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Case Number 66,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LORENZO ROCCIA and TRANSATLANTIC GROUP PARTNERS, LLC

Plaintiffs,

v.

MARTIN MUGICA and ULTINER LLC

Defendants,

and

SKYLINE RENEWABLES, LLC

Nominal Defendant.

No. 66, 2021

On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2020-0641-MTZ

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

As President and CEO of Transatlantic Holdings LLC ("Holdings"), Defendant Martin Mugica's Employment Agreement grants him "paramount and full responsibility and power for the general supervision, direction and control of the business and operations of the Company," subject to ultimate supervisory authority of the Holdings Board of Directors (the "Holdings Board"). A255. This broad delegation of power included the authority to exercise Holdings' right to remove Plaintiff Lorenzo Roccia as a member of the Board of Managers of Holdings' affiliate, Skyline Renewables LLC ("Skyline").

Holdings is a holding company. Along with its partner, Windpower Americas I LLC ("Windpower"), Holdings invests in North American renewable energy assets, but does so indirectly through its ownership in Skyline. Skyline identifies, acquires, owns, and operates the renewable energy assets.

Holdings and Windpower exercise control over Skyline by appointing managers to Skyline's five-member Board of Managers (the "Skyline Board"). Pursuant to the Skyline Operating Agreement, Windpower, as majority owner of Skyline, has the authority to select three managers, and Holdings selects the remaining two. Holdings also has the express right under the Skyline Operating Agreement to remove any of its appointees from the Skyline Board simply by giving notice to Skyline. Mugica and Roccia are the two principal owners of Holdings and

were the two managers Holdings originally placed on the Skyline Board. Holdings, through Mugica and his management team, separately provides management services to Skyline through a management services agreement (the "Management Services Agreement").

Regrettably, disputes arose between Mugica and Roccia over the direction of the business. Among other things, Roccia opposed a proposed $880 million investment by Windpower and used his presence as a manager on the Skyline Board to block the investment. Mugica believed the investment would allow Holdings and Windpower to achieve their business goal of developing three gigawatts of independent renewable energy platforms. Because Mugica believed that Roccia's presence on the Skyline Board was interfering with the business and thus placing at risk Holdings' interest in Skyline, he used his "paramount and full . . . power" over Holdings to exercise Holdings' right to remove Roccia from the Skyline Board. The Holdings Board did not reverse his decision.

Despite the clear delegation of authority, Roccia challenged his removal before the Court of Chancery, arguing that (1) Holdings did not have the power to remove him from the Skyline Board because he could not be removed as *Chairman* of the Skyline Board except for cause and upon unanimous consent of the Skyline

Board; and (2) even if Holdings could remove him as a manager, Mugica did not have the authority to exercise Holdings' removal rights.

The Court of Chancery did not address the first issue, but it assumed for purposes of its summary judgment ruling that Holdings had the right to remove Roccia. Indeed, the Skyline Operating Agreement vests Holdings with complete power to remove Roccia as a manager from the Skyline Board, and Roccia's position as Chairman of the Skyline Board is contingent on him remaining a manager. As for the second issue, although the court recognized that "Holdings is, broadly speaking, a holding company," the Court of Chancery held that Holdings' "business" consisted of identifying, acquiring, owning, and operating renewable energy assets and did not extend to exercising its removal rights in Skyline.

The Court of Chancery conflated Skyline's business with that of Holdings. Holdings' "business," like any other holding company, is to oversee, manage, and protect its investment interest in Skyline. It does this through exercising its equity interest in Skyline, including in its appointment (and removal) of its two designees on the Skyline Board. Mugica's decision to remove Roccia from the Skyline was simply a decision over how Holdings' equity interest in Skyline should be exercised. Mugica, with "paramount and full … power" over Holdings, had the clear authority to make this decision on behalf of Holdings, and the Court of Chancery erred.

Mugica respectfully requests that the Court reverse the Court of Chancery's judgment and direct entry of summary judgment in favor of Mugica.

SUMMARY OF ARGUMENT

1. Exercising Holdings' removal rights in Skyline falls within Mugica's powers as Holdings' President and CEO. In addition to having the "operational" powers typically vested in a President and CEO of a corporation, the Holdings Board delegated Mugica "paramount and full responsibility and power for the general supervision, direction and control of the business and operations of the Company." A255. This delegation of power conferred maximum decision-making authority to Mugica, subject only to the Holdings Board's ultimate authority to reverse his decision. Indeed, at the same time Mugica's Employment Agreement grants him "paramount and full responsibility and power," it carves out a list of 10 specific actions reserved for the Holdings Board. Mugica must obtain board *pre-approval* before taking actions that fall within this list, demonstrating that the parties knew how to require board pre-approval when they intended to do so. Accordingly, the parties necessarily delegated all other decisions related to the "business and operations of the Company" to Mugica without the need first to obtain board pre-approval. The authority to exercise Holdings' removal rights—or any other rights in an affiliate—is *not* one of the 10 actions that requires pre-approval. Therefore, so long as Holdings' "business and operations" encompassed exercising its voting rights in Skyline, Mugica could act without first obtaining board approval.

2. Holdings' "business and operations" encompassed the exercise of its removal rights on the Skyline Board. As its name makes clear, Holdings is a holding company. It does not acquire, develop, build, or operate renewable energy assets. Those matters are left to Skyline. By contrast, Holdings confines its role to owning, managing, and protecting its membership interest in Skyline and, separately, providing management expertise to Skyline through the Management Services Agreement. Holdings oversees and protects its Skyline investment by exercising its ownership rights in Skyline, including the right to appoint and/or remove its two allotted representatives to the Skyline Board. Indeed, appointing and removing its representatives to the Skyline Board to achieve its desired goals for its investment is at the very center of Holdings' "business." Here, Mugica believed that Roccia's presence on the Skyline Board was damaging Holdings' interest in Skyline by, among other things, preventing critical investment to allow Skyline to acquire and operate renewable energy assets. Thus, acting pursuant to his "paramount and full responsibility and power for the general supervision, direction and control of the business," Mugica removed Roccia from the Skyline Board. Regardless of whether this was ultimately the right decision—it was—there can be no dispute that it was Mugica's decision to make. The Court of Chancery erred in holding otherwise.

3. Although the Court of Chancery did not address the issue of whether Holdings could remove Roccia from the Skyline Board, because it is a matter of contract interpretation, this Court can and should decide the issue *de novo*. There can be no reasonable dispute that Holdings has the unfettered power to remove Roccia as a manager from the Skyline Board. Section 7.6(a) of the Skyline Operating Agreement vests Holdings with the power to remove "[a]ny Manager" that it appoints to the Skyline Board by providing written notice to Skyline. A306. Roccia was a manager serving on the Skyline Board, and Holdings designated him as a manager. Therefore, the plain language of Section 7.6(a) vests Holdings with the right to remove Roccia from his position as a manager of Skyline. And this power was not circumscribed by Roccia's separate role as the Chairman of the Skyline Board. Rather, pursuant to Section 7.2 of the Skyline Operating Agreement, Roccia's position as Chairman was contingent upon him remaining a manager.

STATEMENT OF FACTS

A. FACTUAL HISTORY.

1. Mugica Starts a Company Focused on North American Renewable Energy Assets.

Mugica has been at the forefront of the North American renewable energy market for 15 years. From 2006 until mid-2015, Mugica served as President and CEO of Iberdrola Renewables, a North American subsidiary of the Spanish multinational electric utility company, Iberdrola S.A. A89, ¶ 2. Iberdrola S.A. was focused on wind and solar development, operations, and power, and Mugica, through Iberdrola Renewables, led Iberdrola S.A.'s renewable energy business in North America. *Id.*

In mid-2015, Mugica left Iberdrola Renewables and began meeting with a number of potential investors about forming a venture to pursue North American renewable energy opportunities, primarily wind energy. A89, ¶ 3. One investor Mugica met was Roccia, who held himself out to be a sophisticated investor with years of experience and connections to financial institutions and other institutional investors that, if true, would provide Mugica access to the capital necessary to pursue the type of renewable energy investments he envisioned. A89, ¶ 4.

2. Mugica and Roccia Form Holdings with Mugica Given Paramount Authority Over the Business and Its Operations.

In 2016, Mugica and Roccia formed Holdings as the entity through which they would pursue renewable energy investments. A90, ¶ 5. Holdings' managing member is Transatlantic Ultiner LLC ("Managing Member"), which, in turn, is co-equally owned by Ultiner LLC ("Ultiner") and Transatlantic Group Partners LLC ("TGP"). *Id.* Ultiner and TGP are majority-owned and -operated by Mugica and Roccia, respectively. *Id.* The Holdings Board is made up of four members, two appointed by Ultiner and two by TGP. A91, ¶ 7; A180, § 8.02. In order to raise capital to pursue the venture, Holdings solicited investors, who purchased passive minority interests in Holdings. A90, ¶ 5.

Roccia serves as the nonexecutive Chairman of the Holdings Board. A91, ¶ 8; A180, § 8.02. As nonexecutive chairman, Roccia has no management role in Holdings. A91, ¶ 8. By contrast, Mugica—who had years of experience running a sophisticated, multinational renewable energy company—is President and CEO of Holdings. A91, ¶ 9. In that role, Mugica insisted on, and the Holdings Board granted him, "paramount and full responsibility and power" to manage and operate Holdings. A91, ¶ 9; A183-84, § 8.09; A255.

Consistent with this delegation of authority, as the parties were negotiating definitive agreements, Mugica specifically stated, "[W]hat I want is to be very

specific on what matters should be subjected to Board Approval and carve them out from the delegated powers to the CEO." *Id.* Exhibit A to his Employment Agreement reflects this broad delegation of authority:

- First, in line with Mugica's requirements, Exhibit A curtails the power of the board:

> [T]he Board will use commercially reasonable efforts to refrain from involving itself with or directing the Executive's discharge of his duties and responsibilities on behalf of the Company so long as such discharge of his duties and responsibilities are consistent with the annual budget and business plan.

A255.

- Second, pursuant to Mugica's direction that the parties be "very specific" on what matters are "subjected to Board Approval," Exhibit A of the Employment Agreement "carve[s] out" a limited and enumerated list of actions that Mugica may not take without prior board approval:

> 1. Set or adjust the compensation or benefits of any employee of the Company or Affiliate in excess of $250K annual salary or equivalent value;
>
> 2. Set or adjust the compensation or benefits for himself;
>
> 3. Determine the availability, amount (if any) or timing of any distributions or guaranteed payments to Members;
>
> 4. Make any material change to the nature of the Business or enter into any Business other than the Business;

5. Obtain or acquire on behalf of the Company or Affiliate any loan or debt, in any one transaction or in a series of related transactions, in an amount greater than $10M in the aggregate;

6. Enter into any contract (in any one transaction or in a series of related transactions) that includes an obligation in an amount greater than $5M;

7. Approve any individual expenditure in excess of $5M;

8. Cause the Company or Affiliate to make any capital expenditure in excess of $10M;

9. Approve any action to sell, lease, exchange, mortgage, pledge, or transfer all or substantially all of the Company's or Affiliate's property or have the Company or Affiliate engage in or obligate itself to engage in any merger, sale of assets involving the transfer of all or substantially all of the Company's assets, reorganization, recapitalization, dissolution, liquidation, or bankruptcy;

10. Make any charitable or political grants or contributions for or on behalf of the Company or Affiliate.

Id.

- Third, aside from this enumerated list of actions for which board pre-approval was required,

> [Mugica] ha[s] paramount and full responsibility and power for the general supervision, direction and control of the business and operations of the Company and the officers and employees of the Company, ***and*** shall have all of the general powers of management usually or typically vested in the office of president of a corporation, ***and*** shall

> have such other powers and duties as may be prescribed or granted by the Board.

Id. (emphasis added).

- Section 2.1 of Mugica's Employment Agreement, in turn, specifically recognizes the broad delegation of authority conferred by Exhibit A:

> During the Employment Term, the Executive shall serve as the Executive Officer of the Company, reporting to the Board of Directors or Managers of the Company (the "Board"). In such position, the Executive shall have such customary and usual duties, authority and responsibility as a chief executive, as shall be further determined from time to time by the Board, which duties, authority and responsibility are consistent with the Executive's position. Notwithstanding the foregoing, unless and until changed or revised by the Board, *the Executive's duties and powers shall include the duties, powers and limitations described on the attached Exhibit A*. The Executive shall also serve as a member of the Board or as an officer or director of any of the Company (for no additional compensation or such additional compensation as is determined by the Board).

A239 (emphasis added).

- Finally, the Holdings Operating Agreement also reflects Mugica's extensive powers:

> [T]he President and Chief Executive Officer shall have paramount and full responsibility and power for the general supervision, direction and control of the business and operations of the Company and the Officers and employees of the Company, and shall have all of the general powers of management usually or typically vested

> in the office of president of a corporation, and shall have such other powers and duties as may be prescribed or granted by the Board.

A183-84, § 8.09.

3. Holdings and Windpower Form Skyline to Identify, Acquire, and Manage Renewable Energy Assets.

The Holdings Operating Agreement was executed on August 19, 2016, and Mugica's Employment Agreement was executed shortly thereafter, on September 12, 2016. A143; A239. Two years later, in 2018, Holdings reached an agreement with Windpower, an affiliate of Ardian, an equity firm based in France, to form Skyline with the goal of acquiring operation and development projects in the United States' onshore renewables sector. A92-93, ¶ 12.

The two members of Skyline are Holdings and Windpower. A343. Pursuant to the agreement to form Skyline, Ardian (through Windpower) invested roughly $318 million in the joint venture and, in turn, received 99.5% of the Class A Membership Interests in Skyline. A92-93, ¶ 12; A343. Holdings was allocated the remaining 0.5% of the Class A Membership Interests in Skyline. A92-93, ¶ 12; A343.

Section 7.1 of the Skyline Operating Agreement establishes the Skyline Board and specifies that it shall be made up of five members, three appointed by

Windpower and two appointed by Holdings. A302-03, § 7.1. Holdings designated Mugica and Roccia as its initial managers. A303, § 7.1(f).

Pursuant to Roccia's request, Roccia was designated the initial Chairman of the Board of Managers. A93-94, ¶ 14; A304, § 7.2(a). Roccia was concerned that Ardian's majority on the Board of Managers would give Ardian the power to remove him as Chairman at any time, for any reason, and by a simple majority vote. A93-94, ¶ 14. Therefore, Roccia requested—and Section 7.2 of the Skyline Operating Agreement provides—that "[p]rior to the third (3rd) anniversary of the Effective Date, Lorenzo Roccia shall not be removed as the Chairman of any Board except for cause . . . upon unanimous vote of the Managers with respect to such Board (excluding the Chairman of such Board)." A93-94, ¶¶ 14-15; A304, § 7.2(a); A354; A358. The "Effective Date" is February 23, 2018. A258.

Section 7.2 also requires, however, that the Chairman "*shall be a Manager serving on [the] Board.*" A304, § 7.2(a) (emphasis added). Further, pursuant to Section 7.6(a) of the Skyline Operating Agreement, "[a]ny Manager or Board Observer may be removed from any Board by a written notice to the Company or applicable Series (as applicable) executed by the Member initially designating such Manager or Board Observer." A306. Thus, so long as Roccia remained "a Manager" of Skyline, the Skyline Board was not entitled to remove Roccia *as Chairman* prior

to February 23, 2021, absent cause and a unanimous vote of the other managers. A304, § 7.2(a); 306, §7.6(a). After February 23, 2021, Roccia could be removed as Chairman without cause and by a simple majority vote. A304, § 7.2(a).

4. Holdings Manages Skyline Through Mugica.

As described in the Holdings Operating Agreement, Holdings' "usual and ordinary business," is "identifying, acquiring[,] . . . developing, building, operating and managing renewable energy assets." A168, § 4.06(b)(ii). While this provision contemplated Holdings directly owning and operating renewable energy assets, as events unfolded, this was ultimately done through Skyline. A265 (defining "Business"); A282, § 2.7. Specifically, Holdings teamed with Windpower to form Skyline, which became the operating entity that directly owned renewable energy assets. A92-93, ¶ 12; A265. Holdings, in turn, is a member of Skyline, and through the Management Services Agreement with Skyline, Holdings (through Mugica and his management team) provides management services to Skyline. A373, § 2.4(b).

In return, Holdings was granted a 0.5% ownership interest in Skyline's Class A shares and the opportunity to own 100% of the nonvoting Class B Membership Interests in Skyline. A95, ¶ 17; A343. The owner of Class B Membership Interests is entitled to certain cash proceeds in line with a formula set forth in Section 5.4 of the Skyline Operating Agreement if Skyline meets certain performance criteria. A295-96, § 5.4. The purpose of the Class B Membership Interests is to incentivize

Holdings' management of Skyline, and therefore they do not vest all at once. A95, ¶ 17; A286, § 3.2(b). Instead, the Class B Membership Interests vest according to a schedule set out in the Skyline Operating Agreement. A286, § 3.2(b). At the time of filing this case, 60% of Holdings' Class B Membership Interests currently remains unvested. *Id.*

5. Roccia is Made President and CEO of Transatlantic Power Fund Management LLC, but Roccia's Promised Investments Do Not Materialize.

Ardian and Holdings agreed to an initial "Business Plan" for Skyline. A95, ¶ 18. The goal of the Business Plan is to develop independent renewable power platforms with an expected capacity of three gigawatts. *Id.* To fund this plan fully, the parties anticipated the need to raise at least $1 billion. *Id.* With Ardian's initial investment, this meant raising at least an additional $700 million. *Id.*

To achieve this investment goal, the Skyline Operating Agreement gives both Holdings and Ardian the right to increase their investment in Skyline consistent with their ownership percentage of Class A Membership Interests. A95-96, ¶ 19. What is more, an "Affiliate of [Holdings]" was given special preference to acquire additional Class A Membership Interests within 18 months after February 23, 2018 (*i.e.*, the Effective Date), upon Holdings' written request or before Ardian invested at least $250 million, whichever occurred later. A287, § 3.3(a).

To this end, Holdings established an affiliate, Transatlantic Power Fund Management LLC ("TPFM"), to acquire additional Class A Membership Interests. A96, ¶ 20. Roccia was made President and CEO of TPFM, where he was tasked with soliciting investors for an investment vehicle, Transatlantic Power Funds SCA SICAV RAIF, which could be used to purchase additional Class A Membership Interests. A406-497. TPFM did not, however, raise the minimum amount required to acquire additional shares within 18 months of the Effective Date, nor did TPFM raise even enough funds to cover its operating costs in accordance with its budget. A97, ¶ 23.

6. Roccia Rejects Ardian's Offer to Invest an Additional $880 Million in Skyline.

In January 2019, Ardian offered to invest an additional $880 million in Skyline, an amount that would have fully funded Skyline's $1 billion Business Plan. A97, ¶ 24. Ardian's offer would have required a proportional $4.4 investment from Holdings. A95-96, ¶ 19. Because Holdings' proportional investment would have been less than $5 million, Mugica had the authority as President and CEO to approve the Holdings investment. A255. Mugica strongly supported Ardian's proposal. A98, ¶ 25. He believed it amounted to a "breakthrough" in the parties' ability to achieve the Business Plan. *Id.* But Roccia opposed Ardian's offer in part based on an unsupported belief that it would have negatively impacted the total market value

of the assets by requiring the creation of multiple holding companies for the new group of assets that would be purchased using the $880 million investment. *Id.* Notwithstanding Mugica's efforts to assuage Roccia that this was not the case, Roccia maintained his objection. A98, ¶¶ 25-26.

Roccia's objection had consequences. Because the proposed investment involved a potential conflict of interest between Ardian and Skyline, Schedule 7.2(e) to the Skyline Operating Agreement required unanimous consent from the Skyline Board for the proposed investment. A347. Thus, without Roccia's consent, there would be no transaction. Ardian withdrew its offer in early May 2019. A98, ¶ 26.

7. Mugica Attempts To Resolve The Parties' Disputes.

The prolonged disagreement over Ardian's $880 million offer and how to raise the additional capital necessary to achieve the Business Plan led to other disagreements between the parties. A99, ¶ 27. Recognizing that these disputes and Roccia's continued veto right on the Skyline Board jeopardized the Business Plan, Mugica and the rest of his management team attempted to reach an agreement to settle the impasse and preserve the significant investment that all parties—including Holdings' third-party investors—made in Holdings. A99, ¶ 28.

After Roccia rejected Mugica's efforts at restructuring, Mugica offered a reciprocal buy/sell proposal. A99, ¶ 29; A499-506. In response, Roccia purported to "accept" Ultiner's reciprocal offer to sell its 50% interest in the Managing

Member but made a number of material changes and conditions to the offer, including requiring that Mugica would "remain temporarily as acting CEO" and demanding that the parties sign a confidentiality agreement that would prevent them from disclosing the terms of the proposal with third parties, including Holdings' investors, Ardian, and Skyline. A508-512. Mugica rejected Roccia's counteroffer. A514. Nevertheless, Roccia continued to maintain that Ultiner had agreed to sell its 50% interest in the Managing Member and proceeded to take actions that put Skyline—and Holdings' investment in Skyline—at risk, A101, ¶ 35:

- On April 14, 2020, Roccia sent a letter to Ardian in which he falsely represented that an agreement had been reached in which TGP would buy out Ultiner's 50% interest in [the Managing Member]. A101-02, ¶ 36. On April 17, 2020, just three days after Roccia sent his letter, Ardian responded with a letter to Mugica and Roccia, stating that the Skyline Operating Agreement "designated Mr. Mugica as the initial President and CEO of the Company" and it "expects that Mr. Mugica will remain as CEO and President of [Holdings] and that both [Holdings] and [Skyline] will continue to perform their respective obligations under the Management Services Agreement." A534-35. In the letter, Ardian stated that, "in the event that Mr. Mugica ceases to be employed by [Holdings], Ardian reserves all rights and remedies that

may be available to the Company under the Management Services Agreement, including to terminate the Management Services Agreement[.]" A534. This termination would have resulted in Holdings forfeiting the unvested Class B Membership Interests in Skyline. A385, § 7.3(a); A366 (describing "Key Person Event"). Despite receiving this letter from Ardian, Roccia filed suit in Oregon seeking to force Mugica to (a) sell Ultiner's interest, and (b) step down from management. A103, ¶ 39.[1]

- On April 18, 2020, Holdings received notice from the law firm, Newman, Simpson & Cohen, LLP (the "Newman Firm"), that implicitly threatened litigation against investors in Skyline, including Ardian. A537-39. The letter was addressed to Mugica and Vikram Bakshi, the other Ultiner-appointed Holdings Board member. *Id.* The Newman Firm stated that it represented TPFM "in connection with potential claims concerning investments" by a number of firms in Skyline, which were made "through an Ardian investment fund." A537.

8. Mugica Removes Roccia from the Skyline Board.

Mugica believed that Roccia's actions placed Roccia in conflict with both Holdings' and Skyline's interests and were directly impeding investments needed to

[1] The Oregon court dismissed the lawsuit.

acquire and develop additional renewable energy assets. A69; A102-03, ¶ 38. Therefore, on May 11, 2020, Mugica acted pursuant to his "paramount and full" authority as Holdings' President and CEO to remove Roccia as a Skyline Board manager. *Id.* As with any act encompassed under Mugica's "paramount and full responsibility and power," Mugica's decision to remove Roccia from the Skyline Board was subject to the Board's ultimate authority to reverse him. The Holdings Board did not reverse his decision.

B. PROCEDURAL HISTORY.

Roccia did not file suit challenging his removal until July 31, 2020, over two and a half months after his removal and following Holdings' appointment of Paul DiMarco, Holdings' largest third-party investor, to replace Roccia on the Skyline Board. Op. 5, ¶ E; A103, ¶ 40. Roccia sought a declaration that his removal as a Skyline manager was invalid for two reasons: (1) Holdings lacked the authority to remove him from the Skyline Board; and (2) even if Holdings had the authority to remove him from the Skyline Board, Mugica did not have the authority, as Holdings' President and CEO, to exercise that authority. Op. 6, ¶ G.

The parties agreed to present both issues to the Court of Chancery through cross-motions for summary judgment, which were simultaneously filed on October 23, 2020. Op. 5, ¶ F. On December 29, 2020, the Court of Chancery issued an

opinion and order (the "Summary Judgment Order").[2] Op. 10. In the Summary Judgment Order, the Court of Chancery found it unnecessary to determine whether Holdings had the authority to remove Roccia from the Skyline Board, but the Summary Judgment Order assumes that it did. Op. 10-11, ¶ 2.

As to Mugica's authority to remove Roccia, the Court of Chancery held that Mugica did not have the authority to exercise Holdings' removal rights to remove Roccia from the Skyline Board. Op. 10, ¶ 1. The Court of Chancery explained that, as a limited liability company, "Holdings could delegate to Mugica any or all of the powers and duties to manage and control its business and affairs." Op. 11, ¶ 3. To this end, the court recognized that Mugica had been delegated what the court described as four "branches of authority": (1) the general powers of management, (2) control of Holdings' business and operations, (3) control of Holdings' officers and employees, and (4) other duties assigned by the Holdings Board. Op. 13, ¶ 5.

The Court of Chancery reasoned that, as a Skyline manager, Roccia was neither a Holdings officer nor an employee, and therefore his removal did not fall under Mugica's control of Holdings' officers and employees. Op. 17, ¶ 11. Further, the Court of Chancery noted that there was no evidence that the Holdings Board specifically assigned removal rights to Mugica. Op. 17, ¶ 12. Thus, if the power

[2] The Summary Judgment Order is attached hereto as Exhibit A.

existed, it fell under Mugica's powers as those usually or typically vested in a chief executive or his "paramount and full responsibility and power" over the business.

In analyzing the "general powers . . . usually or typically vested in the office of president of a corporation," the Court of Chancery analogized Mugica's position to a chief executive of a corporation and looked to Delaware corporate law. Op. 13-14, ¶ 6. The Court of Chancery explained that, in such contexts, a chief executive is ordinarily limited to binding the company in the ordinary course of business. *Id.* Relying on the definition of "Business" in the Holdings Operating Agreement—which is not used in the Employment Agreement—the court defined Holdings' "usual and ordinary business" as '"identifying, acquiring[,] . . . developing, building, operating and managing' its various renewable energy assets." Op. 14-15, ¶ 7. The Court of Chancery found that these "day-to-day operations do not encompass . . . [e]xercising Holdings' removal right," which the Court of Chancery described as "inherently an extraordinary event, outside of Holdings' ordinary business." *Id.*

Similarly, to analyze the scope of Mugica's "paramount and full responsibility and power for the general supervision, direction and control of the business and operations of the Company," the Court of Chancery relied on dictionary definitions of the terms "business" and "operations" supplied by the court in *Miramar Police Officers' Retirement Plan v. Murdoch*, 2015 WL 1593745 (Del. Ch. Apr. 7, 2015).

Op. 15-16, ¶ 9. In *Murdoch*, the court defined "business" to mean the "commercial enterprise" of the company and "operations" to mean the "commercial activities" of the company. 2015 WL 1593745, at *12. The *Murdoch* court distinguished those terms from "corporate governance matters," which the court described as "matter[s] of internal affairs" regarding the "the relationships among or between the corporation and its officers, directors, and shareholders." *Id.* at *12-13 (citations omitted).

Based on those definitions, the Court of Chancery held that "business and operations" referred to Holdings' "commercial enterprise and activities." Op. 16, ¶ 10. Thus, the Court of Chancery concluded that Mugica's "paramount and full responsibility and power" over Holdings' "business and operations" was limited to supervising and directing Holdings' commercial enterprise and activities. *Id.* The Court of Chancery concluded that Holdings' "commercial enterprise and activities . . . do[] not include exercising Holdings' removal rights in Skyline." *Id.* According to the Court of Chancery, removing Roccia "would dramatically expand Mugica's delegated authority beyond *operational* matters." Op. 16-17, ¶ 10 n.64 (emphasis added).

On February 1, 2021, the Court of Chancery issued an Implementing Order and Final Judgment affirming the Summary Judgment Order. [3] On March 2, 2021, Mugica and Ultiner timely filed a Notice of Appeal with this Court.

[3] The Implementing Order and Final Judgment is attached hereto as Exhibit B.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN HOLDING THAT MUGICA LACKED THE AUTHORITY TO REMOVE ROCCIA FROM THE SKYLINE BOARD.

1. Question Presented.

Whether the Court of Chancery erred in its interpretation of the Employment Agreement and the Holdings Operating Agreement by finding that exercising Holdings' removal rights were outside Holdings' "business" or "operations" even though Holdings accomplishes its "business" in no small part by appointing and removing managers to the Skyline Board. This question was raised below and considered by the Court of Chancery. Op. 6, ¶ G.

2. Scope of Review.

"A decision granting summary judgment is subject to *de novo* review." *Nw. Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996). Similarly, "[t]he interpretation of contract language is reviewed by [the Supreme] Court *de novo*." *Sonitrol Hldg. Co. v. Marceau Investissements*, 607 A.2d 1177, 1181 (Del. 1992).

Delaware LLCs are creatures of contract. *TravelCenters of Am., LLC v. Brog*, 2008 WL 1746987, at *1 (Del. Ch. Apr. 3, 2008). Therefore, "[i]n governance disputes among constituencies in an LLC, the starting (and end) point almost always is the parties' bargained-for operating agreement, and the court's role in these disputes is to 'interpret [the] contract [and] effectuate the parties' intent.'" *A & J*

Cap., Inc. v. Law Office of Krug, 2018 WL 3471562, at *5 (Del. Ch. July 18, 2018) (alterations in original) (quoting *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *7 (Del. Ch. June 21, 2012)).

When a contract is clear and unambiguous, courts "will give effect to the plain-meaning of the contract's terms and provisions." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010). A contract is unambiguous unless it is reasonably subject to multiple, different interpretations. *Id.* at 1160. "When the language of a contract is plain and unambiguous, the intent of the parties expressed in that language is binding. If, however, the language of the contract is ambiguous, the court may look to extrinsic evidence to determine the parties' intent." *Sun-Times Media Grp., Inc. v. Black*, 954 A.2d 380, 389 (Del. Ch. 2008) (footnote omitted).

3. Merits of Argument.

a. The Court of Chancery Erred in Holding That Mugica Lacked the Power to Exercise Holdings' Removal Rights.

The Court of Chancery's holding that Mugica could not remove Roccia from the Skyline Board is based on the erroneous finding that exercising Holdings' removal rights is not a part of its "business" or "operations." In fact, Holdings' right to appoint and remove directors to the Skyline Board is central to its business of overseeing its investment in Skyline, and therefore falls squarely within Mugica's paramount and full authority as President and CEO.

(i) Mugica's Employment Agreement Vests Him with Plenary Authority Over Holdings' "Business and Operations."

Mugica's Employment Agreement delegates to him "paramount and full" authority to make all but a limited set of decisions relating to Holdings' "business and operations." A255. When interpreting a contract, the court's aim is to "give priority to the parties' intentions," "construe[] the agreement as a whole and give[] effect to all its provisions" so as not to render any part of the contract mere surplusage. *Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014) (quoting *GMG Cap. Inv., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 779 (Del. 2012)); *Kemp*, 991 A.2d at 1159-60.

Delaware courts apply *expressio unius est exclusio alterius*—"to express or include one thing implies the exclusion of the other"—to contract interpretation. *See, e.g.*, *Fortis Advisors LLC v. Shire US Hldgs., Inc.*, 2017 WL 3420751, at *8 (Del. Ch. Aug. 9, 2017) (applying *expressio unius est exclusio alterius* to interpret merger agreement); *Murdoch*, 2015 WL 1593745, at *8 (applying "the interpretive principle that 'the expression of one thing is the exclusion of another'" to settlement agreement (citation omitted)). And "[s]ophisticated parties entering unambiguous LLC agreements are presumed to understand the consequences of the language they have chosen, and are bound thereby." *DG BF, LLC v. Ray*, 2020 WL 3867123, at *4 (Del. Ch. July 9, 2020) (quoting *Huatuco v. Satellite Healthcare*, 2013 WL

6460898, at *5 (Del. Ch. Dec. 9, 2013), *aff'd*, 93 A.3d 654 (Del. 2014)), *appeal refused*, 237 A.3d 70 (Del. 2020) (TABLE). Accordingly, "where 'the relevant contracts expressly grant the [parties] certain rights . . . the court cannot read the contracts as also including an implied covenant to grant [a party] additional unspecified rights in the event that other transactions are undertaken.'" *Id.* (alterations in original) (quoting *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 707 (Del. Ch.), *aff'd*, 861 A.2d 1251 (Del. 2004)).

Here, as the Court of Chancery correctly recognized, "Holdings [as an LLC] could delegate to Mugica . . . *all* of the powers and duties to manage and control its business and affairs." Op. 11, ¶ 3 (emphasis added). Holdings did just that. Subject to the ultimate authority of the Board, Mugica's Employment Agreement bestows him with plenary decision-making authority over the business and its operations, providing:

> Subject to the ultimate control of the Board, the Executive shall have paramount and full responsibility and power for the general supervision, direction and control of the business and operations of the Company and the officers and employees of the Company, ***and*** shall have all of the general powers of management usually or typically vested in the office of president of a corporation, ***and*** shall have such other powers and duties as may be prescribed or granted by the Board.

A255.

By distinguishing between Mugica's "paramount and full responsibility and power" and the "general powers" of a chief executive, the Holdings Board intended to confer different categories of authority; any other reading would improperly render the grant of "paramount and full responsibility and power" superfluous. *Kemp*, 991 A.2d at 1159 ("We will not read a contract to render a provision or term 'meaningless or illusory.'" (citation omitted)). Indeed, the Holdings Board's delegation of "paramount and full responsibility and power" over the "business and operations of the Company" is intended to place ultimate authority to manage and control Holdings' affairs in Mugica, subject to the Board's ultimate supervisory powers.

The structure of the Employment Agreement supports this interpretation. The Employment Agreement states that "notwithstanding" the total delegation of authority to Mugica, there are 10 actions that are preserved for the Board. A255. Specifically, Exhibit A to the Employment Agreement provides that Mugica may *not* take certain actions without pre-approval from the Board. *Id.*

The Court of Chancery interpreted these 10 actions to be merely "specific operational actions," which it used to support its conclusion that the grant of "paramount and full" authority to Mugica was limited to "operational matters." Op. 16-18, ¶¶ 10 n.64, 13. Contrary to the Court of Chancery's description of these

actions as merely "specific operational actions," the list includes a wide variety of actions far beyond day-to-day "operational actions," including (i) making a material change to the nature of the business, (ii) issuing distributions, (iii) selling all or substantially all of the company's assets, (iv) reorganizing or dissolving the company, and (v) filing for bankruptcy. A255. If Mugica's "paramount and full" powers were limited to overseeing day-to-day commercial or "operational" activities similar to a traditional corporate chief executive, there would have been no need explicitly to prohibit him from unilaterally exercising powers as significant as changing the nature of the business, selling the business, or dissolving it—actions that are necessarily *outside the ordinary course of business*.

The enumerated list of powers identified in Exhibit A confirms that (a) Mugica' powers were not limited to "operational matters," and (b) the parties knew how to preserve powers for the Board and how to require pre-approval by the Board when they intended to do so. By setting forth a list of 10 actions that expressly require board pre-approval, the parties necessarily delegated all other decisions related to the "business and operations of the Company" to Mugica without the need first to obtain board pre-approval.[4] *Fortis Advisors*, 2017 WL 3420751, at *8

[4] To the extent the Court finds the agreement ambiguous, the extrinsic evidence also supports Mugica's position. In negotiating his Employment Agreement, Mugica required that the board limit its involvement over the company

(applying *expressio unius est exclusio alterius* to interpret merger agreement); *Murdoch*, 2015 WL 1593745, at *8; (applying "the interpretive principle that 'the expression of one thing is the exclusion of another'" to settlement agreement (citation omitted)). The authority to exercise Holdings' removal rights is not one of the 10 actions that requires pre-approval. *See* A255. Thus, as long as Holdings' "business and operations" encompassed exercising its removal rights, Mugica could act without first obtaining board approval.[5] And there can be no reasonable dispute that appointing and removing managers to the Skyline Board is central to Holdings' business.

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to "set[ting] an annual budget" and reviewing the operations of the company "on a quarterly basis." A235. In fact, as the parties were negotiating definitive agreements, Mugica stated to Roccia's attorney who was drafting the documents: "[W]hat I want is to be very specific on what matters should be subjected to Board Approval and carve them out from the delegated powers to the CEO." *Id.* This is precisely how the Employment Agreement was structured.

[5] By providing that Mugica could act without first obtaining board approval, Mugica does not suggest that the Board did not also have the power to exercise Holdings' appointment and removal rights, either before or after Mugica acted. In its ruling, the Court of Chancery seemed to erect an impenetrable barrier between the powers delegated to the Holdings Board and those delegated to Mugica while ignoring the reality that power can be vested in both. For example, a president of a corporation clearly has the authority to spend $100 of the corporation's money. Of course, that does not mean that the board of directors does not have the same authority. It is a shared power. Similarly, voting Holdings' equity interest in Skyline to remove a manager from the Skyline Board is a power that was shared by Mugica and the Holdings Board. The fact that the Holdings Board had the power does not mean that Mugica did not.

(ii) Removing Roccia Was Part of Holdings' "Business and Operations."

Holdings' removal rights go to the very heart of its "business and operations." As a holding company, the purpose of Holdings is to oversee and manage its investment in Skyline, and it does so through, among other things, its two appointees to the Skyline Board. Holdings' right to remove those appointees is therefore critical to its "business and operations."

Although the Court of Chancery recognized that "Holdings is, broadly speaking, a holding company," Op. 15, ¶ 8 n.56, the court noted that the Holdings Operating Agreement defined its "Business" as '"identifying, acquiring[,] . . . developing, building, operating and managing' renewable energy assets," Op. 15, ¶ 8 (quoting A168, § 4.06(b)(ii)). The Court of Chancery held that these "day-to-day … operational" activities do not encompass removing Holdings' designees to the Skyline Board. Op. 14-15, ¶ 7.

The Court of Chancery not only misinterpreted Mugica's authority—it expressly is *not* limited to "operational matters"[6] as discussed herein—the ruling ignores *what Holdings is and how it operates*. Holdings does *not* directly "identify[], acquir[e][,] develop[] [or] build[]" any renewable energy assets. Skyline does. While Holdings lends management expertise to Skyline through the

[6] Op. 16-17, ¶ 10 n.64.

Management Services Agreement, Holdings is, as its name makes clear, first and foremost *a holding company*.

A holding company is "[a] company formed to control other companies, usually confining its role to owning stock and supervising management." *Holding Company*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Ravenswood Inv. Co., L.P. v. Est. of Winmill*, 2018 WL 1410860, at *2 (Del. Ch. Mar. 22, 2018) (holding company "'conducts an investment management operation' through its affiliates (in which it has ownership interests of varying degrees)."), *aff'd*, 210 A.3d 705 (Del. 2019) (TABLE). Thus, the principal purpose of a holding company—its "commercial enterprise," to use the definition of "business" provided by the Court of Chancery[7]—is to oversee, manage, and protect its ownership interests in its affiliates. *Id.* A holding company does this by exercising whatever ownership rights it may have in those entities.

One of the ownership rights granted to Holdings in this case is the authority to appoint (and remove) two representatives to the Skyline Board, who are supposed to monitor and protect Holdings' interest in the enterprise. In this case, Mugica believed that Roccia was failing in his role as a Holdings' representative on the Skyline Board. Indeed, Mugica believed that not only was Roccia failing to

[7] Op. 15-16, ¶ 9.

protect Holdings' interest in Skyline, he was actively damaging that interest by, among other things, serving as an impediment to needed investment in the enterprise. To prevent Roccia from further damaging Holdings' interest in Skyline, Mugica, acting pursuant to his "paramount and full responsibility and power" over the "supervision, direction and control" of Holdings' business, exercised Holdings' right to remove Roccia as a Holdings representative from the Skyline Board. Roccia may disagree with the decision, but the decision was left to Mugica.[8]

(iii) Removing Roccia Was Not Related to Holdings' "Corporate Governance"

Finally, there is at least a suggestion in the Court of Chancery's ruling that it believed exercising Holdings' removal rights was off-limits because it was a matter of "corporate governance," not "business or operations." *See* Op. 16, ¶ 9 (noting that the *Murdoch* court "distinguished . . . commercial activities from 'corporate governance matters'"). While the Court of Chancery did not expressly categorize Mugica's action as "corporate governance," it did state that "[r]emoving a director of a Delaware corporation is a significant action that is protected by statute." Op. 14, ¶ 7 n.52 (emphasis added).

[8] As noted herein, all of Mugica's decisions were "[s]ubject to the ultimate control of the Board," A255, and thus, the four-person Holdings Board could have reversed Mugica's decision. That did not happen here.

The Court of Chancery's reasoning was improper. By viewing the issue through the lens of Delaware corporate law, the Court of Chancery placed an improper burden on Mugica to prove that this "significant action" was *specifically* authorized, *e.g.*, "Mugica has the right to remove any Holdings representative placed on an affiliate board." The appropriate way to frame the issue, however, is not to focus solely on the "remov[al] of a director," but rather to focus on whether Mugica had the power to exercise Holdings' equity interest in Skyline, since that is what voting Holdings' removal rights entailed.

As an LLC, the relevant removal standard is supplied by *the Skyline Operating Agreement*, not the Delaware General Corporation Law. *See* 6 *Del. C.* § 18-1101(b) (The Delaware Limited Liability Company Act "give[s] the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."); *A & J Cap.*, 2018 WL 3471562, at *5 ("In governance disputes among constituencies in an LLC, the starting (and end) point almost always is the parties' bargained-for operating agreement, and the court's role in these disputes is to 'interpret [the] contract [and] effectuate the parties' intent" (alterations in original; citation omitted). The Skyline Operating Agreement clearly gave Holdings the power to remove a manager that it appointed. *See* A306, § 7.6(a) (providing that "[a]ny manager" may be removed from the Skyline Board by the

member who appointed the manager simply by providing written notice to the company). Nor does the Skyline Operating Agreement establish that removal of a manager is a "significant action." Rather, it can be done for any reason, underscoring the fact that this was not a "significant action" but a matter of ordinary business operations. The Court of Chancery's reliance on a corporate analogy injected a "significance" into the decision which does not exist under the Skyline Operating Agreement and which infected the court's analysis of the issue.

In short, Roccia's removal from the Skyline Board had nothing to do with Holdings' "corporate governance" or the "internal affairs" of Holdings. *Murdoch*, 2015 WL 1593745, at *12. Instead, this was an officer of an LLC exercising the LLC's express right to remove a representative from an affiliate LLC's board. In hindsight, Roccia may regret having granted Mugica this kind of discretion over Holdings' business decisions, but "[p]arties to contracts governed by Delaware law 'are free to make bad bargains.'" *Id.* at *9 (citation omitted); *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (court cannot "rewrite [a] contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal. Parties have a right to enter into good and bad contract, the law enforces both."). Mugica had the authority to exercise Holdings' membership interest in Skyline to remove Roccia from the Skyline Board.

II. HOLDINGS HAD THE RIGHT TO REMOVE ROCCIA FROM THE SKYLINE BOARD.

1. Question Presented.

Whether Holdings had the power to remove Roccia as a manager from the Skyline Board pursuant to Section 7.6(a) of the Skyline Operating Agreement, which provides that "[a]ny Manager or Board Observer may be removed from [the] Board by a written notice to the Company . . . executed by the Member initially designating such Manager or Board Observer." This question was raised below (Op. 6, ¶ G).

2. Standard of Review.

As discussed, "[a] decision granting summary judgment is subject to *de novo* review," *Nw. Nat'l Ins. Co.*, 672 A.2d at 43 (Del. 1996), and "[t]he interpretation of contract language is reviewed by [the Supreme] Court *de novo*." *Sonitrol Hldg. Co.*, 607 A.2d at 1181. Here, because the Court of Chancery did not address the issue of whether Holdings could remove Roccia from the Skyline Board, instead assuming for purposes of its Summary Judgment Order that it did, Mugica addresses the issue—one of contract interpretation—in a separate section and respectfully requests that the Court decide the issue in the first instance. *See Telxon Corp. v. Meyerson*, 802 A.2d 257, 263 (Del. 2002) (holding that an issue raised in the complaint and "briefed in the trial court" was "fairly presented to that court and thus properly a

subject of appeal" even where "it was not addressed by the trial court in its decision").

3. Merits of Argument.

a. Holdings Has the Right to Remove Roccia as a Skyline Board Manager.

(i) Section 7.6(a) Vests Members with the Right to Remove Any Manager.

The Skyline Operating Agreement unambiguously allows Holdings to remove any manager it appoints to the Skyline Board, including Roccia. Holdings' right to appoint and remove managers to the Skyline Board is governed by Sections 7.1 and 7.6 of the Skyline Operating Agreement. Section 7.1 charges the members—Windpower and Holdings—with appointing managers of Skyline, and Section 7.6(a) charges the members with removing managers. Section 7.6(a) provides, in pertinent part:

> ***Any*** Manager or Board Observer may be removed from ***any*** Board by a written notice to the Company or applicable Series (as applicable) executed by the Member initially designating such Manager or Board Observer[.]

A306, § 7.6(a) (emphasis added). The right to appoint and remove managers is consistent with Delaware law, which traditionally vests stockholders/members with the authority to appoint and remove members of a company's board of directors. *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1126 (Del. 2003) ("The

stockholders' power is the right to vote on specific matters, in particular, in an election of directors.").

Here, Roccia was a manager serving on the Skyline Board, and Holdings was the member that initially designated Roccia as a manager. Therefore, the plain language of Section 7.6(a) vests Holdings with the right to remove Roccia from his position as a manager of Skyline.

(ii) Roccia's Position as Chairman Does Not Affect Holdings' Right to Remove Him.

Roccia's status as Chairman of the Skyline Board did not impede upon Holdings' right to remove him as a manager. Section 7.2 of the Skyline Operating Agreement provides that "[p]rior to the third (3rd) anniversary of the Effective Date, Lorenzo Roccia shall not be removed as the Chairman of any Board except for cause . . . upon unanimous vote of the Managers with respect to such Board (excluding the Chairman of such Board)." A304, § 7.2(a). The "Effective Date" is February 23, 2018. A258.[9] Roccia reads the word "shall" to suggest that he cannot be removed as a manager unless he is first removed as Chairman, which had to occur by unanimous consent from the Skyline Board.

Roccia's interpretation improperly ignores the remainder of Section 7.2 and other key provisions of the Skyline Operating Agreement. When construed as a

[9] It is undisputed that Roccia was removed before the Effective Date.

whole and effect is given to all provisions, the Skyline Operating Agreement makes clear that Roccia's position as the *Chairman* is separate and distinct from his status as a *manager*—and, in order to be the Chairman, Roccia must be a manager in the first instance. *Salamone*, 106 A.3d at 368 (quoting *GMG Cap. Inv.*, 36 A.3d at 779) (when interpreting a contract, the court's aim is to "give priority to the parties' intentions" and "construe the agreement as a whole and giving effect to all its provisions").

First, Section 7.2 also uses the directive "shall," stating that the Chairman "*shall* be a Manager serving on [the] Board." A304, § 7.2(a) (emphasis added). And Section 7.6(a) of the Skyline Operating Agreement holds that "[a]ny Manager or Board Observer may be removed from any Board by a written notice to the Company or applicable Series (as applicable) executed by the Member initially designating such Manager or Board Observer." A306, § 7.6(a). Moreover, the Chairman's role is simply to "preside over all meetings of [the] Board." *Id.* By contrast, a manager is defined as "a voting member of [the] Board." A272. When a contract uses different words in two clauses, "it must be presumed different meanings are intended." *Lukk v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 4247767, at *4 (Del. Super. Ct. Aug. 29, 2014). That these roles are different is further demonstrated by the fact that Section 7.1 charges the members—Windpower and Holdings—with

appointing managers, whereas Section 7.2(a) charges the Skyline Board with appointing a Chairman. A303, § 7.1(e), (f).

Furthermore, conditioning Holdings' removal rights on Roccia's removal as Chairman would improperly require the Court to rewrite the agreement to include language that is decidedly absent and would contravene well-established Delaware law. Specifically, it would require Holdings first to receive authority from the Skyline Board before exercising its right under Section 7.6(a) to remove "any" Holdings-appointed manager from the Skyline Board, a precondition found nowhere in the Skyline Operating Agreement. The Court should not rewrite the agreement to include a condition that does not exist in the language of the agreement as written.[10] *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 350 (Del. 2020) ("Implying terms that the parties did not expressly include [in a contract] risks upsetting the economic balance of rights and obligations that the contracting parties bargained for in their agreement.").

Finally, under Delaware corporate law, the power to appoint and remove directors is vested in stockholders, not the board. *See Ross Sys. Corp. v. Ross*, 1993 WL 49778, at *17 (Del. Ch. Feb. 22, 1993) ("The only persons empowered to

[10] This is unlike Section 7.2(a), which expressly conditions the Chairman position on being a manager in the first place.

remove a director are the corporation's shareholders."). Yet if Roccia's removal as a manager were conditioned on his removal as Chairman, the Skyline Board, as opposed to the member who appointed him, would have ultimate authority on the removal of Roccia, a fellow board member, running directly counter to Section 7.6(a)'s plain language, which vests the right to remove a manager in the member that appointed him, and well-established Delaware corporate law.

Therefore, Section 7.2(a)'s discussion of Roccia's removal "as the Chairman" says nothing about Holdings' right to remove him as a manager. That authority is found in Section 7.6(a), which states that Holdings can remove *any* manager that it appointed to the Skyline Board. Further, because the Chairman must "be a Manager serving on such Board," Holding's decision to remove Roccia as a manager disqualified him to serve as the Chairman, irrespective of whether Roccia was first removed as Chairman by the Skyline Board.[11]

[11] To the extent there is any ambiguity about the difference between these two terms, the extrinsic evidence also supports this interpretation. Roccia was concerned over Windpower's ability to remove him as Chairman because Windpower controls three of the five seats on the Skyline Board. *See* A354 ("Clarify Ardian [Windpower] cannot remove Lorenzo without cause during initial 3 year term."). Thus, he demanded that he not be removed as Chairman except for cause and by a unanimous vote of the board. Windpower agreed to this arrangement for the first three years. Had Roccia been concerned with Holdings' ability to remove him as a manager, he could have attempted to include a similar provision in Section 7.6(a)—but he did not. Instead, Section 7.6(a) allows Holdings to remove any manager simply by providing written notice.

CONCLUSION

For the foregoing reasons, Mugica and Ultiner respectfully submit that this Court should reverse the order of the Court of Chancery granting Roccia and TGP's motion for summary judgment. Instead, Mugica and Ultiner respectfully request that the Court direct entry of an order for summary judgment in their favor declaring that (1) Mugica had the authority to exercise Holdings' removal rights to remove Roccia from the Skyline Board, and (2) Holdings had the right to remove Roccia from the Skyline Board. Because Mugica is entitled to summary judgment on these matters, the Court should also reverse the award of fees and costs to Roccia and TGP entered by the Court of Chancery and award Mugica and Ultiner costs and fees as the prevailing parties pursuant to Section 15.15 of the Holdings Operating Agreement.

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