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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' REPLY BRIEF

HALLORAN FARKAS + KITTILA LLP

Theodore A. Kittila (Bar No. 3963)
James G. McMillan, III (Bar No. 3979)
William E. Green, Jr. (Bar No. 4864)
5722 Kennett Pike
Wilmington, Delaware 19807
Phone: (302) 257-2025
Fax: (302) 257-2019
Email: tk@hfk.law / jm@hfk.law / wg@hfk.law

Counsel for Plaintiff Below/Appellant Applied Energetics, Inc.

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page(s)**

Statutes and Rules

INTRODUCTION[1]

Defendants frame the primary question before this Court incorrectly. Appellant is not asking this Court to exercise personal jurisdiction over Defendants for filing and maliciously prosecuting a lawsuit in New York merely because they previously appeared *pro hac vice* before the Delaware Court of Chancery in two prior lawsuits. Appellant does not contend that *pro hac vice* admission grants Delaware *general* jurisdiction over out-of-state attorneys.[2]

Rather, Defendants' *pro hac vice* admissions grant this Court, and hence the state of Delaware, personal jurisdiction over Defendants 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). Defendants do not dispute that this Rule is not limited to jurisdiction to initiate and prosecute disciplinary actions, but grants Delaware personal jurisdiction over attorneys appearing *pro hac vice* for "all actions," including civil actions like the present case.

To address the true question before this Court requires assuming the facts pled in Appellant's complaint are true. *Munoz v. Vazquez-Cifuentez*, 2019 WL 669935, at *5 (Del. Super. Ct. Feb. 18, 2019). The Complaint alleges that Defendants filed

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[1] All capitalized terms carry the same definition as Appellant's Opening Brief.

[2] Thus, *Kronzer v. Burnick*, 2004 WL 1753409 (N.D. Cal. Aug. 5, 2004) (*Kronzer*), cited in Defendants' Answering Brief, has no relevance here.

the Securities Fraud Action with the specific and malicious intent to disrupt the resources available to Appellant to prosecute Appellant's lawsuit against Defendants' client, Farley, then pending in the Delaware Court of Chancery before which Defendants had been admitted *pro hac vice*. (*See* Appellant's Opening Brief ("AOB") at 20-21.)

Defendants steadfastly maintain their Securities Fraud Action had nothing to do whatsoever with any intent to gain a litigation advantage in the 2018 Delaware Action. They 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.

(Answering Brief ("AB") at 19.) They proceed to argue as if this premise – the opposite of what is alleged in the Complaint – must be assumed true.

Thus, the primary question before this Court is whether Defendants' malicious prosecution of the Securities Fraud Action against Appellant was an "activit[y] related thereto" to Defendants' "practice of law under this Rule." In answering this question, Appellant's burden is less at the personal jurisdiction determination stage than Appellant's ultimate burden at trial. *Harris v. Harris*, 289 A.3d 310, 332 (Del. Ch. 2023) ("It is more logical that a court could exercise jurisdiction based on a

somewhat lesser showing than what is required to impose liability. Otherwise, the determination regarding jurisdiction would be case-dispositive.")

Defendants' Answering Brief does not respond to the hypothetical situations of litigation-related misconduct occurring outside of Delaware (e.g., bribing witnesses, destroying evidence) that an out-of-state attorney might commit while physically outside of Delaware, but still done to gain an improper litigation advantage in the Delaware court proceeding in which the attorney had been admitted *pro hac vice*. (*See* AOB at 2.) Rather, Defendants brush aside Appellant's well-supported allegations by claiming the theory is "so fanciful that one cannot find another case where it was argued." (AB at 19-20.) How often do attorneys admitted *pro hac vice* in Delaware maliciously sue their opposing party and opposing counsel to gain a litigation advantage while the Delaware lawsuit is pending? It is not surprising that a published case with these facts does not exist.

A finding that Delaware lacks personal jurisdiction over Defendants here is equivalent to a finding that an attorney's litigation misconduct while admitted *pro hac vice* must occur within the boundaries of the state of Delaware to be subject to disciplinary action. This is neither good law, nor good policy.

In addition to Delaware maintaining personal jurisdiction over Defendants due to their *pro hac vice* status and their consent to Delaware personal jurisdiction, Appellant made a sufficient factual showing to demonstrate personal jurisdiction

under Delaware's Long Arm Statute and the Due Process Clause of the federal Constitution. Both subsections (c)(1) and (c)(2) of Delaware's Long Arm Statue, 10 *Del. C.* § 3104, are satisfied because Defendants' Securities Fraud Action was filed and maliciously prosecuted in furtherance of their *pro hac vice* admission and their contract to provide legal services within Delaware to their client, Farley. Neither subsection (c)(1) or (c)(2) requires the specific conduct giving rise to liability must have occurred within the state of Delaware. Each of these subsections only requires the tortious conduct have a "nexus" to the business activity occurring in Delaware. *Dow Chem. Co. v. Organik Kimya Holding A.S.*, 2017 WL 4711931, at *8 (Del. Ch. 2017).

Under *Calder v. Jones*, 465 U.S. 783, 789 (1984), due process is satisfied where the "intentional, and allegedly tortious, actions were expressly aimed at," and the "harm suffered [in]," the forum state. Thus, if the act constituting the tortious activity has a sufficient nexus with the "Transact[tion of] any business or perform[ance of] any character of work or service in the State; [or] (2) Contract[] to supply services or things in this State;" then Delaware has personal jurisdiction over the defendant regardless of whether the specific act or breach occurred within the borders of Delaware.

Finally, because the law is well settled that a defendant need not commit a specific act constituting the actionable conduct within the borders of the state of

Delaware for Delaware to have personal jurisdiction, Appellant only raised the fact that Defendants personally served the Securities Fraud Action upon Appellant's agent for service of process within Delaware[3] after the trial court found that conference of personal jurisdiction requires a "Delaware-*specific* act." (Opinion at 8, emphasis added.) The trial court did not provide any authority for this formulation of the test. Rather, the trial court correctly cited the law in its Opinion as follows:

> *Dow Chem. Co. v. Organik Kimya Holding A.S.*, 2017 WL 4711931, at *8 (Del. Ch. 2017) (quoting *Chandler v. Ciccoricco*, 2003 WL 21040185, at *11 (Del. Ch. 2003)); *LaNuova D & B, S.p.A. v. Bowe Co.*, 513 A.2d 764, 768 (Del. 1986) ("The conduct embraced in subsections (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.")) (Emphasis added.)

(Opinion at 8, footnote 50.)

Under this correct formulation of the law, a "nexus" is broader than an act that occurs within Delaware. Otherwise, subsections (c)(1) and (c)(2) would expressly state that an act constituting the actionable conduct must occur in Delaware is an additional requirement. Under the plain meaning of subsections (c)(1) and (c)(2), a "Delaware-specific act" beyond conducting business or contracting to provide goods or services in Delaware is not required. The trial court erred in so holding.

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[3] Notably, Defendants do not dispute this judicially noticeable fact, nor do they dispute that personal jurisdiction may be satisfied if the defendant acts "in person or through an agent[.]" 10 *Del. C.* § 3104(c).

Any act that Defendants took in furtherance of the objectives of their *pro hac vice* status, or their contract to perform services to their client, Farley, in Delaware (i.e., defend Appellant's lawsuit filed against Farley in the Delaware Court of Chancery), grants Delaware personal jurisdiction. The parties have a factual dispute as to Defendants' purpose in filing the Securities Fraud Action. At this stage of the litigation, either all facts pled in Appellant's complaint are presumed true and all inferences must be drawn in Appellant's favor, or at a minimum the court should allow jurisdictional discovery to gather evidence of Defendants' objectives. Either finding requires a reversal of the dismissal and remand to the Superior Court.

ARGUMENT

I. THE SUPERIOR COURT HAS PERSONAL JURISDICTION OVER DEFENDANTS.

A. Defendants' Malicious Prosecution of a New York Lawsuit Arose Out Of and was Related To Defendants' *Pro Hac Vice* Admission in the 2018 Delaware Action for Purposes of the Long Arm Statute.

To begin, the Superior Court's statement that "Rule 170(c)(iv) . . . is not a jurisdiction-conferring statute; it is a court rule governing *pro hac* admissions" (Opinion at 9, fn. 54) is technically correct, but incomplete. Delaware Court of Chancery Rule 170(c)(iv)[4] requires a party receiving admission *pro hac vice* must agree to designate the Register in Chancery as the attorney's agent for service of process. Here, Defendants did file such certifications consenting to such jurisdiction. A-232; A-293.[5] Thus, although the Rule alone does not confer personal jurisdiction over *pro hac vice* attorneys, it requires those attorneys to consent to personal jurisdiction of Delaware courts for "all actions, including disciplinary actions, that may arise out of the practice of law under this Rule and any activities related thereto." Personal jurisdiction may be obtained via consent. "Because the defense of lack of personal jurisdiction is a personal right, 'it may be

[4] *See also* Del. R. Civ. P. Super. Ct. 90.1 (substantively identical rule).

[5] Certificate of Ryan Whalen, *Applied Energetics, Inc. v. Farley*, 2018-0489-TMR (Del. Ch. Jul. 11, 2018) (Tr. ID 62227497).

obviated by consent or otherwise waived.'" *Foster Wheeler Energy Corp. v. Metallgesellschaft AG*, 1993 WL 669447, at *1 (D. Del. Jan. 4, 1993).

Nor does Appellant argue that Defendants' *pro hac vice* admissions result in automatic, general conferral of jurisdiction for any action. (AB at 21.) Rather, Appellant argues that its malicious prosecution claims "arise from" and are "related thereto" to such admissions within the meaning of Rule 170(c)(iv).

In this regard, *Kronzer* is distinguishable. In that case, the plaintiff argued an attorney's *pro hac vice* admission was "*alone* sufficient to confer both general and specific personal jurisdiction" and therefore resulted in "the implicit consent of counsel to the jurisdiction of the Courts in this state for all purposes." 2004 WL 1753409 at *3 (emphasis added). The plaintiff did not apparently argue (and the court did not address) whether such admissions (along with other evidence) could establish a "a relationship between the quality of the defendant's forum contacts and the particular claims for relief advanced by plaintiff" in order to establish specific personal jurisdiction. *Id.* at *2 (citing *Hirsch v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474, 1477 (9th Cir. 1986)).

The question the Superior Court should have addressed is whether Defendants' filing of the Securities Fraud Action (again, assuming all allegations pled in the Complaint were true) constituted an act that "[arose] out of the practice of law under this Rule" or was an "activit[y] related" to Defendants' practice of law

pursuant to their *pro hac vice* admission. Instead, the Superior Court avoided this question by claiming "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." (Opinion at 9.) This is not a fair statement of Appellant's argument. As the Complaint alleges succinctly in paragraph 2:

> Defendants, as experienced litigators in New York, knew that by merely filing a lawsuit in federal court in the Southern District of New York alleging AE committed federal securities fraud, such lawsuit would garner far more publicity than other state law-based civil claims, and would therefore depress AE's publicly traded stock price, hinder AE's ability to raise capital via sales of stock, hinder AE's ability to obtain contracts with the federal government, and create a conflict between AE and its counsel of record in the Farley Litigation (who were named as co-defendants in the Securities Fraud Action). Defendants knew that AE's sole source of cash to fund the Farley Litigation was by selling AE stock, or loans backed by warrants to acquire stock, to investors. Defendants filed and prosecuted their Securities Fraud Action in an intentional effort to deprive AE of cash to pay for the expenses of litigating against Defendants' clients, Farley and AnneMarieCo, in the hopes of forcing AE into an unfavorable (but favorable to Defendants and their clients) settlement, or to simply abandon the Farley Litigation altogether."

A-10.

These conclusions are bolstered by the fact that Defendants have never attempted to argue, either before the Superior Court or this Court, their Securities Fraud causes of action had probable cause. If the Securities Fraud Action was a lawsuit intended exclusively "so that [Defendants] would not be denied their right

to sell their Shares that were located in New York" (AB at 19), why include frivolous federal Securities Fraud causes of action?[6]

Defendants' Answering Brief never truly grapples with the allegations in the Complaint supporting the inference of their true purpose in filing the Securities Fraud Action. Instead, Defendants argue that any activity subjecting them to personal jurisdiction in Delaware under their *pro hac vice* status must be related to "the filing of a *motion* for admission *pro hac vice* in Delaware" (AB at 16, emphasis added.) They then argue that Defendants' *pro hac vice motion* did not constitute a ground for Appellant's malicious prosecution claim. (*See* AB at 16-17.) It is untrue that this Court only maintains jurisdiction over *pro hac vice* attorneys for committing misconduct in connection with their *motion* for *pro hac vice* admission, and not any and all "activities related" to their practice of law *after* being admitted *pro hac vice*. As such, this argument should be rejected.

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[6] In this regard, the United States Supreme Court's recent Opinion in *Chiaverini v. City of Napoleon, Ohio*, 144 S. Ct. 1745, 1751, 219 L. Ed. 2d 262 (2024) is instructive. There, the court held that a claim for malicious prosecution may lie if any claim lacks probable cause, and a defendant is not insulated from malicious prosecution liability merely because another claim is well-founded. "All that dooms the Sixth Circuit's categorical rule barring a Fourth Amendment malicious-prosecution claim if any charge is valid. That rule receives support from neither half of the claim's name—neither from the Fourth Amendment nor from the malicious-prosecution tort we have invoked as an analogy. And the question is not close, as shown by the parties' decision not to contest it in this Court." *Id.* at 1751.

B. Defendants' Malicious Prosecution of a New York Lawsuit Had a Sufficient Nexus To Defendants' *Pro Hac Vice* Admission in the 2018 Delaware Action and Their Contract with Farley to Provide Legal Services in Delaware for Purposes of the Long Arm Statute.

Defendants do not contest that this Court has interpreted the Long Arm Statute "to confer jurisdiction to the maximum extent possible under the Due Process Clause" of the United States Constitution. *Hercules, Inc. v. Leu Trust & Banking, Ltd.*, 611 A.2d 476, 480-81 (Del. 1992). Under 10 *Del. C.* § 3104(c)(1) & (2), it is not the mere act of contracting, or the initiation of conducting business in Delaware, that must amount to the tortious conduct conferring personal jurisdiction. Rather, as this Court has explained:

> The conduct embraced in subsections (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. Where personal jurisdiction is asserted on a transactional basis, even a single transaction is sufficient if the claim has its origin in the asserted transaction. *Speakman,* 583 F. Supp. at 275; *Wilmington Supply Co. v. Worth Plumbing & Heating, Inc.,* 505 F. Supp. 777, 780 (D. Del. 1980). Thus, if the claim sought to be asserted arose from *the performance of business or the discharge of the contract*, no further inquiry is required concerning any other indicia of the defendant's activity in this state.

LaNuova D & B, S.p.A., 513 A.2d at 768 (emphasis added).

Accordingly, if Defendants' malicious prosecution of the Securities Fraud Action (i.e., the tortious conduct) arose from "the performance of business or the discharge of the contract" that Defendants conducted in Delaware, then Delaware has personal jurisdiction over them, regardless of where the specific conduct

constituting the tortious act(s) occurred. If it were otherwise, there would be no need for the "nexus" or "arose from" tests.

Defendants' attempt to distinguish *Darcy v. Hankle*, 765 N.E.2d 583 (Mass. App. Ct. 2002) is limited to baldly asserting, "[Defendants'] filing [the Securities Fraud Action] does not constitute intentional tortious conduct aimed at Delaware." (AB at 19.) The Answering Brief offers no support for this statement other than Defendants deny the allegations in the Complaint.

Next, in perhaps an implicit admission, Defendants assert their intent in filing the Securities Fraud Action, and the harm it caused in Delaware to Appellant, is irrelevant:

> 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.

(AB at 19-20.) Not so. Defendants cite several cases where out-of-state conduct "aimed at" causing harm in the forum state was sufficient to grant personal jurisdiction. *Calder*, 465 U.S. at 789; *Hanly v. Powell Goldstein, L.L.P.*, 290 F. App'x 435, 437-38 (2d Cir. 2008); *Rothstein v. Carriere*, 41 F.Supp.2d 381, 386 (E.D.N.Y 1999); *Darcy*, 54 Mass. App. Ct. at 848, 852 (2002). Defendants' motive is highly relevant to determine whether Defendants' malicious prosecution of the Securities Fraud Action was an attempt to gain an improper litigation advantage in

the 2018 Delaware Action. If it was, then the Securities Fraud Action arose from or was related to their *pro hac vice* admission. Defendants' argument that their *mens rea* for committing an intentional tort is irrelevant should be rejected.

While Defendants dispute their Securities Fraud Action was "aimed at" causing harm to Appellant in Delaware, Defendants do not attempt to argue that it did not actually cause the harm alleged. As alleged in the Complaint, when Appellant's stock price went down, Appellant had to sell treasury stock at lower prices, which increased the cost of prosecuting the 2018 Delaware Action. A-11-12. The Securities Fraud Action also created a (fortunately waivable) conflict of interest with its counsel of record in the 2018 Delaware Action. A-10. Each of these harms, while not thwarting the prosecution of the 2018 Delaware Action entirely, certainly made it more difficult, burdensome, and expensive to prosecute that lawsuit in the Delaware Court of Chancery.

Finally, as explained further below, Defendants' act of serving Appellant's agent for service of process in Delaware was an act that occurred in Delaware in furtherance of the prosecution of the Securities Fraud Action. Defendants do not dispute the extensive law in Appellant's Opening Brief explaining that service of process is an integral part of "prosecuting" a lawsuit. (*See* AOB at 37-39.)

C. The Exercise of Personal Jurisdiction Comports with Due Process Principles.

The entirety of Defendants' argument as to why they claim due process is not satisfied here is as follows:

> 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.

(AB at 25.)

Again, this argument presumes a trier of fact must believe Defendants' contention that their Securities Fraud Action had nothing to do with an attempt at thwarting Appellant's prosecution of the 2018 Delaware Action. Defendants lament that subjecting them to Delaware jurisdiction would be unfair because they could be forced to engage in two lawsuits, one in New York and one in Delaware, at the same time. This fairness argument is particularly ironic given the Securities Fraud Action required *Appellant* to defend claims in both Delaware (Farley filed a counter-claim in the 2018 Delaware Action; A-291) and New York, and Defendants could easily have filed the Securities Fraud Action in Delaware against Appellant as a Delaware citizen.

II. DEFENDANTS' EFFECTUATION OF PERSONAL SERVICE WAS A SUFFICIENT IN-STATE ACT FOR PURPOSES OF PERSONAL JURISDICTION.

If the Court holds that Defendants' conduct discussed above does not amount to sufficient in-state acts for the exercise of personal jurisdiction in this malicious prosecution action, Defendants' effectuation of personal service upon Appellant's registered agent was such an act. That "single act" enables the court to exercise personal jurisdiction over Defendants under the Long Arm Statute. *See Eudaily v. Harmon*, 420 A.2d 1175, 1180 (Del. 1980).

Defendants' tone in this section betrays their concern for the merits of Appellant's argument. Appellant did not "apparently" acknowledge, nor was AE "wrong" in conceding, it did not make this argument below. (AB at 29.) To the contrary, Appellant expressly requested the Court exercise its authority under Rule 8 to consider the argument despite the fact it was not made in the Superior Court below. (AOB at 34.)

Appellant did not raise the personal service argument below because, as explained above, the Superior Court applied a "Delaware-specific act" test rather than the proper "nexus" or "arose out of" or "relating to" tests. Under the Superior Court's incorrect "Delaware-specific act" test, Defendants' service of process of the Securities Fraud Lawsuit in Delaware passes that test. Moreover, and, candidly, fresh eyes discovered the issue during the appellate process. Appellant neither chose

to remain silent nor lay in wait on the issue before the Superior Court; why would it? The interests of justice therefore favor the consideration of this argument and the indisputable evidence that supports it.

VT S'holder Representative, LLC v. Edwards Lifesciences Corp., 2024 WL 3594457 (Del. July 31, 2024), cited by Defendants, supports the consideration of the same. In that case, this Court declined to exercise its discretion to permit an appellant to supplement the record with evidence that had not been presented to the trial court. *Id.* at *1. *VT S'holder* supports Appellant's position. The (undisputed and undisputable) evidence that Defendants effected personal service of summons in the Securities Fraud Action on Appellant's registered agent in Delaware is at minimum "potentially dispositive" of the personal jurisdiction question. *Id.* The Court need not speculate as to how this evidence might have affected the Superior Court's decision: since the Long Arm Statute provides for personal jurisdiction based on a single in-state act or transaction by the nonresident, there is no reasonable dispute that the Superior Court would have found it could properly exercise personal jurisdiction over Defendants. *See Eudaily*, 420 A.2d at 1180. Last, there is not "little to gain from considering the new evidence" (*VT S'holder*, 2024 WL 3594457 at *2); to the contrary, given the evidence is at least potentially dispositive, and almost certainly changes the result, there is much to gain from its consideration.

Appellant's argument that this single act occurring in Delaware confers personal jurisdiction is not "breathtaking and unprecedented." (AB at 32.) Rather, it is the straightforward application of the Long Arm Statute and established precedent. Nor do Defendants argue for a categorical rule that effectuation of personal service *always* exposes the servicing party to suit in Delaware. Rather, Appellant argues that personal jurisdiction attaches under the specific circumstances at bar: Defendants' effectuation of personal service on a Delaware corporation, in Delaware, of a maliciously prosecuted action, by attorneys admitted *pro hac vice* in Delaware, in order to adversely affect the personally-served party's prosecution of the very pending Delaware action for which they had been admitted *pro hac vice*.

As for Defendants' concern that "[s]uch jurisdiction would exist even if the attorney or the case had no other connection with Delaware" (AB at 32), that is an incomplete hypothetical. Defendants are certainly not in that position. In any event, Defendants' in-state act is only the first step of the analysis. As Defendants themselves argue, the exercise of personal jurisdiction must still meet due process requirements to be proper. There may well be cases (other than the case at bar) where such due process requirements are not met.

There is nothing "novel[]" about Appellant's arguments, based as they are in the straightforward application of the Long Arm Statute. (AB at 32.) In any event, the lack of directly on-point case law cuts both ways: Defendants tacitly admit they

have found no case cutting against Appellant's arguments. Moreover, Appellants concede it is unusual to sue a defendant for malicious prosecution in a state other than the jurisdiction in which the maliciously prosecuted case was filed. But is has occurred. *Hanly*, 290 F. App'x at 437-38; *Rothstein*, 41 F. Supp. 2d at 386.

Finally, Defendants miss the point of Appellant's citations to *McCoy v. Hickman*, 15 A.2d 427 (Del. 1940) and *Castelline v. Goldfine Truck Rental Serv.*, 112 A.2d 840 (Del. 1955). (AB at 33.) These cases establish that Defendants' effectuation of service on Appellant is a "proceeding" within, and therefore an intrinsic component of, their malicious prosecution of the Securities Fraud Action. Accordingly, Appellant's claims for malicious prosecution "arise from" such service within the meaning of the Long Arm Statute.

A. The Exercise of Personal Jurisdiction Over Defendants Is Fully Consistent with Due Process.

Due process is satisfied 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). This "fair warning" requirement is satisfied if a defendant has "purposefully directed" his activities at residents of the forum. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984). Since Defendants literally "purposefully directed" service of summons on Appellant in Delaware as part of their continuation

of a maliciously prosecuted action, they can express no surprise if they are haled into Delaware courts to answer for resulting injuries.

Defendants' proposition that effectuation of service on a *defendant* does not by itself confer personal jurisdiction over *that defendant* in an out-of-state action is irrelevant. (AB at 33, citing *Wallace v. Herron*, 778 F.2d 391, 395 (7th Cir. 1985)). Defendants ignore that Delaware law provides a malicious prosecution claim may be based on the "*continuation* of a proceeding against the plaintiff." *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). As discussed above, service of process in a maliciously prosecution action constitutes a "continuation" of such proceeding.

There is nothing surprising about the general proposition that an attorney might be exposed to suit in Delaware, by a Delaware corporation, for maliciously continuing the prosecution of an action against that corporation by taking a deposition in Delaware. (AB at 34.) This is not a perverse result as Defendants assert. This Court has held that "*[d]epositions are court proceedings . . . .*" *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 78 (2019) (emphasis added).

Defendants' *ipse dixit* that "effectuation of service did not give rise to the malicious prosecution claim, nor was it at issue" (AB at 35) is as unsupported as it

is wrong. Defendants acknowledge, as they must, that "[s]ervice of process was a procedural matter" whereby Defendants acquired jurisdiction over Appellant in connection with their continuation of the Securities Fraud Action. *Id.* If there is any question in this regard, Appellant should be given leave to amend its Complaint to specifically identify Defendants' effectuation of personal service as a basis for their claim.

Defendants miss the point of Appellant's reliance on *Sample v. Morgan*, 935 A.2d 1046 (Del. Ch. 2007) and *Clark v. Davenport*, 2019 WL 3230928 (Del. Ch. July 18, 2019). Defendants analogize to these cases for the proposition that service of process in a malicious prosecution case has at least as much nexus as the presentation of a Certificate Amendment or filing of a Certificate of Incorporation has to the claims at issue in those cases. In each of *Sample* and *Clark*, these seemingly perfunctory procedural acts occurring in Delaware were held sufficient to confer personal jurisdiction.

Lastly, Defendants' reference to the purported expiration of a statute of limitations as the reason Appellant filed this action in Delaware is irrelevant. (AB at 34-35.) Appellant is entitled to its choice of forum. *See Chrysler First Business Credit Corp. v. 1500 Locust Ltd. Partnership*, 669 A.2d 104, 107-108 (Del. 1995). Appellant could just as easily surmise reasons why Defendants chose to frivolously sue Appellant in their home state of New York rather than in Appellant's home state

of Delaware. Nonetheless, speculation as to the reasons for Appellant's filing in Delaware has no bearing on the personal jurisdiction analysis.

III. IF NECESSARY, THE COURT SHOULD REVERSE AND DIRECT THE SUPERIOR COURT TO GIVE APPELLANT LEAVE TO CONDUCT LIMITED JURISDICTIONAL DISCOVERY.

Appellant's request for leave to conduct jurisdictional discovery is entirely provisional. Should the Court reverse on the grounds discussed above, such discovery is unnecessary. Appellant did not request jurisdictional discovery below because all of Appellant's "allegations of fact concerning personal jurisdiction are presumed true unless contradicted by affidavit." *Munoz*, 2019 WL 669935, at *5 (internal quotes and citation omitted). Defendants submitted no affidavits purporting to contradict any of the allegations in Appellant's complaint. Despite this, the Superior Court *sua sponte* expressed skepticism about Appellant's allegation that Defendants intended to suppress Appellant's stock price (*see* Opinion at 10, fn. 58) which appears to have formed a basis for the Superior Court's ruling.

As discussed in Appellant's Opening Brief, its burden to establish personal jurisdiction is minimal. Appellant "need only make a *prima facie* showing of personal jurisdiction and the record is construed in the light most favorable to [Appellant]." *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007) (internal quotations omitted). Its burden to establish jurisdictional discovery is appropriate is even less. Appellant is "entitled to [jurisdictional] discovery if [its] assertion of jurisdiction is minimally plausible . . . ." *Munoz*, 2019 WL 669935, at *5.

As made clear by both parties' briefing, the parties have significantly different conceptions of the facts. Defendants accuse Appellant of merely "speculating" as to Defendants' purpose in filing the Securities Fraud Action. (AB at 19.) To the contrary, there are substantial indications that Defendants intended to cause such harm. In addition to the undisputed fact that their federal Securities Fraud counts lacked probable cause, the indicia of Defendants' harmful intent include Defendants' (undisputed) effort to increase the preliminary injunction bond in the 2018 Delaware Action ***ten-fold***, in order to prevent Appellant from utilizing those funds to litigate the 2018 Delaware Action. A-27. In connection therewith, Defendants repeatedly claimed Appellant was unable to raise capital via sales of its treasury stock, and was on the verge of bankruptcy. *Id.*

Although Appellant submits it has met its burden to establish personal jurisdiction, if there is any doubt as to Defendants' intent, jurisdictional discovery would be appropriate. For example, Appellant could inquire of Defendants whether they conducted any legal research, or inquired with other attorneys or professionals, before filing the Securities Fraud Action, and whether there are communications (internal to Defendants, as well as with other parties) relating to that decision. Jurisdictional discovery would also bear on who was involved in the June 2019 publication of an article in Seeking Alpha, a widely-read financial markets website,

claiming AE would soon "implode," which caused a significant drop in AE's share price. A-116 & A-132.

Jurisdictional discovery would not be a "fishing expedition" as claimed by Defendants. (AB at 38.) Again, this request is merely in case the Court accepts Defendants' argument that AE's allegations regarding Defendants' intent are merely "speculative" (AB at 19) or that there is any factual gap regarding Defendants' effectuation of personal service on Appellant. (AB at 31.) While Defendants' involvement in effecting personal service on Appellant's registered agent in Delaware is not subject to any dispute, Defendants equivocate on the point in their briefing. (*See* AB at 3 & 31.) Jurisdictional discovery would then be appropriate to address any purported factual gap related thereto.

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: September 16, 2024

HALLORAN FARKAS + KITTILA LLP

William E. Green, Jr.

Theodore A. Kittila (No. 3963)
James G. McMillan, III (Bar No. 3979)
William E. Green, Jr. (No. 4864)
5722 Kennett Pike
Wilmington, Delaware 19807
Phone: (302) 257-2025
Fax: (302) 257-2019
Email: tk@hfk.law / jm@hfk.law / wg@hfk.law

Counsel for Petitioner Below/Appellant, Applied Energetics, Inc.