 2011 it was trading at $.10 and in January 2012 AEI was delisted. A-200. The Company was put in "shell" status under SEC rules in August 2014, and could have no or only nominal operations. A-200. AEI exited shell status in April 2017, at which time its stock was trading over the counter at $0.03 per share. A-200.

Gusrae is a New York law firm which, at the relevant times, included Whalen, a New York resident. A-13-14; A-638. Gusrae's principal place of business is in New York County, New York. A-13. Defendants' only alleged contacts with Delaware are (1) their two prior *pro hac vice* admissions in two Court of Chancery cases, *Superius Securities Group, Inc. v. Farley*, Case No. 2017-0024 (the "*Superius* Case"), and *Applied Energetics, Inc. v. Farley*, Case No. 2018-0489 (the "*Farley* Case") and their representation of AEI in a proxy contest in early 2008, OB at 8-10 (the only three contacts that AEI argued below) and (2) initiating service of process

on AEI's Delaware registered agent in *Gusrae Kaplan Nusbaum PLLC v. Applied Energetics, Inc.*, C.A. No. 1:19-cv-06200-DCF (S.D.N.Y) (the "New York Securities Fraud Action"), an argument that AEI seeks to add to this appeal, even though it was not discussed below.

B. Past Litigation and Other Disputes.

1. The *Superius* Case

On January 13, 2017, certain AEI stockholders filed the *Superius* Case against George Farley ("Farley"), AEI's then sole director and officer, in the Delaware Court of Chancery, for breach of fiduciary duties arising out of Farley's issuance of AEI stock to himself and others. A-17-18. Defendants were retained as counsel to Farley, and Whalen, an attorney at Gusrae, appeared *pro hac vice*. A-18. AEI moved to dismiss the action twice, which resulted in the voluntary dismissal of the action on July 24, 2017. A-18. As a result of the dismissal, under Delaware General Corporation Law Section 145(c)(1), Farley was entitled to indemnification by AEI for his attorney's fees. A-18-19.

2. The Proxy Contest

Following the voluntary dismissal of the *Superius* Case, AEI's stockholders initiated a proxy contest in January 2018 to remove Farley from management. Farley retained Defendants to represent AEI in connection with the proxy contest. A-19-21. For Defendants' services in connection with the proxy contest and for the

balance owed to them for defending Farley (who was entitled to indemnification) in the *Superius* Case, Farley caused AEI to issue 745,626 shares of stock to Gusrae and 497,084 shares to Whalen (collectively, the "Shares"). A-25; A-201. On March 1, 2018, Farley requested that AEI's stock transfer agent, Continental Stock Transfer & Trust Company ("Continental"), located in New York, issue the Shares to Defendants. A-24. On March 2, 2018 AEI's counsel sent a signed opinion letter to Continental. A-24. On March 8, 2018, Continental issued the stock certificates to Defendants. A-25.

The same day Defendants received the stock certificates, AEI stockholders removed Farley from the Board of Directors. A-25. On March 11, 2018, Thomas Dearmin, AEI's new CEO, sent an email to Whalen terminating Defendants' services. A-25.

3. The *Farley* Case

On July 3, 2018, AEI filed the *Farley* Case against Farley (who was no longer an officer or director of the company) and others. A-25. Defendants represented Farley in the matter and Whalen appeared *pro hac vice* on July 11, 2018. A-26. The *Farley* complaint alleged breach of fiduciary duties arising out of Farley's issuance of AEI stock to himself and others who provided services to the Company. A-201. The *Farley* Case did not challenge the issuance of the Shares to Defendants. A-201.

During the course of the *Farley* Case, AEI moved for a preliminary injunction

to preclude Farley and others from selling the challenged Farley-issued shares. A-26. The injunction was issued and AEI was required to post a $582,377.26 bond. A-26. AEI moved to reduce or eliminate the bond. A-27. Defendants, as counsel for Farley and others, opposed that motion by arguing that AEI was experiencing financial difficulties, and submitted a request to increase the bond amount. A-27. The Court denied both motions. A-27.

4. The New York Securities Fraud Action

On June 17, 2019, Whalen sold 100,000 of the 497,084 Shares, clearing at $0.32 per share. A-28. On June 24, 2019, Benjamin Pugh, lead counsel for AEI in the *Farley* Case (and this action), sent a Demand Letter to Defendants, asserting that Defendants violated the New York Rules of Professional Conduct ("NYRPC"). A-28-29; A-204. Specifically, the Demand Letter claimed that Defendants' representation of Farley in the proxy contest was a non-waivable conflict and the Shares were "improperly issued" to them. A-204-205. AEI demanded the return of the Shares on the ground that they allegedly violated NYRPC and therefore the transaction "is rescindable" and AEI elected to rescind. A-28-29; A-204. Attempts to sell AEI shares stalled after the Demand Letter was received. A-28-32.

On July 3, 2019, Defendants filed *Gusrae Kaplan Nusbaum PLLC, et al. v. Applied Energetics, et al*, Case No. 1:19-cv-06200-DCF in the United States District Court for the Southern District of New York (the "New York Securities Fraud

Action"). A-32. The complaint included claims for securities fraud, tortious interference and libel *per se* (which later was pled in *Gusrae Kaplan Nusbaum PLLC v. Applied Energetics. Inc.*, Case No. 158265/2021 (the "New York State Court Action")). A-32-33. The New York Securities Fraud Action was based upon Defendants' independent right to sell *their* AEI shares, which at the time of the action were located in New York with AEI's transfer agent. A-639. In the Complaint in the Superior Court case, AEI alleges that Defendants filed the New York Securities Fraud Action in order to cause AEI stockholders "to sell [AEI] stock in the public markets, depressing [AEI's] stock price, and not purchase [AEI] treasury stock, so as to deprive [AEI] of cash to continue the Farley Litigation." A-41; Opinion at 2.

In September and October 2020, the *Farley* Case settled. A-37. During February 2021, AEI's stock price rose from approximately $0.30 to $0.75. A-38. In the summer of 2021, Defendants sold their remaining shares and voluntarily dismissed the New York Securities Fraud Action on August 5, 2021. A-38-39. AEI's stock closed at $1.51 per share on August 11, 2021. A-39.

5. The New York State Court Action

On September 7, 2021, about a month after the New York Securities Fraud Action was dismissed without prejudice, Defendants filed the New York State Court Action against the same defendants who were defendants in the New York Securities Fraud Action, including AEI. A-39. The New York State Court Action asserted one

claim of libel *per se*, which had previously been asserted in the New York Securities Fraud Action. A-208. The court granted AEI's motion to dismiss. A-40, A-208. AEI moved for sanctions under CPLR 8303-a (alleging that Defendants asserted, and continued to prosecute, a frivolous action) and under 22 NYCRR § 130-1.1 (asking the court to exercise its discretion to award attorneys' fees for bad faith litigation). The court denied that motion. A-208 -209.

AEI's stock closed at $2.13 on May 27, 2022, the day the state court dismissed the action. A-40. Its stock price rose to $3.00 "immediately thereafter" but then dropped to $2.00 - $2.50, where it has remained through the filing of the Complaint in the instant Superior Court case. A-40.

6. AEI's New York Malpractice Action Against Defendants

Approximately four months after resolving the *Farley* Case, AEI sued Defendants in the United States District Court for the Southern District of New York on January 15, 2021 (the "Malpractice Action"). A-37; A-209. The complaint asserts two claims: (1) legal malpractice for allegedly failing to disclose the conflict in representing AEI in the proxy contest and (2) Recission and Restitution/Recoupment for violation of the NYRPC 1.5, 1.7, and 1.8, for which AEI seeks the return of all 1,242,711 shares of the Shares. A-209. Count II was dismissed, in part, as being redundant of Count I. A-209.

C. This Case

Notwithstanding the pendency of its New York Malpractice Action against Defendants, AEI filed this Action on July 26, 2023, asserting one claim: malicious prosecution of the New York Securities Fraud Action. A-9; A-41-46; A-210. Presumably, AEI filed this Action here instead of moving to amend its New York malpractice complaint because the claim for malicious prosecution would be barred by New York's one-year statute of limitations. A-197; *See Bittner v. Cummings*, 188 A.D.2d 504, 506 (N.Y. App. Div. 1992) ("malicious prosecution [is an] intentional tort[] which [is] governed by CPLR 215, the one-year Statute of Limitations….").

The Complaint alleges that "[d]efendants initiated and prosecuted a civil proceeding against Plaintiff by filing the [New York] Securities Fraud Action in the United States District Court, Southern District of New York, Case No. 1:19-cv-06200-DCF[]" and that claim was prosecuted maliciously and ultimately damaged AEI. A-41-46. AEI alleges that Defendants' purpose in filing the New York Securities Fraud Action was to cause AEI's stockholders to sell stock, thereby "depressing AE[I]'s stock price, and not purchase AE[I] treasury stock, so as to deprive AE[I] of cash to continue the Farley" Case in the Court of Chancery. A-41-42.

In response to the Complaint, Defendants filed a motion to dismiss pursuant to Superior Court 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. AEI filed its Answering Brief in Opposition to the Motion to Dismiss on October 25, 2023. A-443. Defendants were granted leave to add a claim-splitting argument and on December 1, 2023, filed their Reply Brief. A-630-633. On December 22, 2023, Plaintiff filed its Sur-Reply Brief. A-690.

The Superior Court heard oral argument on the Motion to Dismiss on January 19, 2024 and the matter under advisement. A-712. The Court issued its Opinion granting Defendants' Motion to Dismiss on April 16, 2024. Ex. A to OB. The Court dismissed the case on the basis that AEI had failed to identify sufficient Delaware contacts to establish personal jurisdiction over Defendants. Opinion at 3, 12. The Court did not address the issue of due process because it found that AEI's "failure to meet the first step of the jurisdictional analysis obviates this Court's need to engage in the second due process analysis." Opinion at 12. AEI timely filed a Notice of Appeal on May 2, 2024. A-1.

ARGUMENT

I. The Superior Court Lacks Personal Jurisdiction Over Defendants.

A. Question Presented

Whether AEI established a *prima facie* case for personal jurisdiction over Defendants pursuant to the Delaware Long-Arm Statute, 10 *Del. C.* § 3104. Defendants preserved this issue at A-212-216; A-638-650.

B. Standard and Scope of Review

> The question of *in personam* jurisdiction involves mixed questions of fact and law. We 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 sufficiently supported by the record. We will review questions of law *de novo*.

Uribe v. Md. Auto Ins. Fund, 115 A.3d 1216, 2015 WL 3536574, at *1 (Del. 2015) (TABLE) (cleaned up).

C. Merits of the Argument

Delaware's long arm statue, 10 *Del. C.* § 3104, defines when a court may exercise personal jurisdiction over a nonresident defendant. Section 3104 provides, in pertinent part:

> § 3104. Personal jurisdiction by acts of nonresidents.
>
> > (a) The term "person" in this section includes any natural person, association, partnership or corporation.
> >
> > (b) The following acts constitute legal presence within the State. Any person who commits any of the acts enumerated herein 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;
> >
> > (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;…

Sections 3104(c)(1), (c)(2) and (c)(3) are specific jurisdiction provisions. Section 3104(c)(4) is a general jurisdiction provision. *See Rotblut v. Terrapinn, Inc*., 2016 WL 5539884, at *4 (Del. Super. Ct. Sept. 30, 2016).

AEI argued below that it satisfied the criteria in Sections 3104(c)(1), (c)(2), and (c)(4). A-462–468. The Superior Court rejected each argument.

1. Defendants' *Pro Hac Vice* Admissions In Delaware Do Not Support An Exercise Of Personal Jurisdiction For A Claim That Arose In New York.

a. AEI's Malicious Prosecution Claim In Connection With The New York Securities Fraud Action Does Not Arise From Defendants' Prior *Pro Hac Vice* Admissions In Delaware.

Defendants, who are New York attorneys, filed the New York Securities Fraud Action in New York arising out of contacts with AEI's New York transfer agent and New York counsel relating to the sale of Shares. That case was based upon the Defendants' independent right to sell their Shares, which at the time of the action were located in New York with AEI's transfer agent. The conduct that gave rise to the malicious prosecution claim occurred only in New York.

The Superior Court rejected AEI's argument that Defendants' *pro hac vice* appearances in the two prior Court of Chancery cases established a *prima facie case* of specific jurisdiction over Defendants pursuant to 10 *Del. C.* § 3104 (c)(1) or (c)(2):

> Plaintiff identifies no Delaware-specific act giving rise to the claim for malicious prosecution. Section 3104(c)(1) and (2) "will only support an exercise of personal jurisdiction with respect to those causes of action that have a nexus to the transaction of business that took place in the State." This nexus requirement is also reflected in the language of Section 3104, which requires the cause of action to "aris[e] from" the Delaware-specific acts. The defendant's act must, therefore, "set in motion a series of events which form the basis for the cause of action before the court." The identified act must "form a *source* of the claim."
>
> The in-state jurisdictional acts AEI identifies under subsections

> (1) and (2) of Section 3104(c) are Defendants' *pro hac vice* appearances in the Court of Chancery actions. But the claim for malicious prosecution does not arise from these acts. While Defendants' legal services in connection with these actions preceded Defendants' decision to file the New York Action, it was the Defendants' act of filing the New York Action that purportedly gave rise to AEI's claim for malicious prosecution. The amount of time that elapsed from Defendants' involvement in the Court of Chancery actions to the filing of the New York Action highlights this point. Defendants filed the New York Action approximately two years after the 2017 Delaware Action ended, and one year after the 2018 Delaware Action began.

Opinion at 8 (footnotes and citations omitted).

AEI fails to establish a *prima facie* case of specific jurisdiction pursuant to Section 3104(c)(1) or (c)(2) because its claim for malicious prosecution does not "arise from" any alleged contacts of Defendants with Delaware. "Specific jurisdiction depends on an affiliation between the forum and the underlying controversy, principally, that the activity or occurrence takes place in the forum state and is therefore subject to the State's regulation. Specific jurisdiction is at issue when the plaintiff's claims arise out of the acts or omissions that take place in Delaware." *In re Asbestos Litig.*, 2015 WL 556434, at *6 (Del. Super. Ct. Jan. 30, 2015) (citations omitted). The proper question is not where the plaintiff experienced a particular injury or effect, but whether the defendant's conduct connects him to the forum in a meaningful way. *Walden v. Fiore*, 571 U.S. 277, 290 (2014).

> The conduct embraced in [3104] subsection (1) and (2), the transaction of business or performance of work and contracting to supply services or things in the State, may supply the jurisdictional basis for suit only with respect to claims which have a nexus to the designated conduct.

LaNuova D&B, S.p.A. v. Bowe Co., 513 A.2d 764, 768 (Del. 1986).

Section 3104(c)'s "arising from" language '"requires that the defendant's act [here, the filing of a motion for admission *pro hac vice* in Delaware] set in motion a series of events which form the basis for the cause of action before the court."' *Altabef v. Neugarten*, 2021 WL 5919459, at *9 (Del. Ch. Dec. 15, 2021) (citing *LVI Grp. Invs., LLC v. NCM Grp. Holdings., LLC*, 2017 WL 3912632, at *5 (Del. Ch. Sept. 7, 2017)); *see also Lone Pine Res., LP v. Dickey*, 2021 WL 2311954, at *5 (Del. Ch. June 7, 2021); *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *9 (Del. Ch. July 14, 2008). Section 3104 requires claims to "arise from," not merely be "related to," conduct in Delaware. *Otto Candies, LLC v. KPMG, LLP*, 2019 WL 994050, at *8 (Del. Ch. Feb. 28, 2019); *Microsoft Corp. v. Amphus, Inc*., 2013 WL 5899003, at *11 (Del. Ch. Oct. 31, 2013). "To confer jurisdiction, the transaction of business must have a 'tight nexus' to the cause of action and must 'form a source of the claim.'" *LVI Grp. Invs.*, 2017 WL 3912632, at *5 (emphasis in original) (citation omitted).

AEI offers no valid reason to challenge the Superior Court's conclusion that AEI's claim for malicious prosecution of the New York Securities Fraud Action, filed two years after the *Superius* Case ended, and one year after the *Farley* Case began, does not relate to the Delaware *pro hac vice* motions in either of those cases. Or, stated another way, Defendants' *pro hac vice* motions in Delaware did not form

a source of the New York claim of malicious prosecution. *See LVI Group Investments*, *supra*, at *5 (citing *Sample v. Morgan*, 935 A.2d 1046, 1057 n.43 (Del. Ch. 2007) and *Chandler v. Ciccoricco*, 2003 WL 21040185, at *11 (Del. Ch. May 5, 2003))

In Section I of its Opening Brief, pp. 24-33, AEI relies upon two groups of non-Delaware cases, not mentioned below, to support its argument that Defendants' *pro hac vice* admission in Delaware in 2018 established *in personam* jurisdiction in Delaware for filing the New York Securities Fraud Action in 2019.

Contrary to AEI's argument, *Calder v. Jones*, 465 U.S. 783 (1984), a case arising in California, is not on point. The issue in *Calder* was the constitutionality of an exercise of *in personam* jurisdiction under the facts of that case and the California long-arm statute, which is much more expansive than 10 *Del. C.* § 3104:

> California's "long-arm" statute permits an assertion of jurisdiction over a nonresident defendant whenever permitted by the state and federal Constitutions. Section 410.10 of the California Code of Civil Procedure provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

Id. at 786 n. 5. Indeed, *Calder* is not relevant to this appeal because it addresses the constitutionality of application of a long-arm statute, the issue that the Superior Court found it did not need to address, because the statutory requirements of Section

3104 had not been satisfied. Opinion at 7-8, 12.[2]

AEI also relies upon *Hanly v. Powell Goldstein, LLP*, 290 Fed. Appx. 435 (2d Cir. 2008), and *Rothstein v. Carriere*, 41 F.Supp.2d 381 (E.D.N.Y. 1999) in which New York courts applied a New York long-arm statute, New York Civil Practice Law and Rules § 302(a)(3), which provides that:

> [A] nondomiciliary who commits a tortious act outside of New York that causes injury within the state "may be brought before a New York court to answer for his conduct if he has … an active interest in interstate or international commerce coupled with a reasonable expectation that the tortious conduct in question could have consequences within the State."

Hanly, 290 Fed. Appx. at 437 (citation omitted); *see Rothstein*, 41 F.Supp.2d at 385. AEI makes no attempt to argue why this Court should look to California's or New York's long-arm statutes, which are very different from 10 *Del. C.* § 3104, to interpret Section 3104.

The other non-Delaware cases that AEI cites are not factually close to the case before this Court. Indeed, by its discussion of those cases, AEI appears to argue that any case, in any state, that finds long-arm jurisdiction supports its argument to reverse the Superior Court's holding.

In *Darcy v. Hankle*, 765 N.E.2d 583 (Mass. App. Ct. 2002) the defendant

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[2] We discuss *Calder* further at p. 23, *infra*, in connection with AEI's argument, raised for the first time in this appeal, that Defendants subjected themselves to specific jurisdiction by effecting service of process on AEI's Delaware registered agent in connection with the New York Securities Fraud Action.

caused the plaintiff to receive a threatening phone call at his Massachusetts home from a New York police officer. That phone call, which created a contact with Massachusetts, was the source of the claim. In the pending case, the basis of AEI's malicious prosecution claim against Defendants is the filing of the New York Securities Fraud Action. That filing does not constitute intentional tortious conduct aimed at Delaware. Defendants' acts in New York did not target Delaware. Instead, they brought a securities fraud action in the proper court in order to protect their rights. Specifically, Defendants filed the New York Securities Fraud Action so that they would not be denied their right to sell their Shares that were located in New York.

We address the other two non-Delaware cases that AEI cites at p. 21-22, *infra*.

b. AEI Cannot Establish Personal Jurisdiction Over Defendants By Speculating As To Defendants' Purpose In Filing The New York Securities Action.

AEI argues that it can establish personal jurisdiction over Defendants in Delaware by alleging that Defendants filed the New York Securities Fraud Action in order to gain an advantage in the *Farley* Case that was then pending in Delaware. *See* p. 10, *supra*; A-41.

AEI's theory of jurisdiction is that a plaintiff's motive in filing a lawsuit in New York can constitute transacting business, performing a character of work or service, or contracting to supply services or things in Delaware. Some theories are

so fanciful that one cannot find another case where it was argued. Apparently this is such a theory, since AEI cites no case to support it.

AEI fails to explain how Defendants' actions in New York can provide a basis for jurisdiction under Section 3104, even if such actions were intended to have an effect in Delaware. The Superior Court concluded:

> AEI attempts to tie the filing of the New York Action and Defendants' appearances in the 2018 Delaware Action by pointing to the fact that they overlapped in time. The inference that AEI asks this Court to draw is that Defendants filed the New York action in order to "depress [the Company]'s stock price and hamstring [AEI]'s ability to prosecute the [2018 Delaware Action]." Even if that were so, the jurisdictional act giving rise to the claim for malicious prosecution is the filing of the New York Action, not Defendants' *pro hac vice* appearances in Delaware. At most, the pro hac vice appearances would constitute a contact with Delaware but not one relating to the filing of the New York Action.

Opinion at 9-10.

c. Court Of Chancery Rule 170 Does Not Confer Jurisdiction Over Defendants In This Case.

AEI argues that Court of Chancery Rule 170, governing *pro hac vice* admissions, confers jurisdiction in this case. AEI points to Rule 170(c)(iv), which states:

> **Rule 170. Attorneys.**
>
> . . .
>
> (c) Any attorney seeking admission pro hac vice shall certify the following in a statement attached to the motion:
>
> . . .
>
> (iv) That the attorney has consented to the appointment of the

> Register in Chancery of the county in which the matter pends as agent upon whom service of process may be made for all actions, including disciplinary actions, that may arise out of the practice of law under this Rule and any activities related thereto….

Ct. Ch. R. 170(c)(iv). The Superior Court addressed this argument in footnote 54 and correctly ruled: "Rule 170(c)(iv) . . . is not a jurisdiction-conferring statute; it is a court rule governing *pro hac* admissions." Opinion at 9 n.54.

In *Kronzer v. Burnick*, 2004 WL 1753409, at *3 (N.D. Cal. Aug. 5, 2004), the United States District Court for the Northern District of California rejected the same theory that AEI advances here:

> [The California pro hac vice rule] does not purport to confer general or specific personal jurisdiction on *pro hac vice* attorneys for *all* purposes. The rule specifically limits its scope to attorney conduct in the matter for which counsel has been admitted to practice, and provides no guidance as to personal jurisdiction in California generally. [Plaintiff's] claim that Rule 983(d) is alone sufficient to confer both general and specific personal jurisdiction would have the effect of requiring as a price for admission *pro hac vice,* the implicit consent of counsel to the jurisdiction of the Courts in this state for all purposes. Rule 983(d) does not allow for such an interpretation, nor would it be reasonable to give it that reading.

The two legal malpractice cases that AEI cites arose from the defendant attorney's prior representation of the plaintiff in the forum state. In *Nawracaj v. Genesys Software Systems, Inc*., 524 S.W.3d 746 (Tex. Ct. App. 2017), the court held, unsurprisingly, that Texas courts have jurisdiction over a malpractice claim by a Texas client against an Illinois attorney who was admitted *pro hac vice* to represent the Texas client in Texas.

Similarly, in *Zahl v. Eastland*, 239 A.3d 1063 (N.J. Super. Ct. App. Div. 2020), the court held that a Mississippi attorney was subject to a legal malpractice suit in New Jersey when that attorney was admitted *pro hac vice* in New Jersey in order to "provide[ ] representation to plaintiff, a New Jersey resident, in a lawsuit alleging that New Jersey officials and government offices engaged in RICO activities against plaintiff." *Id.* at 1072-73.

Moreover, even if Rule 170 were interpreted to confer jurisdiction under certain circumstances, in this case, as the Superior Court held on page 9 of its Opinion, "the claim for malicious prosecution does not arise out of" Defendants' earlier *pro hac vice* appearances in Delaware. "While Defendants' legal services in connection with these actions preceded Defendants' decision to file [the New York Securities Fraud Action], it was the Defendants' act of filing the New York [Securities Fraud] Action that purportedly gave rise to AEI's claim for malicious prosecution." Opinion at 9.

2. Exercising Jurisdiction Over Defendants Would Violate The Due Process Clause Of The Fourteenth Amendment To The United States Constitution.

The Superior Court correctly stated the proper sequencing of a court's consideration of a defense of absence of personal jurisdiction under various grounds:

> To determine whether Delaware courts can obtain personal jurisdiction over a nonresident, the court must consider (1) whether AEI identifies a valid means of invoking the Delaware Long Arm Statute, and (2) whether subjecting Defendants to jurisdiction in Delaware

> violates the due process clause of the fourteenth amendment. When no jurisdiction exists under step (1), the statutory analysis, it makes it unnecessary to engage in step (2), the constitutional analysis.

Opinion at 7-8 (citations omitted). After concluding that AEI has alleged no Delaware-specific conduct under Sections 3104(c)(1) or (2), or general presence factors under Section 3104(c)(4), the Court stated that "failure to meet the first step of the jurisdictional analysis obviates this Court's need to engage in the second due process analysis." Opinion at 12.

AEI argues, based upon *Calder v. Jones*, *supra*, that the Court's exercise of personal jurisdiction over Defendants would comport with the Due Process Clause. In view of the present posture of the case, that argument is unnecessary.

If this Court were to reverse the Superior Court and conclude that AEI has satisfied the requirements of Section 3104(c)(1) or (c)(2), this Court could remand to Superior Court in order for it to (1) decide whether subjecting Defendants to jurisdiction in Delaware would violate the Due Process Clause of the Fourteenth Amendment. *See United Techs. Corp. v. Treppel*, 109 A.3d 553, 560 (Del. 2014); *Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 991 (Del. 2013), and, (2) if necessary, decide Defendants' other defenses raised in their motion to dismiss.

In the event this Court decides to decide the due process question now, an exercise of jurisdiction over Defendants would violate due process.

Even if Section 3104 is satisfied, exercise of personal jurisdiction must comport with due process. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011). For a court to exercise specific jurisdiction consistent with due process, "the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden*, 571 U.S. at 284. *Accord*, *AR Capital, LLC v. XL Specialty Ins. Co.*, 2019 WL 1932061, at *3 (Del. Super. Ct. Apr. 25, 2019). "[T]his requires a plaintiff to establish that a nonresident defendant engaged in deliberate, significant activities' in Delaware. Specifically, a defendant's contacts with Delaware must rise to such a level that [he] should reasonably anticipate being required to defend [himself] in Delaware's courts." *EBP Lifestyle Brands Hldgs., Inc. v. Boulbain*, 2017 WL 3328363, at *6 (Del. Ch. Aug. 4, 2017) (alterations in original) (cleaned up). Accordingly, AEI must establish that "[Defendants had] 'fair warning' that a particular activity may subject [them] to jurisdiction" in Delaware. *Outokumpu Eng'g Enters., Inc. v. Kvaerner EnviroPower, Inc.*, 685 A.2d 724, 731 (Del. Super. Ct. 1996) (citation omitted).

In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), decided after *Calder*, the Supreme Court stated:

> [T]he foreseeability that is critical to due process analysis . . . is that defendant's conduct and connection to the forum State are such that he would reasonably anticipate being haled into court there.
>
> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact

> with the forum State. The application of that rule will vary with the quality and nature of defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.
>
> This "purposeful availment" requirement ensures that a defendants will not be haled into a jurisdiction solely as a result of "random," fortuitous," or attenuated contacts….

Id. at 474-75 (cleaned up) (quotations and citations omitted).

Dragging Defendants into court in Delaware merely because they were counsel in the *Superius* Case and the *Farley* Case does not comport with notions of due process. Indeed, serving as defense counsel would in no way give "fair warning" that they may later be subject to jurisdiction in Delaware for filing a New York action arising out of contacts with AEI's New York transfer agent and New York counsel relating to the sale of the Shares. Moreover, it is especially unfair to drag Defendants into Delaware, when they are already defending a claim filed by AEI in New York.

3. AEI Has Not Established Personal Jurisdiction Pursuant To Section 3104(c)(4).

AEI's arguments that address the issues it raised below appear in Argument I of its Opening Brief. While that argument alleges that Defendants caused injury in Delaware by an act outside Delaware, it makes no mention of the Superior Court's conclusion that AEI failed to establish Defendants' general presence in Delaware under 10 *Del. C.* § 3104(c). Opinion at 11. As a result, AEI has waived presenting argument on that issue. Supr. Ct. R. 14*; Monzo v. Nationwide Prop. & Cas. Ins.*

Co., 249 A.3d 106, 123 (Del. 2021).

We speculate that AEI may have decided not to try to argue Defendants' general presence because it has no answer to the Superior Court's conclusion, in footnote 65 of the Opinion, that in order to establish general jurisdiction under Section 3104(c):

> Defendants must have current contacts in the forum state, and because the 2017 and 2018 Delaware Actions have settled, Plaintiff cannot establish the general presence factors. *Computer People, Inc. v. Best Intern. Grp., Inc*., 1999 WL 288119, at *7 (Del. Ch. 1999); *see* 10 *Del. C*. § 3104(c)(4) (providing for jurisdiction when "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.") (italics added)).

Opinion at 11 n.65.

Even if one ignores AEI's waiver of argument on the "general presence" aspect of Section 3104(c), it also fails to address the second half of the Superior Court's holding under that section: Defendants' action of filing the New York Securities Fraud Action did not constitute "tortious injury":

> Even if the Court accepts that AEI has satisfied the general presence factors listed above, the Court is not convinced that a reduction in the price of publicly traded stock of a Delaware company is a cognizable harm under Section 3104(c)(4). Though the situs of the stock of a Delaware corporation is in Delaware, it is unclear to the Court whether actions occurring outside Delaware that negatively impact the stock price of a Delaware corporation can constitute "tortious injury in the State." It also makes no difference to the Court whether the harm is a reduced stock price, or a client's ability to fund litigation in this forum. The latter is an effect of the former and poses the same question as to whether actions taken outside the state of Delaware that reduce the

> value of the stock of a Delaware company can constitute "tortious injury."

Opinion at 11-12.

4. AEI Waived Any Argument Regarding Alleged Dual Jurisdiction.

AEI argued below that jurisdiction was also appropriate under the concept of "dual jurisdiction" A-467. The Superior Court did not address the issue of dual jurisdiction in its Opinion, nor did AEI in its opening brief. As a result, AEI has waived that argument. Supr. Ct. R. 14; *Monzo, supra.*

5. AEI Waived Any Argument Regarding the Proxy Contest.

The Opinion states, at p. 9, note 53: "Plaintiff also alludes to Defendants' involvement in the proxy contest, but identifies no acts related to the proxy contest occurring in Delaware." AEI did not argue with that statement in its Opening Brief, nor does it argue that any action related to the proxy contest establishes jurisdiction. As a result, AEI has waived any such argument. Supr. Ct. R. 14; *Monzo, supra.*

II. Defendants' Effecting Service Of Process On AEI's Registered Agent In Delaware In Connection With The New York Securities Case Does Not Make Defendants Subject To Jurisdiction In Delaware.

A. Question Presented

Whether Defendants' effecting service of process on AEI's registered agent in Delaware in connection with the New York Securities Case AEI established a *prima facie* case for personal jurisdiction over Defendants pursuant to the Delaware Long-Arm Statute, 10 *Del. C.* § 3104(c)(1) or (c)(2). No party raised this issue in Superior Court.

B. Standard and Scope 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." Supr. Ct. R. 8. This exception is limited to "plain error requiring review in the interests of justice." *Shawe v. Elting*, 157 A.3d 152, 168 (Del. 2017) (citation omitted). Under the "plain error" doctrine, [this Court 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." *Jenkins v. State*, 8 A.3d 1147, 1152 (Del. 2010) (citation omitted). Since this argument was not presented to the trial court, the standard of review is plain error.

C. Merits of the Argument

In its Argument II at pp. 34-42 of its Opening Brief, AEI argues, for the first time, that Defendants' effecting service of process on AEI in the New York Securities Fraud Action constitutes sufficient grounds to subject Defendants to jurisdiction in Delaware in this case. Apparently realizing that not only did they fail to make the argument below, but that there is nothing in the record below to support the argument, AEI asks this Court to take judicial notice of a summons and the docket in the New York Securities Case. OB at 22-23.

1. AEI Did Not Make This Argument In Superior Court And Therefore Cannot Make It In This Court.

AEI acknowledges that "it did not expressly argue below that Defendants' effectuation of personal service on [AEI's] registered agent in Delaware conferred personal jurisdiction over Defendants." OB at 34. AEI is wrong. It did not expressly, implicitly, or inferentially make the argument; it did not discuss anything about service of process of the New York Securities Fraud Action. The argument violates Supreme Court Rule 8:

> **Rule 8. Questions which may be raised on appeal.**
>
> 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.

Supr. Ct. R. 8.

This is not a case where "the interests of justice . . . require" that this Court consider an argument not presented to the Superior Court.

> It is a basic tenet of appellate practice that an appellate court reviews only matters considered in the first instance by a trial court. Parties are not free to advance arguments for the first time on appeal. "Only questions fairly presented to the trial court may be presented for review…." Supr. Ct. R. 8.

Del. Elec. Coop., Inc. v. DuPhily, 703 A.2d 1202, 1206 (Del. 1997). Rule 8 is the same as "plain error." *Eaton v. ArchTelecom, Inc.*, 184 A.3d 1292, at *2 (Del. 2018) (Table).

When reviewing for plain error, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. Furthermore, 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 show manifest injustice. As one learned treatise states:

> It is axiomatic that an appellate court will generally not review any issue not raised in the court below. This rule is based on the principle that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Furthermore, it is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable.

Shawe, 157 A.3d at 168-69 (cleaned up).

2. This Court Should Not Consider Exhibits Not Introduced Below.

In an attempt to find a factual basis for its newly hatched argument regarding service of process, AEI asks this Court to take judicial notice of documents that it did not mention in the court below.

The request violates Supreme Court Rule 9, which states that "[a]n appeal shall be heard on the original papers and exhibits which shall constitute the record on appeal." Supr. Ct. R. 9(a).

This Court recently denied a request to supplement the record on appeal in *VT S'holder Representative, LLC v. Edwards Lifesciences Corp*., 2024 WL 3594457 (Del. July 31, 2024), stating:

> Although we do not have a court rule permitting a party to supplement the record on appeal, our decision in *Getty Oil Co. v. Heim* [372 A.2d 529 (Del. 1977)] recognizes our inherent discretion to consider such an application. In *Getty Oil*, we explained that this Court generally "refuses to consider evidence which was not part of the record below," and that "[o]n appeal, our function is to review the record, not to provide a forum to make it."
>
> . . .
>
> Moreover, it is impossible to predict how this one additional fact might have affected the trial court's analysis, if at all, and considering it for the first time on appeal would contravene our long-established practice of reviewing the record that the trial court considered, rather than considering new evidence that was not made available to the court.

2024 WL 3594457, at *1-2 (cleaned up).

3. If The Court Considers The Argument, It Should Reject It.

a. Effecting Service Of Process On A Delaware Entity In A Case Pending In Another State Does Not Subject A Plaintiff's Attorney To Jurisdiction In Delaware.

First, the arguments stated at pp. 14-22, *supra*, that support the Superior Court's holding that Defendants' prior *pro hac vice* admissions in the Court of Chancery do not support a finding of jurisdiction over Defendants for an alleged claim of malicious prosecution of the New York Securities Fraud Action, apply with equal force to AEI's newly minted argument that serving AEI's registered agent in Delaware in connection with the New York Securities Fraud Action supports a finding of jurisdiction.

Adoption of the service of process theory of conferring jurisdiction that AEI advances would expand the effect of the Delaware Long-Arm Statute in a breathtaking and unprecedented way. It would mean that any party suing a Delaware entity in another state, and any attorney representing such a party, would subject themselves to personal jurisdiction in Delaware by the mere act of effecting service of process on such Delaware entity pursuant to another state's long-arm statute. Such jurisdiction would exist even if the attorney or the case had no other connection with Delaware.

The novelty of AEI's argument is confirmed by its inability to cite any case, in Delaware or elsewhere, that supports it. At p. 38 of its Opening Brief, AEI argues:

> 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).

The problem with that argument is that the two cases cited discuss obtaining jurisdiction over a *defendant* who is served with process, *not* jurisdiction over the *plaintiff*, let alone the plaintiff's attorney who is effecting such service of process.

b. An Exercise Of Jurisdiction Over Defendants For Effecting Service Of Process On AEI In The New York Securities Fraud Action Would Violate Due Process.

If the Court decides to consider AEI's argument that Defendants' effecting service of process on AEI's Delaware registered agent in connection with the New York Securities Fraud Action subjects Defendants to jurisdiction, such exercise would violate the Due Process Clause.

It strains credulity that an attorney in New York, representing a client in New York against a Delaware corporation in a New York case, would have "fair warning" that effecting service of process on the Delaware corporation would subject that attorney to personal jurisdiction in Delaware.

The mere service of legal papers is insufficient to satisfy due process requirements. *Wallace v. Herron*, 778 F.2d 391, 395 (7th Cir. 1985). Forcing Defendants to litigate in Delaware merely because they served AEI's registered

agent documents for a proceeding in New York does not comport with due process. The act of service of process did not give rise to the instant action. Rather, the filing of the New York Securities Fraud Action arising out of contacts with AEI's New York transfer agent and New York counsel relating to the sale of Shares is the alleged source of the instant claim. Defendants' effectuating service of process in no way gave "fair warning" that they may be haled into Delaware for filing the New York Securities Fraud Action.

AEI argues that an element of the tort of malicious prosecution, the institution or continuation of a proceeding, includes service of process on AEI's Delaware registered agent in connection with the New York Securities Fraud Action. It cites in support of its claim *In re K.M.*, 2017 WL 1148198, at *2-3 (Del. Fam. Ct. Jan. 20, 2017), which does not mention personal jurisdiction. In that case, the Family Court held that the term "proceeding" under a Delaware statute regarding expungement of a criminal record included a Family Court hearing. In reaching its conclusion, the court referred to the definition of "proceeding" in BLACK'S LAW DICTIONARY.

Adoption of the rule that AEI advocates would mean, for example, that an attorney who files a case in another state and takes a deposition in Delaware in that case could be sued in Delaware on a later claim of malicious prosecution of the initial case, in the event that the statute of limitations of the other state had expired,

and Delaware's statute of limitations had not expired.

Sample v. Morgan, 935 A.2d 1046 (Del. Ch. 2007), cited by AEI, supports Defendants' position. In *Sample*, the moving defendant attorneys provided a wide range of advice and services to the board and officers of a Delaware corporation about important issues of Delaware law. *Id*. at 1064. The advice included the conception, preparation and filing of the Certificate of Amendment which resulted in a filing in Delaware. *Id*. at 1064-65. Defendants in *Sample* faced claims of aiding and abetting breaches of fiduciary duty for actions they took in connection with the Certificate of Amendment. *Id.* at 1052-53. The plaintiffs alleged that fiduciaries of a Delaware entity issued voting stock to themselves at unfair price, an action that was only made possible by the filing of the Certificate of Amendment which lowered the par value of the corporation's shares. *Id.* at 1048. The court explained that the Certificate of Amendment was filed by the defendant law firm and was "directly at issue in the claims against the moving defendants[.]" *Id* at 1057.

In contrast, in the case before this Court, the effectuation of service did not give rise to the malicious prosecution claim, nor was it at issue. As the court stated in *Sample*: "The 'single act' or specific jurisdiction subsections of § 3104(c), such as § 3104(c)(1), only allow jurisdiction over causes of action that are closely intertwined with the jurisdictional contact." *Id.* at 1057 n.43. Service of process was a procedural matter that occurred after the New York Securities Fraud Action

was filed.

Clark v. Davenport, 2019 WL 3230928 (Del. Ch. July 18, 2019), cited by AEI, does not apply to these facts. *Clark* found jurisdiction based upon a conspiracy theory. There is no such theory pled here.

III. AEI Is Not Entitled to Jurisdictional Discovery

A. Question Presented

Whether AEI is entitled to jurisdictional discovery. No party raised this issue in Superior Court.

B. Standard and Scope 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." Supr. Ct. R. 8. This exception is limited to "plain error requiring review in the interests of justice." *Shawe*, 157 A.3d at 168. Under the "plain error" doctrine, [this Court 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." *Jenkins*, 8 A.3d at 1152 (citation omitted). Since this argument was not presented to the trial court, the standard of review is plain error.

C. Merits of the Argument

As discussed above at *supra,* p. 3, AEI seeks jurisdictional discovery for the first time in its Opening Brief. This question was not fairly presented to the court below and therefore it violates Rule 8 and should not be considered by this Court on Appeal. However, if this Court decides to entertain this argument, it should find that

AEI is not entitled to jurisdictional discovery because its assertion of personal jurisdiction lacks the minimal level of plausibility needed for this Court to grant the discovery. "Faced with a challenge to personal jurisdiction, plaintiffs are entitled to discovery if their assertion of jurisdiction is minimally plausible." *Munoz v. Vazquez-Cifuentez*, 2019 WL 669935, at *5 (Del. Super. Ct. Feb. 18, 2019); *Green v. McClive*, 2024 WL 2815794, at *4-5 (Del. Ch. June 3, 2024) (plaintiff's conclusory allegations "plainly failed to establish a basis for personal jurisdiction over the Nonresident Defendants. This was not a close call; jurisdictional discovery is not warranted.").

> The holding in [*Hart Holding Co. v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 539 (Del. Ch. 1991)] is not ... an invitation to sue first and ask questions later. The *Hart* court found that a plaintiff is not entitled to 'jurisdictional' discovery ... where the 'plaintiffs assertion of personal jurisdiction lack[s] th[e] minimal level of plausibility needed to permit discovery to go forward.' The Plaintiff cannot establish a right to jurisdictional discovery simply by alleging that the Defendant "might" have engaged in the activities enumerated in the long-arm statute[.]

Picard v. Wood, 2012 WL 2865993, at *2 (Del. Ch. July 12, 2012) (citations omitted). The purpose of jurisdictional discovery is not so plaintiffs without a basis can have the assistance of the court to go on a fishing expedition. *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 816 n.195 (Del. Ch. 2009) ("It is also not appropriate to give the [plaintiffs] the benefit of jurisdictional discovery so they can fish for a possible basis for this court's jurisdiction."); *Green Am. Recycling, LLC v. Clean*

Earth, Inc., 2021 WL 2211696, at *6 (Del. Super. Ct. June 1, 2021). A plaintiff needs to explain how discovery would provide "something more" needed to establish personal jurisdiction, if the plaintiff fails to do so then jurisdictional discovery, no matter how narrow, is unwarranted. *Id.*; *see also Ruggiero v. FuturaGene, pic.,* 948 A.2d 1124, 1139 (Del. Ch. 2008) (denying plaintiffs' request for discovery to establish personal jurisdiction as they were unable to identify any reasonable discovery that may aid them in establishing personal jurisdiction, as no amount of discovery would create contacts between Delaware and the individual defendants).

AEI argues that it is entitled to limited jurisdictional discovery to determine whether (1) Defendants intended to cause harm to AEI in Delaware, (2) Defendants effectuated personal service on AEI in Delaware and with respect to (3) "any other factual questions" this Court may have with regard to personal jurisdiction. OB at 44-45. Jurisdictional discovery is not warranted here because personal jurisdiction is not "minimally possible". AEI belatedly seeks an impermissible fishing expedition in order to find alternative routes to establish personal jurisdiction over Defendants. This is demonstrated by AEI's new argument on appeal that Defendants are subject to personal jurisdiction due to the effectuation of personal service on AEI's registered agent in Delaware. AEI's Opening Brief lacks any explanation of *how* discovery would provide the Court with the "something more" needed to

establish personal jurisdiction. No amount of discovery would create contacts between Defendants and Delaware in connection with the malicious prosecution claim in order to satisfy the long arm statute. The Court should deny AEI's request to direct the Superior Court to afford AEI leave to conduct jurisdictional discovery.

CONCLUSION

This Court should affirm the Superior Court's dismissal of the Complaint.

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