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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' CORRECTED REPLY BRIEF

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INTRODUCTION

Plaintiffs do not dispute the three dispositive facts necessary to decide this case: (1) Holdings is a holding company that oversees its ownership interest in its affiliate, Skyline; (2) Holdings does so by appointing representatives to the Skyline Board to vote its interests; and (3) Martin Mugica, as President and CEO of Holdings, has "paramount and full" authority over Holdings' "business and operations." These facts confirm that Mugica had authority to exercise Holdings' right to remove its representatives, including plaintiff Lorenzo Roccia, from the Skyline Board.

In their Answering Brief, Plaintiffs obfuscate, offering a laundry list of arguments that are belied by the parties' agreements and corporate law analogies that only prove Defendants' points. Plaintiffs start by asking the Court to ignore Defendants' argument that Holdings is a *holding company* and, therefore, its "business" is to oversee and manage its ownership interest in its affiliate, Skyline. This is an important point because Mugica's "paramount and full" control over "the business" of a *holding company* like Holdings must necessarily include the authority to exercise Holdings' right to appoint and remove representatives to and from Skyline's Board.

Plaintiffs wrongly contend that Defendants did not "fairly raise" this argument below. Defendants have always argued that, as an *owner* or *member* of Skyline,

Holdings has the right to appoint and remove its representatives to the Skyline Board, and that Mugica, with "paramount and full" authority over Holdings, may exercise this ownership right. While Defendants may not have "affirmatively state[ed] or note[d] that Holdings is a *holding company*" (Ans. Br. at 27, emphasis added) in its briefs below, the *title* is irrelevant. Whether Holdings is considered a "member," a "shareholder," a "holding company," or a simple "owner," the point is the same: Holdings' principal objective is to ensure the best possible outcome over its investment in Skyline and it does this, in part, through its representatives on the Skyline Board. Defendants raised the issue below.

Plaintiffs also focus on the fact that the broad authority delegated to Mugica was "[s]ubject to the ultimate control of the [Holdings] Board." Here, the "subject to the ultimate control" language means that the Board may *overturn* decisions of Mugica. But the relevant question is not whether the Board may reverse Mugica or if it *also* has the appointment/removal right, but whether Mugica was given the authority to make the appointment/removal decision *in the first place*. He was. This is amply reflected by the fact that Mugica's Employment Agreement not only gave him "paramount and full" authority over Holdings, but it listed 10 specific actions for which he must seek Board *pre-approval*. Appointing and removing representatives on an affiliate's board is *not* on the Board pre-approval list. Mugica was authorized to vote Holdings' interest in Skyline.

The Court should also reject Plaintiffs' argument—not adopted by the Court of Chancery—that the Holdings Operating Agreement and the Employment Agreement needed *expressly* to state that Mugica had the authority to appoint and remove representatives to and from an affiliate's board. No operating or employment agreement should be expected to list every single act that an officer may or may not take. Here, "paramount and full" authority over Holdings necessarily encompasses exercising Holdings' appointment and removal rights in an affiliate.

Plaintiffs' argument that the parties were supposed to have "equal" power in their venture also misses the mark. By design, Mugica was given "paramount and full" authority over ***Holdings***, which was the entity that was going to be most closely tied to the renewable energy assets. Mugica insisted upon and was granted this broad authority because of his experience and expertise in managing such assets. Roccia, on the other hand, was given the exact same "paramount and full" authority, ***but over a different jointly owned entity***, TPFM, which was supposed to be the entity that raised funds for the venture. Roccia insisted upon and was given this broad authority because of his purported fundraising expertise. Thus, Mugica was the designated decisionmaker for Holdings, and Roccia was the designated decisionmaker for TPFM. In this sense, there was in fact an "equal ***division***" (*id.* at 2, emphasis added) of power, but it was not within Holdings. Instead, Mugica was given full authority

over one part of the venture—Holdings—while Roccia was given full authority over the other part of the venture—TPFM.

With respect to the issue *not* decided by the Court of Chancery—*i.e.*, whether *Holdings* could remove Roccia from the Skyline Board under the Skyline Operating Agreement—Plaintiffs conflate Roccia's position as a manager with his role as the Skyline Board's Chairman. They are separate roles, and the Skyline Operating Agreement states that being a manager in Skyline is a prerequisite to holding the "Chairman" title. While the Skyline Board could not remove Roccia from his role as ***Chairman*** of the Board absent cause and a unanimous vote, the Skyline Operating Agreement makes clear that Holdings had the unfettered right to remove Roccia from his position as a ***manager*** at any time.

For these reasons, as detailed below, and in Appellants' Opening Brief, the Court should reverse the Court of Chancery's judgment and direct entry of summary judgment in favor of Defendants.

ARGUMENT

A. MUGICA HAD THE AUTHORITY TO EXERCISE HOLDINGS' REMOVAL RIGHTS.

1. The Argument That Mugica Was Exercising Holdings' Interests as a Member in Skyline Was Raised Before the Court of Chancery.

Holdings indisputably carries out its business objectives by overseeing and managing its investment in Skyline. It does this through, among other things, its two representatives on the five-member Skyline Board. Mugica, as CEO of Holdings, believed that Roccia was failing in his role as a Holdings representative on the Skyline Board. Specifically, and contrary to Plaintiffs' argument that Roccia's presence on the Skyline Board "present[ed] no obstacle" to Skyline or Holdings (Ans. Br. at 22), Roccia's presence on the Skyline Board allowed him to block certain actions that would require the Skyline Board Managers' unanimous consent, including a planned $800 million investment from Ardian. To prevent Roccia from further damaging Holdings' interest in Skyline, Mugica, pursuant to (a) Section 7.6 of the Skyline Operating Agreement—which allows Holdings to remove any of its Skyline Board representatives, and (b) his "paramount and full" authority over "the business" of Holdings, removed Roccia from the Skyline Board.

Rather than directly address the merits of Defendants' position that "the business" of a holding company like Holdings includes exercising appointment and removal rights in an affiliate, Plaintiffs deflect and argue (incorrectly) that

Defendants did not "affirmatively state or note [below] that Holdings is a holding company or mention any implications of its status as one." *Id.* at 27. This argument is specious for several reasons.

First, Defendants raised the issue below. For example, in their summary judgment briefs, Defendants presented the issue as whether Mugica was entitled to exercise Holdings' ownership right in Skyline. *See, e.g.*, A47-49; A69-70; A598; A610. During oral argument before the Court of Chancery, counsel for Defendants was also clear on this point:

> This is simply . . . a shareholder exercising its interests. And Mr. Mugica gets to exercise [this] interest as per these agreements.
>
> ***
>
> [T]his is a member exercising its interests in Skyline. And Mugica, as the decision-maker at [Holdings], gets to make that decision.

A710; A713. Defendants' fundamental argument has never wavered: *Holdings is an owner, and Roccia's removal was the exercise of Holdings' ownership right.*

Second, both parties acknowledged that Holdings is a "holding company" by outlining in detail the ownership structure of the various entities, highlighting that Holdings invested in renewable energy assets indirectly through Skyline (*i.e.*, that it is a holding company). *See* A40-41; A82; A559; B39. This fact was not lost on the Court of Chancery, which noted that "Holdings is, broadly speaking, a holding company." Op. 15, ¶ 8 n.56.

Third, even if Defendants did not "affirmatively state that Holdings is a holding company" in its briefs below, that is irrelevant. Whether called a "member," a "shareholder," an "owner," or a "holding company," Holdings' "business" and its principal purpose is to oversee its ownership interest in Skyline, a fact that cannot reasonably be disputed.

Fourth, at the very least, this point—that "the business" of a holding company is to oversee its investments—is an "additional reason in support of a proposition urged [by Defendants] below" and may therefore be considered by this Court.[1] *Kerbs v. Cal. E. Airways, Inc.*, 90 A.2d 652, 659 (Del. 1952) (while court "will not permit a litigant to raise in this court for the first time matters not argued below where to do so would be to raise an entirely new theory of [the] case, . . . when the argument is merely an additional reason in support of a proposition urged below," the argument may be considered); *Mundy v. Holden*, 204 A.2d 83, 87 (Del. 1964) (same). Indeed, before the Court of Chancery, Defendants argued, exactly as they do here, that Mugica had the right to remove Roccia pursuant to his "paramount and

[1] Unlike the Court of Chancery in its opinion, neither party in their briefs below focused on the meaning of the terms "business" and "operations" in Mugica's Employment Agreement. Defendants do *not* take issue with the Court of Chancery's interpretation of "business" as the "commercial enterprise" of an entity. Op. 15-16, ¶¶ 9-10. Defendants *do* take issue with the Court of Chancery's failure to recognize that the "commercial enterprise" of a holding company, or an owner like Holdings, is to oversee and protect its investments through, among other things, exercising its ownership rights to appoint and remove representatives to and from an affiliate's board.

full responsibility and power" as Holdings' President and CEO. Accordingly, even if the precise reason for upholding Mugica's actions was not raised (it was), Defendants' theory of the case—including the contractual provision from which Defendants argue Mugica's power derives—has remained consistent.

The Court should not ignore the point that "the business" of a holding company/member like Holdings is to oversee and manage its investments through the exercise of its ownership rights.

2. Mugica's Powers Were Not Limited to "Operational" Matters Usually or Typically Vested in a CEO.

Plaintiffs argue that Mugica's powers were limited to "operational matters" typically vested in a corporation's president and that the Holdings Board had plenary authority over the business. Ans. Br. at 30. This fundamentally misreads the relevant agreements.[2] First, the Employment Agreement specifically provides that Mugica has paramount and full responsibility and power over the company's "business *and* operations." A255 (emphasis added). Limiting Mugica's authority to operational matters would improperly render the explicit grant of authority over Holdings' "business" superfluous. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010). Moreover, the Employment Agreement distinguishes

[2] Even if Plaintiffs' are correct that Mugica was only delegated "operational" authority, as Defendants have noted, the "operations" of a holding company include appointing and removing representatives to and from an affiliate's board.

between Mugica's paramount and full responsibility and power over "business and operations" and his "general powers" as president and chief executive. A255. As such, these delegations of power have different meanings.

Further supporting this interpretation, Exhibit A to the Employment Agreement provides that Mugica may *not* take certain actions without pre-approval from the Board. A255. Plaintiffs argue that this enumerated list is simply a limitation on the *operational* authority that the Holdings Board granted Mugica. Yet the list includes a wide variety of actions far beyond day-to-day "operational actions" that go to the very existence of the business itself, including changing the nature of the business, selling the business, or dissolving it. *Id.* If Mugica's powers were limited to overseeing "operational" activities, there would have been no need explicitly to prohibit him from unilaterally exercising such *non*-operational powers.

3. The Fact That Mugica's Broad Powers Are "Subject to the Ultimate Control" of the Holdings Board Does Not Mean That Mugica Was Not Authorized to Exercise Holdings' Removal Rights.

Plaintiffs rely heavily on the language in Mugica's Employment Agreement that his delegated powers are "[s]ubject to the ultimate control of the Board." Ans. Br. at 18-20. Defendants do not dispute that this language provides the Holdings Board with "ultimate" authority. But the question is what that means *in the context of the specific agreements at issue*. The "subject to" language means that the Board has "ultimate authority" to *overrule* any decision Mugica makes. *See* Opening Br.

at 2. But the fact that the Holdings' Board may *overrule* Mugica says nothing about whether Mugica was delegated a power in the first instance. Here, the only reasonable interpretation of the Employment Agreement—especially in light of its structure requiring Board pre-approval for only specifically listed items—is that Mugica's "paramount and full" authority over Holdings included the authority to exercise its removal rights in Holdings, "subject to" the Board's authority to overturn that decision.

4. Defendants' Interpretation Does Not Render the Holdings Board "Powerless."

Defendants' interpretation of Mugica's authority as President and CEO would not, as Plaintiffs argue, render the Holdings Board "powerless." Ans. Br. at 24. Indeed, Defendants do not contend that Mugica has absolute authority over everything at Holdings; in fact, Defendants concede that *every decision Mugica makes* is subject to the Holdings Board's ultimate control, and that there are several actions for which Mugica must receive pre-approval from the Holdings Board before taking, such as whether to dissolve or sell the company. A255.

Nor is it correct—as Plaintiffs argue—that the Holdings Board could never overrule Mugica because there would always be an "impasse at the Holdings Board" whenever Roccia and Mugica had a disagreement. *Id.* Holdings has four board members: (1) Mugica, (2) Roccia, (3) a Mugica appointee, and (4) a Roccia appointee. To borrow Plaintiffs' term, it is "disingenuous" to argue that the two

additional board members would ignore their duties and blindly support whichever member appointed them whenever Roccia and Mugica disagreed on an issue. *Id.* And to the extent that the Holdings Board's structure would at times cause an "impasse"—like the current situation—this is how the parties agreed to structure this particular LLC, which of course is a "creature[] of contract." *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 880 (Del. Ch. 2009).

5. Plaintiffs' Reliance on Mugica's Authority Involving Appointment and Removal of Holdings' *Officers* Only Proves Defendants' Point.

In their effort to distract from the specific question before the Court, Plaintiffs also attempt to conflate (a) Mugica's right to appoint officers at the Holdings level with (b) Mugica's right to exercise Holdings' removal rights on the Skyline Board. Ans. Br. at 20-21. Specifically, Plaintiffs argue that Mugica could not have had the right to exercise Holdings' removal rights on the Skyline Board because he could not appoint officers at the Holdings level without Holdings' Board approval. *Id.* This argument fails for multiple reasons.

First, the question before the Court is whether exercising Holdings' removal rights on the *Skyline Board* is part of Holdings' "business and operations" and therefore falls within Mugica's "paramount and full authority." Appointing officers at the Holdings level is an entirely separate power delegated to Mugica in the Operating Agreement. A183-84, § 8.09.

Second, Plaintiffs are simply wrong in concluding that Mugica required Holdings' Board approval before appointing officers at the Holdings level. Section 8.09 of the Holdings Operating Agreement states that Mugica "may propose individuals as officers of the Company as it deems necessary or desirable to carry on the business of the Company; and the Board ***shall*** approve such appointments," indicating that the Holdings Board has no discretion in whom Mugica chooses to appoint as an officer. A183-84, § 8.09 (emphasis added). Moreover, Section 8.09 also states that Mugica may ***remove*** any Officer "with or without Cause at any time." *Id.* (emphasis added). He does ***not*** need Board approval to do so. *Id.*

Third, at the Skyline level, the Management Services Agreement also allows Mugica to hire and fire officers ***without*** board approval. Section 2.4(b)(i) states:

> "Martin Mugica, as President and Chief Executive Officer shall be reasonable . . . (B) to lead and oversee the implementation of the Company Group's long- and short-term plans in accordance with its strategy, including overseeing sourcing, development and financing of New Projects and ***hiring and firing of all members of the management team***; (C) to seek to ensure the Company Group is appropriately organized ***and to have the authority to hire and terminate officers, agents, consultants or Outside Advisors as necessary to enable to Company Group to achieve the approved strategy***."

A373 (emphasis added).

Thus, Plaintiffs' analogy only proves Defendants' argument. Specifically, if the Court looks to Mugica's authority to remove officers—at either the Holdings or

Skyline level—to determine whether he has authority to remove Roccia from the Skyline Board, Mugica's broad authority to remove officers without Board approval should compel a conclusion that he also has authority to remove Holdings' representatives from the Skyline Board.

6. Mugica and Roccia Do Not Have "Equal Governance Rights" *in Holdings*.

Plaintiffs argue that the language describing Roccia's authority as Chairman of Holdings is a "mirror image" of the language granting Mugica authority as President and CEO of Holdings. Ans. Br. at 20-22. Plaintiffs further argue that this demonstrates an intent to create "equal governance rights" between Mugica and Roccia, and removing Roccia from the Skyline Board is inconsistent with such equal rights. *Id.*

Plaintiffs badly misread the Holdings Operating Agreement. Section 8.09 of the Holdings Operating Agreement states that, as Chairman, Roccia "shall have paramount and full responsibility and power for the general supervision, direction and control ***of meetings of the Board*** and shall have all of the general powers usually or typically vested in the office of chairman of the board of a corporation." A183 (emphasis added). Conversely, that same section provides that, as President and CEO, Mugica "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 the president of a corporation[.]" *Id.* (emphasis added).

This is not a "mirror image." Ans. Br. at 21. Mugica, as President and CEO of Holdings, has "paramount and full responsibility" over ***"the business,"*** and Roccia, as Chairman of the Board, merely has "paramount and full responsibility" over ***"meetings of the Board."*** Roccia may now regret this power distribution, but this was the agreement. *See Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (A 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 contracts, the law enforces both.").

7. The Parties' "Division of Power" Was Between Holdings and TPFM.

Plaintiffs' broader argument that "the division of power between [Roccia and Mugica] is equal" (Ans. Br. at 2) similarly misses the mark. The "division of power" between the parties—from the very outset—was that Mugica would have "paramount and full" authority over ***Holdings***, which was the entity directly tied to the renewable energy assets ultimately purchased, and that Roccia would have the *exact same* "paramount and full" authority over ***Transatlantic Power Fund Management, LLC***, which was the entity designed to raise funds in the venture. *See* A255; A407; A410.

This "division" was chosen by the parties because Mugica had expertise in

managing renewable energy assets and Roccia purportedly had expertise in fundraising. *See* A91, ¶¶ 8-9. Just as Mugica's "paramount and full" authority over Holdings entitles him to appoint and remove representatives in a ***Holdings*** affiliate, Roccia's "paramount and full" authority over TPFM entitles him to appoint and remove representatives in a ***TPFM*** affiliate. Both grants of power are "subject to" the ultimate authority of the Holdings Board (*see* A255; A410), but there can be no dispute that each party was granted this broad decision-making power in the first instance. In this sense, there was in fact an "equal division of power," but it was not *within* Holdings, but *between* Holdings and TPFM.

8. Roccia's Removal Was Not a Matter of "Corporate Governance."

Plaintiffs' argument that Mugica's "paramount and full responsibility and power" over Holdings' business and operations does not extend to decisions concerning "corporate governance" is another red herring. Ans. Br. at 4, 20. Roccia's removal from *Skyline* did not involve *Holdings'* governance. Instead, because Holdings' conducts its "business" through its ownership interest and management of Skyline, Roccia's removal from the Skyline Board related directly to Holdings' "business and operations."

9. Plaintiffs' Corporate Law Analogy Only Proves Defendants' Point.

Plaintiffs emphasize that, under Delaware corporate law, only a stockholder is entitled to remove a board director: '"The only persons empowered to remove a

director are the corporation's shareholders."' *Id.* at 31 (quoting *Ross Sys. Corp. v. Ross*, 1993 WL 49778, at 17 (Del. Ch. Feb. 22, 1993)). While Holdings is an LLC, Plaintiffs' corporate analogy only proves Defendants' point. Holdings is a "stockholder" (*i.e.*, member) of Skyline and exercised its "stockholder" right to remove Roccia from the Skyline Board. Roccia cites no authority to suggest that when the "stockholder" is a company, its President and CEO cannot exercise that "stockholder" right.

In any case, the starting and end points in LLC governance disputes are the contract, and the Court's role is simply to "interpret [the] contract [and] effectuate the parties' intent." *A & J Capital, 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)). Here, Mugica's Employment Agreement—and the Holdings' Operating Agreement—grants Mugica "paramount and full" power over the company's "business and operations." Holdings' "business and operations" includes exercising its removal rights on the Skyline Board. Thus, Mugica had the right to remove Roccia.

10. Roccia's Removal Was Made Pursuant to Mugica's Powers over Holdings' Business and Operations, Not His Powers over Personnel Decisions.

Plaintiffs argue that when the parties intended to give Mugica power over specific individuals, they did so expressly by granting him "paramount and full" authority and power over "the Officers and employees of the company," which does not include designees to Holdings' affiliates' boards. Ans. Br. at 20. Removing Roccia was not, however, a personnel decision that fell under Mugica's powers over Holdings' officers and employees. Instead, it was a business and operational decision—exercising the company's membership rights—based on Mugica's belief that Roccia was failing to protect Holdings' interest in Skyline and acting as an impediment to achieving needed investment in the business. Mugica's powers over the company's "business and operations" are distinct from his powers over Holdings' officers and employees. *See* A255 ("[T]he 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" (emphasis added)).

Moreover, while Mugica's Employment Agreement does not specifically identify exercising Holdings' removal rights as a business or operational matter, the Employment Agreement cannot be expected to spell out each action that falls under "business and operations." Instead, the question is whether it falls under the

generally accepted meaning of the phrase "business and operations." *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 824 (Del. 1992) ("When construing a contract, and unless a contrary intent appears, we will give words their ordinary meaning."). The Court of Chancery defined "business" and "operations" to mean the "commercial enterprise and activities" of the company. Op. 16, ¶ 10. Because Roccia's removal was nothing more than Holdings exercising its right as a member in Skyline—a right that is core to its business as a holding company—Roccia's removal related to Holdings' commercial enterprise and activities.

11. The Manner in Which Holdings Conducts Its Operations Is Essential to Deciding Whether Mugica Could Exercise Holdings' Removal Rights.

Finally, recognizing that they cannot dispute that Holdings operates through Skyline, Plaintiffs argue that it is irrelevant whether Holdings conducts its operations directly or indirectly through Skyline. Ans. Br. at 29-30. But the question is not "semantics," as Plaintiffs argue. *Id.* at 29. Instead, because Mugica has "paramount and full responsibility and power" over Holdings' "business and operations," the question of *how* Holdings operates and the nature of its business is essential to determining whether Mugica had the authority to exercise Holdings' removal rights.

Holdings' removal rights go to the very heart of its "business and operations." The Court of Chancery identified Holdings' business as "'identifying, acquiring . . ., developing, building, operating and managing' renewable energy assets." Op. 15,

¶ 8. Yet as Plaintiffs concede, Holdings does not *directly* identify, acquire, develop, or build any renewable energy assets. Skyline does. *See* Ans. Br. at 29 ("[T]he Holdings Operating Agreement foresees and recognizes that Holdings' renewable operations are *likely* to be carried out through subsidiaries or affiliates."). While Holdings lends management expertise to Skyline through the Management Services Agreement, the Skyline Board has ultimate authority over identifying, acquiring, developing, or building renewable energy assets. The indirect manner in which Holdings operates its business means that Holdings' removal rights are integral to its business and operations.

B. HOLDINGS HAD THE UNFETTERED RIGHT TO REMOVE ROCCIA FROM THE SKYLINE BOARD.

Plaintiffs argue that Holdings could not remove Roccia from the Skyline Board by erroneously conflating Roccia's position as a ***manager*** with his role as the Skyline Board's ***Chairman***. In so doing, Plaintiffs attempt to rip away Holdings' appointment and removal rights and hand them to the Skyline Board.

1. The Skyline Operating Agreement Provides That Holdings Can Remove "Any" Manager That It Appointed to the Skyline Board.

Section 7.6(a) of the Skyline Operating Agreement unambiguously provides:

> ***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). Plaintiffs argue, however, that because Section 7.2 of the Skyline Operating Agreement states that Roccia "shall not be removed as chairman of any board except for cause . . . upon unanimous vote of the board," the Skyline Board, rather than the member who appointed him, must vote unanimously to remove Roccia.

Plaintiffs ignore the fact that Roccia's position as the *Chairman* is separate and distinct from his position as a *manager*, and, in order to be the Chairman, Roccia must be a manager. Indeed, Section 7.2(a) provides that being a manager is a ***prerequisite*** to being the Chairman: "[t]he Chairman of each Board . . . ***shall be a Manager serving on such Board***." (Emphasis added.) Further, the Skyline

Operating Agreement provides that the Chairman's role is simply to "preside over all meetings of [the] Board." By contrast, a manager is "a voting member of [the] Board." When different words—"Chairman" and "Manager"—are used 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 terms 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) merely charges the Skyline Board with appointing a Chairman. Therefore, while Section 7.2(a)'s prohibition on Roccia's removal "as the Chairman" is mandatory, this says nothing about Holdings' ability to remove him as a manager. That authority is found in Section 7.6(a). And Section 7.6(a) holds that Holdings can remove *any* manager that it appointed to the Skyline Board.

Finally, Plaintiffs' reading ignores Plaintiffs' own recitation of Delaware law. As Plaintiffs note in their Answering Brief, "[u]nder Delaware law, even a majority or near-unanimous vote of the board of directors of a Delaware corporation cannot validly remove one of the corporation's directors." Ans. Br. at 31. Instead, Delaware law traditionally vests stockholders/members with the authority to appoint and remove members of a company's board of directors. *See id.*

2. Mugica's Reading of the Skyline Operating Agreement Ensures That All Relevant Provisions Are Given Effect.

Plaintiffs argue that Defendants' reading would render Section 7.2(a)

meaningless, but it is Plaintiffs' interpretation that would render Section 7.6(a) meaningless. Under Section 7.2(a)'s plain language, Roccia could not be removed *as Chairman* for a three-year period absent cause and unanimous Skyline Board approval. But this right to remain as Chairman was conditioned—as expressly set forth in that same section—on Roccia "be[ing] a Manager," a position that is determined exclusively by Holdings. That express condition does not render Roccia's right in Section 7.6(a) "meaningless"—as long as Roccia is a manager, he could not be removed from the Chairman position by the Skyline Board.

Conversely, Roccia's reading would render Section 7.6(a) meaningless because 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. In other words, it would give the Skyline Board—as opposed to Holdings—a veto right in deciding whether Holdings can remove a manager that it appointed to the Board. This conditional right appears nowhere in the Skyline Operating Agreement. Instead, the Operating Agreement states that Holdings can remove "any" manager that it appoints to the Skyline Board. The Court cannot rewrite the agreement to include a condition that does not exist in the language of the agreement as written. *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.").

3. Defendants' Interpretation Does Not Conflict with General Maxims of Contract Interpretation.

Finally, enforcing Holdings' unambiguous right to remove *any* Holdings-appointed manager does not run afoul of the contractual maxim that specific language in a contract controls over conflicting general language. Nor does it run afoul of the maxim directing courts to give specifically negotiated terms greater weight than standardized terms.

It is true that, as a general matter, "[s]pecific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one." *DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005). It is also true that, as a general matter, separately negotiated terms appearing in a contract are generally given greater weight than standardized terms or terms not separately negotiated. *See* Restatement (Second) of Contracts § 203 (1981). But it is equally true that it is "a general rule of contract construction to consider the entire instrument and attempt to reconcile all of its provisions in order to determine the meaning intended to be given to any portion of it." *In re IAC/InterActive Corp.*, 948 A.2d 471, 497 (Del. Ch. 2008) (internal quotation marks and citation omitted). Thus, the canon that the specific controls over the general or that separately negotiated terms are given greater weight only applies where an actual conflict exists and the competing provisions cannot be

reconciled without rendering one meaningless. *See DCV Hldgs.*, 889 A.2d at 961.

Here, there is no conflict. As noted above, "Chairman" and "Manager" have different meanings. *See supra* at 20-21. Further, Section 7.2(a) deals with "meetings of the Boards" and enumerates the duties and initial term of the Chairman, who must be a manager. Sections 7.1 and 7.6(a), on the other hand, deal with the Skyline Board's *creation* through the appointment and removal of managers. When read together and giving effect to each provision, as the Court must, Sections 7.1, 7.2(a), and 7.6(a) act harmoniously: so long as Roccia "*shall* be a Manager" of Skyline—which, under Section 7.6(a), is decided by Holdings and Holdings alone—Roccia shall be the Skyline Board's initial Chairman and shall not be removed "as the Chairman" by the Skyline Board prior to February 23, 2021, absent cause and upon a unanimous vote of the other managers. This interpretation properly reconciles all relevant provisions. Accordingly, Holdings had the right to remove Roccia as a manager from the Skyline Board.

CONCLUSION

For the foregoing reasons and those discussed in Appellants' Opening Brief, Mugica and Ultiner respectfully submit that the Court should reverse the order of the Court of Chancery granting Roccia and TGP's motion for summary judgment, direct entry of an order for summary judgment in favor of Mugica and Ultiner as outlined in the Opening Brief, and award Defendants' costs and fees as the prevailing

parties pursuant to Section 15.15 of the Holdings Operating Agreement.

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Dated: June 24, 2021

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2021, true and correct copies of the foregoing were caused to be served on the following by File & Serve*Xpress* and e-mail:

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