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Case Number 209,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDRE HAKKAK, DARIUS MOZAFFARIAN, BARBARA MCKEE, DAVID HACKETT, and HALLE BENETT, Defendants-Below/Appellants, and WHITE OAK HEALTHCARE FINANCE, LLC, WHITE OAK HEALTHCARE FINANCE DIRECT, LLC, WHITE OAK HEALTHCARE MOB, LLC, WHITE OAK H-ALTERNATIVE, LLC, WHITE OAK HEALTHCARE REAL ESTATE SALE-LEASEBACK, LLC, and WHITE OAK REAL ESTATE DEBT, LP, Nominal Defendants-Below/Appellants, v. ISAAC SOLEIMANI and INE SOLEIMANI LP, Plaintiffs-Below/Appellees.	No. 209, 2024 Court Below: Court of Chancery of the State of Delaware C.A. No. 2023-0948-LWW

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

There is no dispute that if Soleimani's employment was terminated, Section 6.1 of the WOHC LLC Agreements authorized his removal as Manager.[1] The Term Sheet that governed Soleimani's employment expressly provided for the right to terminate Soleimani's employment "at any time" and that any amounts owing respecting a Specified Termination Event were (i) triggered by such termination and (ii) payable after an appraisal proceeding and due only several months after the termination (and potentially indefinitely thereafter). Section 6.1 itself expressly provided that any termination of employment—predicate to removal as Manager—was to be "in accordance with the provisions of the Term Sheet," *i.e.*, Section 6.1 incorporated the terms of the Term Sheet. The Court of Chancery, however, erred in holding that Section 6.1 of the WOHC LLC Agreements required that Soleimani be paid any amounts owing under the Term Sheet upon a "Specified Termination Event" as a condition precedent to the termination of his employment. Appellees' arguments to support the Court of Chancery's Opinion are meritless.

Appellees' contention that Section 6.1 overrides the Term Sheet to create a condition precedent ignores that Section 6.1 incorporates its terms. Moreover,

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[1] Abbreviations not otherwise defined in this Reply Brief have the meanings assigned to them in Appellants' Opening Brief ("OB"). "AB" refers to Appellees' Answering Brief filed on July 26, 2024.

Appellees' interpretation would result in a hopeless circularity: Soleimani would have to be paid before being terminated, but his right to payment is triggered only upon such a termination. Nor is that circularity resolved by the contrivance that a termination might only be "effective" at some later date. There is no notice requirement in the Term Sheet; the right to terminate "at any time" means just that. And a "Specified Termination Event" is defined as the "occurrence" of "termination of Employee's employment by WOHCF," ***not*** upon some notice of termination. At most, the provision was ambiguous, and parol evidence required the resolution of any ambiguity in Appellants' favor, an issue that was explicitly raised below.

Moreover, even if Appellees' interpretation of Section 6.1 were to control (*quod non*), there were no amounts owing respecting a Specified Termination Event because Soleimani's employment was terminated for Cause. The detailed payment provisions of the Term Sheet make clear that no such amounts are payable in that scenario, and again, the parol evidence on that point required resolution of any ambiguity in Appellants' favor, as explicitly raised below.

Finally, Appellees ask this Court to simply overlook the unresolved genuine factual issue of whether the HVE Revenue Sharing Interests had a non-zero value, which independently required denial of their motion for summary judgment.

ARGUMENT

I. PAYMENT OF THE CALCULATED FAIR MARKET VALUE OF THE HVE REVENUE SHARING INTERESTS IS NOT A CONDITION PRECEDENT TO SOLEIMANI'S REMOVAL AS AN EMPLOYEE AND THEN CONSEQUENTLY AS MANAGER.

A. Section 6.1 and the Term Sheet Unambiguously Provide that Soleimani May Be Removed as an Employee at Any Time.

1. The Plain Language of Section 6.1 Incorporates the Term Sheet Which Expressly Provides for Payment After Any Termination of Employment.

Appellees do ***not*** dispute that Section 6.1 of the WOHC LLC Agreements authorizes the Approval Committee to remove Soleimani as Manager once his ***employment*** with WOHCF has been terminated. (*See, e.g.*, OB 19–20; AB 21, 24.) Their entire argument respecting the operation of Section 6.1 hinges on the facially flawed notion that Section 6.1 modifies the Term Sheet to require payment of the Calculated Fair Market Value of the HVE Revenue Sharing Interests (if any) as a condition precedent to the termination of Soleimani's ***employment***. (*See* AB 21, 24, 28.) Their argument is facially flawed because (i) the plain language of Section 6.1 expressly incorporates the terms of the Term Sheet ***three*** times in the one sentence in dispute; and (ii) the Term Sheet expressly provides that the obligation to pay any such amounts is triggered ***by*** a termination, *i.e.*, a termination ***precedes*** the obligation. (*See* OB 28.)

Appellees' Answering Brief merely glosses over the language incorporating the Term Sheet (*see* AB 24–25), but Section 6.1 itself specifically provides that Soleimani's removal as employee is governed by the terms in the Term Sheet:

> Mr. Soleimani may be removed by the Company ***as an employee in accordance with the provisions of the Term Sheet***, provided that the Company has satisfied its obligations under the Term Sheet relating to a Specified Termination Event (as defined in the Term Sheet).

(A72; A129; A186; A239; A298 (emphasis added).) And the Term Sheet provides that the Employer "has the right to terminate Employee's employment ***at any time***." (A388 (emphasis added).)

To this critical point, Soleimani merely suggests that "[h]ad the parties agreed to a future payment following an effective termination, they could have easily drafted language [in Section 6.1] using the future tense to indicate an action to be completed." (AB 24.) But that is exactly what the parties did in the detailed provisions of the Term Sheet that Section 6.1 references and incorporates (the relevant Amended Term Sheet was executed the same day as the operative version of the WOHCF LLC Agreement). Specifically, the Term Sheet expressly provides that Soleimani is to be paid the Calculated Fair Market Value of his HVE Revenue Sharing Interests "[i]f [Soleimani's] employment ***is terminated*** due to a Specified Termination Event." (A423 (emphasis added).) And a "Specified Termination Event" is defined as the "occurrence" of "termination of Employee's employment

by WOHCF…." (A385.) The Term Sheet also states that "[u]pon the ***occurrence*** of a Specified Termination Event, Employee shall receive the Calculated Fair Market Value of all his HVE Revenue Sharing Interests ***no later than*** the Specified Payment Date." (A385 (emphasis added).) In other words, the Term Sheet makes clear that the payment obligation is triggered only when a termination actually happens, *i.e.*, logically, the termination precedes the payment obligation. In addition, the Term Sheet (i) provides that any such obligation is then subject to an appraisal process, which takes time to complete; and (ii) expressly defines the "Specified Payment Date"—*i.e.*, the deadline for payment—to be three to six months "***after*** the date of the Specified Termination Event," *i.e.*, the termination of employment. (A385 (emphasis added).)

Appellees (and the Opinion below) try to address these explicit textual provisions by urging that there purportedly is "no conflict" between the right to "terminate at any time" and a conditional right to end Soleimani's employment only at some later date, *i.e.*, for the termination to "become effective" after payment. (AB 27, quoting Op. 16.) As Appellees try to finesse it: "it is common for employment agreements to permit immediate termination with delayed effectiveness, such as satisfying a notice provision." (AB 27.) This makes no sense. To begin with, the Term Sheet expressly provides that no notice is required; the right to terminate "at any time" means just that. Moreover, as a general matter, when a contract provides

for a termination on notice—which the Term Sheet does not—the termination occurs after the notice period runs; a "notice of termination"—*i.e.*, a termination to occur at some future date—necessarily happens ***before*** that termination.[2] Here, a "Specified Termination Event" is defined as the "occurrence" of "termination of Employee's employment by WOHCF…," ***not*** some notice of termination (not anywhere provided for).

Appellees also unsuccessfully try to avoid the import of the various payment provisions in the Term Sheet by suggesting that payment somehow could precede or occur simultaneously with termination. They argue that "Appellants could have conducted the necessary appraisal beforehand and paid Soleimani the value of his equity interest simultaneously with the Specified Termination Event." (AB 29.) But any appraisal is to determine the Calculated Fair Market Value ***as of*** the termination date. The expert cannot possibly appraise the value those interests will have on some future date (whether or not specified). Further, because any appraisal must be conducted by an appraiser selected by Soleimani and WOHCF, Appellee's

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[2] Appellees' analogy to the purchase of a "vehicle through a loan with installment payments" (AB 28)—although far afield—ironically makes this exact point. In that hypothetical, as Appellees note (*id*.), the purchase occurs and there is an outstanding payment obligation. Here, the termination occurred, and (Soleimani contends, *but see infra*) there is an outstanding payment obligation. Ownership of the vehicle transfers on purchase, not later when the last loan payment is made; there is not some later "effective date" of the purchase.

(impossible) contrivance is simply to require notice of termination by other means. Relatedly, Appellees' suggestion that the Specified Payment Date only sets a deadline but does not "require" later payment (AB 28), ignores that these deadlines accommodate the contractual requirement of an appraisal, which necessarily takes time ***after*** the occurrence of any termination. The post-termination deadlines therefore reflect the parties' understanding that any payment will occur sometime ***after*** Soleimani's employment is terminated, as the definition of Specified Termination Date expressly states.

Ultimately, Appellees' textual argument boils down to construing four words in Section 6.1—"provided that . . . has satisfied"—in a manner that eviscerates the termination and payment procedures detailed in the Term Sheet. Appellees insist that this reading is necessary because the words "provided that" signal a condition precedent. (AB 21.) But as discussed in Appellants' Opening Brief, a "provided that" proviso can have several meanings and does not unambiguously signal a condition precedent. (OB 29–30.) Appellees effectively acknowledge as much and merely respond that it *can*.[3] (AB 26.) That a proviso ***can*** signal a condition

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[3] Appellees misconstrue Appellants' argument to mean that "just because provisos do not *always* create conditions that *must* be the case here." (AB 26 (emphasis in original).) The point, rather, was that those words in isolation have no definite meaning; they must be read in the context of the rest of the text.

precedent does not mean that it ***must***. And here, the textual context discussed *supra* and in the Opening Brief—including the extensive provisions of the Term Sheet that Section 6.1 expressly incorporates—makes any "condition precedent" reading untenable. The same is true for Appellants' stress on the past tense phrasing "has satisfied" (AB 22–23, 26), which simply makes no sense of the rest of the contractual language.

Appellants' interpretation also would lead to various absurd results, including that WOHCF could not "effect" Soleimani's termination for many months—even in cases of gross malfeasance. This is because (as noted) any payment obligation is subject to an appraisal process, which necessarily takes time after termination. The circumstances of Soleimani's termination demonstrate the absurdity of this result. This litigation began when WOHCF attempted to terminate Soleimani for Cause for various breaches of fiduciary duties and other bad acts. These included seeking to sell the business on terms that would harm WOHCF's investors but benefit Soleimani personally and conducting this *ultra vires* sales process (and other improper acts) on his personal e-mail to avoid detection. (A1154–55.) Despite these bad acts, WOHCF remains yoked to this faithless employee and Manager by virtue of the decision below.

Even more absurdly, under the reading advanced by Appellees and the Opinion below, Soleimani could perhaps prevent WOHCF from effecting his termination in perpetuity. The Term Sheet expressly provides that:

> Prior to receiving any consideration for a Company Sale or a Specified Termination Event, ***any debt*** of the applicable HVE incurred in the ordinary course and which is outstanding ***would need to first be paid off*** . . .

(A421 (emphasis added).) The HVEs are, by design, businesses that use debt financing to fund loans to third parties; the payment of ***any*** debt may not be feasible absent some winding down of the business or other extraordinary transaction (and Soleimani as Manager could act to forestall any such occurrence), effectively leaving Soleimani in place indefinitely on Appellees' reading of Section 6.1.

Appellees argue that this requirement does not apply because it is found in the definition of "Net Fair Market Value," whereas Soleimani is entitled to receive the "Calculated Fair Market Value" of his HVE Revenue Sharing Interests in a Specified Termination Event. (AB 31.) This is incorrect. The debt repayment clause in the definition of "Net Fair Market Value" expressly refers to a "Specified Termination Event." The reference to "Specified Termination Event" can only mean what it plainly states, *i.e.*, that any debt must be paid off before Soleimani can receive a payout relating to a Specified Termination Event. Indeed, it is the very next sentence of the Term Sheet that provides that "[u]pon the occurrence of a Specified Termination Event, Employee shall receive the Calculated Fair Market Value of all

his HVE Revenue Sharing Interests no later than the Specified Payment Date." (A421.)

Soleimani also points to language in Section 11.12 of the LLC Agreements that certain payments are to be made "prior to Distributions made to Members." (AB 31–32 (quoting A577, A634–35, A691, A744, A803, A861).) But "Distributions made to Members" and payment of "debt incurred in the ordinary course" are different concepts, so the fact that the LLC Agreements provide for Soleimani to be paid prior to "Distributions to Members" in no way affects the requirement that debts be repaid before any payment respecting a Specified Termination Event.

Appellees' argument ultimately falls back to the suggestion that "there is nothing absurd about perpetual management." (AB 32.) But it is absurd in the context of contracts expressly providing the right to terminate Soleimani's employment "at any time." Moreover, the point misses the legal distinction between a perpetual manager and a perpetual ***employee***. California law does not allow specific enforcement of personal-services ***employment*** contracts. (OB 32–33, citing Cal. Civ. Code § 3390.) Appellees try to sidestep this concern by arguing that the "LLC Agreements, which establish the mechanism for Soleimani's removal, are governed by Delaware, not California, law." (AB 30.) But Soleimani's ***employment*** relationship is governed by the Term Sheet, and thereunder expressly by California law. In any event, the rule embodied in California's statute is a basic common-law

principle—reflecting the law's "repugnance to the idea of compelling the continuance of a close personal relationship now grown hostile"—which is also recognized in Delaware. *See, e.g.*, 25 WILLISTON ON CONTRACTS § 67:106 (4th ed.); *see also N. Del. Indus. Dev. Corp. v. E. W. Bliss Co.*, 245 A.2d 431, 434 (Del. Ch. 1968) (recognizing "the well-established principle that performance of a contract for personal services . . . will not be affirmatively and directly enforced").

Appellees also argue that "Soleimani was not seeking specific enforcement of an obligation for Appellants to employ him" because his case was styled as a declaratory judgment action. (AB 30–31, citing Op. 24 n.97.) But as noted *supra*, Appellees do not contest that if Soleimani's employment is terminated then Section 6.1 permits his removal as Manager. If the point is that WOHCF could go ahead with terminating his employment—notwithstanding any contrary declaration—then removal is authorized. But, of course, the Court of Chancery's Final Order and Judgment declared that "Soleimani ***is an employee*** and the Manager of the White Oak LLCs." OB Ex. B. That Order had the practical effect of reinstating Soleimani's employment, notwithstanding the lower court's footnote observing that Soleimani was not seeking reinstatement. (*See* Op. 24 n.97.)

B. At the Very Least, Section 6.1 Is Ambiguous and Any Ambiguity Should Have Either Been Resolved in Favor of Appellants or Resulted in Denial of Summary Judgment.

1. The Issue of Ambiguity Was Raised Below and Preserved for Appeal.

Appellants ***explicitly*** and ***repeatedly*** argued below that if Section 6.1 were found to be ambiguous any ambiguity should be resolved in their favor. (*See, e.g.*, A1124 ("To the extent there is any ambiguity in this language, it is easily resolved by looking to the evidence of the parties' intent, reflected in contemporaneous communications during negotiations."); A2304 ("And to the extent there were any ambiguity about the matter, Soleimani's reading of Section 6.1 runs directly contrary to the parties' intent contemporaneously memorialized during the negotiations of the LLC Agreement.").) Appellees' argument that this argument is waived for appeal is meritless.

In the Court of Chancery, as here, both sides argued that the contracts were unambiguous, but in opposite directions. In that common litigation scenario, Delaware courts sometimes conclude that the competing interpretations require a finding that the relevant contractual language is instead ambiguous. *See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1231 (Del. 1997) (holding that the trial court was not bound by parties' separate claims that contract provision was unambiguous and finding ambiguity because both sides proffered reasonable readings); *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 834

(Del. Ch. 2007) (finding a contract provision ambiguous despite parties' arguments that provision was clear and unambiguous). Whether the language is ambiguous is a question of law for the Court. *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007) ("A determination of whether a contract is ambiguous is a question for the court to resolve as a matter of law.").

Precisely for this reason, as noted *supra*, Appellants advanced the alternative argument below that, if the LLC Agreements were found to be ambiguous, then any ambiguity should be resolved in Appellants' favor by looking at extrinsic evidence. In making that argument, Appellants still maintained—and indeed also advance here, *see supra*—their argument that the contract was unambiguous in the manner they propose. But the argument that the contract unambiguously favored Appellants' view was not some concession that the contract is unambiguous for any purpose, including reading it to favor Appellees' interpretation, which was vigorously contested below (although the court below may have made this logical error (*see* Op. 22).). *See Eagle Indus., Inc.*, 702 A.2d at 1231 (holding that the trial court was not bound by parties' separate claims that contract provision was unambiguous). And no such concession was required to preserve the arguments on appeal that, if the Court did not agree with Appellants' plain reading, Soleimani's view that the plain language went the opposite way was wrong and any ambiguity

should be read in favor of Appellants' position and/or require denial of summary judgment. Indeed, that was explicitly argued below.

In arguing that Appellants waived these arguments about ambiguity, Appellees cite two cases in which this Court prohibited parties from raising ***entirely new*** arguments on appeal. (AB 32–33.). In *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, the Court prevented Appellees from advancing a "plain language" interpretation of a contractual provision because it "was not fairly presented below" and conflicted with the position that the Appellees did take below. 202 A.3d 482, 508–09 (Del. 2019). And in *CCSB Financial Corp. v. Totta*, the Court found that appellant had waived an argument that the term "acting in concert" was defined by federal regulation, when it "did not argue below that [this] definition should apply." 302 A.3d 387, 403 (Del. 2023). This Court has held that "the mere raising of the issue" preserves it for appeal. *Watkins v. Beatrice Cos.*, 560 A.2d 1016, 1020 (Del. 1989). For example, in *Watkins*, this Court found that plaintiffs below had preserved an argument by raising it a single time in a letter to the court below. *Id.* Moreover, the Court has held that even when an argument is not raised directly, it is preserved for appeal if "implicitly" raised below. *Telxon Corp. v. Meyerson*, 802 A.2d 257, 263 (Del. 2002). Here, Appellants (Defendants below) offered parol evidence regarding the meaning of Section 6.1 of the LLC Agreement and repeatedly argued that the court below should consider this evidence

if it found the contract ambiguous. This sufficiently preserved the arguments advanced here on appeal.

2. The Court Below Should Have Either Denied Appellees' Motion Because Their Interpretation Was Not Unambiguously the Plain Meaning of Section 6.1, or, if the Provision Was Found to Be Ambiguous, Resolved Any Ambiguity in Appellants' Favor.

As demonstrated *supra*, the Court of Chancery erred in granting summary judgment to Soleimani based on its view that Section 6.1 unambiguously precluded his removal. Moreover, it should have granted summary judgment to Appellants because, to the contrary, the contract unambiguously ***authorized*** Soleimani's removal. *See supra*. But if there were any ambiguity on this latter score, (i) it should have been resolved in Appellants' favor based on parol evidence submitted below, including the "Basic Considerations" document discussed in the Opening Brief at pages 34–35, or (ii) if not that, the court below should have denied Appellees' motion for summary judgment in light of whatever factual issues about the parol evidence remained outstanding.

Notably, Appellees' discussion of the negotiating history relevant to Section 6.1 omits that Soleimani himself insisted that the LLC Agreement would not modify the Term Sheet provisions relating to termination payments. The parol evidence submitted below included exchanges reflecting that White Oak proposed to add a provision in the LLC Agreement that would give the Approval Committee consent

rights prior to the payment of any amounts respecting a for-Cause termination. In response, Soleimani noted sharply: "This is dealt with in each individual employee's employment agreement, not in the LLCA." (A1513 ¶ 29; *see also* A2291.)

II. SOLEIMANI WAS NOT ENTITLED TO RECEIVE THE FAIR MARKET VALUE OF HIS HVE REVENUE SHARING INTERESTS IF TERMINATED FOR CAUSE.

A. The Term Sheet Unambiguously Distinguishes For-Cause Terminations from Specified Termination Events.

As explained in Appellants' Opening Brief, the Term Sheet, when read as a whole (as it must be), makes clear that a "for Cause" termination does not constitute a "Specified Termination Event." (OB 37–40.) This is because the Term Sheet specifically addresses this issue—and the amounts payable in a for-Cause termination—in highly detailed specific provisions elsewhere in the agreement. Those provisions—"Clause A" and "Clause B"—expressly create a binary that directly contrasts payments owing upon a termination "for Cause" and payments owing upon a "Specified Termination Event." Accordingly, because Soleimani was terminated for Cause, he was not entitled to any amounts respecting a Specified Termination Event, and his removal was authorized even under Appellees' own interpretation of Section 6.1, *i.e.*, any purported condition precedent was satisfied.

In opposition, Appellees rely heavily on an isolated reading of the "Specified Termination Event" definition, which includes "termination by either the Employee or WOHCF after five (5) years from the Start Date for any reason." (AB 35–36.) But "the meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan." *E.I. du Pont de Nemours & Co. v. Shell*

Oil Co., 498 A.2d 1108, 1113 (Del. 1985). Here, the highly detailed provisions that distinguish termination for Cause from Specified Termination Events reflects the parties' intent that these be treated as different events, entailing different payment obligations.

Appellees next argue that another provision of the Term Sheet "explicitly defines termination 'for any reason' as including a termination 'with . . . cause.'" (AB 36–37, citing A388, A500). But the provision they cite does no such thing. The provision reads:

> Each of WOGA or WOHCF (as applicable) and Employee has the right to terminate Employee's employment at any time and for any reason (in the case of WOGA or WOHCF (as applicable), WOGA or WOHCF (as applicable) may terminate Employee with or without Cause).

(A388; A500.) This provision merely states that the employment arrangement is mutually at-will; either party has the right to terminate at any time, for any reason. The provision then adds a parenthetical, which, for the avoidance of doubt, merely clarifies that WOGA or WOHCF can terminate Soleimani with or without Cause. The parenthetical does not define anything, much less the phrase "for any reason."

Appellees also point to a parenthetical reference to "a Specified Termination Event that is by the Employee without Good Reason or by WOHCF for Cause" in Clause (B) to argue that the parties contemplated that some for-Cause terminations would be Specified Termination Events. (AB 38, citing A874 §6(i)(B)(i)–(ii).) This

parenthetical makes clear that Soleimani would not be entitled to receive a Guaranteed Bonus if he departed without Good Reason or was terminated for Cause. There is no dispute that Soleimani's departure after five years other than for "Good Reason" would constitute a Specified Termination Event, and this provision makes clear that in that circumstance, as well as in a for-Cause termination, Soleimani would not receive his Guaranteed Bonus. Because the Term Sheet otherwise distinguishes between a Specified Termination Event and termination for Cause, "Specified Termination Event" in this parenthetical is best read to apply only to "by the employee without Good Reason" and not to "by WOHCF for Cause."

Appellees next advance a confused argument that, because the for-Cause termination clause ("Clause (A)") does ***not*** state that Soleimani is ***not*** entitled to the Calculated Fair Market Value of the HVE Revenue Sharing Interests upon termination, the parties must have contemplated that he would receive that payout in certain for-Cause scenarios. (AB 39.) But this misses the basic point that Clause (B) states that such payments ***are*** due upon a Specified Termination Event, among other listed obligations; Clause (A)'s listing of various obligations due in a for-Cause termination—but ***not*** the Calculated Fair Market Value of the HVE Revenue Sharing Interests—reflects the clear intent that such payments are not due upon a termination for Cause.

Finally, Appellees argue that Appellants apply the specific-over-general canon of construction "backwards," because the definition of "Specified Termination Event" is more "specific" than Clauses (A) and (B). (AB 40.) Despite Appellees' bald assertion to the contrary, Clauses (A) and (B) describe the payments owing in for-Cause terminations versus Specified Termination Events with great detail. Because those two clauses create a clear dichotomy between for-Cause terminations and Specified Termination Events, the definition of "Specified Termination Event"—and particularly the highly general language "for any reason" in that definition—should be read in the context of those two clauses.

B. At the Very Least, the Term Sheet Obligations Are Ambiguous and Any Ambiguity Should Have Either Been Resolved In Favor of Appellants or Resulted in Denial of Summary Judgment.

1. The Issue of Ambiguity Was Raised Below and Preserved for Appeal.

Appellants also ***explicitly*** and ***repeatedly*** argued below that if the Term Sheet provision respecting for-Cause payments was found to be ambiguous, any ambiguity should be resolved in their favor based on parol evidence submitted by the parties. (*See, e.g.*, A1124 ("To the extent there is any ambiguity in this language, it is easily resolved by looking to the evidence of the parties' intent, reflected in contemporaneous communications during negotiations."); A2313 ("[E]ven if there were any ambiguity in the language of the Amended Term Sheet, that ambiguity can be resolved by looking to evidence of the parties' intent during negotiations.").) The

argument also was advanced in oral argument, but Appellees misleadingly slice the transcript to make it seem otherwise, cutting out the bold-italicized text below:

(i) "I don't think there's ambiguity. I think it's pretty clear. ***We only offer it in case your Honor considers that there's ambiguity.***" (B119 (emphasis added).)

(ii) "THE COURT: Do you think there is an ambiguity in this --

> "ATTORNEY CANDIDO: I think Clause (A) and Clause (B) are pretty clear. So no. ***But we submit, as I said, that the negotiation history -- for Your Honor's consideration in case you decide otherwise, I think the negotiating history is very clear on that point . . . .***" (B126 (emphasis added).)

(*Compare* AB 41 (selectively quoting the transcript of these exchanges).)

For all the same reasons discussed *supra* in Section I.B.1, this issue is preserved for appeal.

2. The Court Below Should Have Either Denied Appellees' Motion Because Their Interpretation Was Not Unambiguously the Plain Meaning of the Term Sheet, or, If the Provisions Were Found to Be Ambiguous, Resolved Any Ambiguity in Appellants' Favor.

As demonstrated *supra*, the Court of Chancery erred in granting summary judgment to Soleimani based on its erroneous interpretation of the payment provisions in the Term Sheet. Moreover, it should have granted summary judgment to Appellants because, to the contrary, the Term Sheet unambiguously provided that Soleimani was not entitled to relevant payments in a for-Cause termination. *See supra*. But if there were any ambiguity on this latter score, the court should have

(i) resolved any ambiguity in Appellants' favor based on parol evidence submitted below, discussed in the Opening Brief at pages 41–42, or (ii) denied Appellees' motion for summary judgment in light of whatever factual issues remained on the parol evidence.

Moreover, Appellees' discussion of the parol evidence and the MOU (*see* AB 42–43) omits that on September 3, 2020, Soleimani criticized a draft version of the Amended Term Sheet for "departing" from the MOU, noting that he had informed his counsel that he had "full agreement with [his] WOGA partners" on the contents of the MOU. (A1517.) He demanded that "[a]ll the non-MOU points come out." (A1517.) Soleimani was completely clear that he only intended the Amended Term Sheet to cover those changes included in the MOU, ***none*** of which related to payouts in the event of Soleimani's termination. (A1517.) The MOU itself stated that it "assume[s] that the legal documentation that will follow will simply document what we have agreed on here, and will not raise any additional issues[.]" (A1511.) Thus, the binary between termination "for Cause" and termination following a "Specified Termination Event" was not intended to effect any change from the corresponding binary between "for Cause" and "without Cause" termination in the Original Term Sheet.

III. THE COURT OF CHANCERY FAILED TO CONSIDER EVIDENCE THAT SOLEIMANI'S HVE REVENUE SHARING INTERESTS WERE WORTH ZERO.

Appellants introduced evidence below that Soleimani's HVE Revenue Sharing Interests were worth zero, including an affidavit from WOGA's President, who detailed various relevant valuations that White Oak received near in time to Soleimani's termination. (A1156–A1157 ¶ 36.) Thus, even if payout of those interests was a condition precedent to terminating Soleimani's employment and removing him as Manager (*quod non*), there would have been no obligations owing at the time of his termination and removal, and any condition precedent related to payment would have been satisfied. For this legally independent reason, the Court of Chancery should have denied Appellees' motion for summary judgment.

Instead, the Court of Chancery failed to consider the evidence in the light most favorable to Appellants, which required, at minimum, consideration of Appellants' affidavit. It merely stated that "[a]ny disagreements about the value of [the relevant] interests and the parties' obligations under the Term Sheet are, however, subject to an arbitration provision and are not before me." (Op. 22 n.94.) But in trying to side-step the issue, the Court of Chancery resolved the factual question in Appellees' favor, effectively assuming that the interests had some value notwithstanding Appellants' evidence that they did not.

In urging this Court to uphold the Opinion, Appellees disingenuously characterize the Defendants' affidavit below as "unsupported *ipse dixit*." (AB 45.) But an affidavit is ***evidence***—not an unsupported statement. *See Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 75 (Del. Ch. 2013) (noting that "[t]he party opposing summary judgment . . . must offer, by *affidavit or other admissible evidence*, specific facts showing that there is a genuine issue for trial" (emphasis added)). And indeed, courts routinely rely upon party affidavits in resolving motions for summary judgment. *See, e.g.*, *Barker v. Huang*, 610 A.2d 1341, 1347 (Del. 1992); *Feinberg v. Makhson*, 407 A.2d 201, 203 (Del. 1979); *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 38–40, 44, 48 (Del. Ch. 2012).

Appellees alternatively suggest that their competing affidavit should be credited—but not Appellants'—because theirs attached valuations rather than described them. (AB 45.) But both forms of evidence were admissible on a motion for summary judgment, *see supra*, and Appellees cite no authority to the contrary. In effect, Appellees are asking this Court impermissibly to resolve the factual dispute that required the denial of their motion for summary judgment.

CONCLUSION

For the foregoing reasons and for the reasons articulated in Appellants' Opening Brief, the Judgment should be reversed and judgment granted in favor of Appellants. In the alternative, the Judgment should be reversed and the matter returned to the Court of Chancery for further proceedings regarding the parties' intent in executing the WOHC LLC Agreements and the Term Sheet.

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