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Case Number 199,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CARIBBEAN SUN AIRLINES INC. d/b/a WORLD ATLANTIC AIRLINES INC., and MIAMI AIR INTERNATIONAL INC.,	)	No. 199,2024
Appellants, Defendants Below,	)	Court Below: Superior Court of the State of Delaware
v.	)	C.A. No. N21J-04427
HALEVI ENTERPRISES LLC,	)	
Appellee, Plaintiff Below.	)	

APPELLANTS' OPENING BRIEF

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Dated: July 9, 2024

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NATURE OF PROCEEDINGS

The crux of this appeal arises from a massive fraud scheme orchestrated against Appellants/defendants-below Caribbean Sun Airlines, Inc. ("Caribbean Sun") and Miami Air International Inc. ("Miami Air") (collectively, "Appellants") during the COVID pandemic by defaulted-defendants Alan Boyer ("Boyer") and his partner-in-crime, Joel Plasco ("Plasco"). Boyer and Plasco were able to ensnare appellee/plaintiff-below Halevi Enterprises, LLC ("Halevi") in their scheme; however, as set forth below, Halevi facilitated the fraud with its shockingly lax due diligence procedures and repeatedly ignoring conspicuous red flags.

Appellants found themselves in the crosshairs of this litigation because of a business opportunity presented by Boyer, under the guise of purchasing all of Appellants' equity. Boyer lied to Halevi and told them he was Appellants' CEO. Halevi did not investigate Boyer's claims or look at Appellants' public disclosures to see that Boyer was lying. Instead, Halevi wired Boyer's entity $3,750,000. After Boyer defaulted on the loan, he failed to appear at trial, and the Superior Court awarded Halevi over $25,000,000 in damages against Appellants, holding Halevi reasonably believed Boyer had apparent authority to bind Appellants.

In June 2020, Appellants hired Boyer as a financial advisor to assist with obtaining governmental loans. Ultimately, Boyer offered to purchase Appellants' equity from Intervenor-below, Tomas Romero ("Romero"). Romero was and is the

CEO and sole equity owner of both Appellants. As early as September 2020, a securities purchase agreement was executed between Romero on behalf of Miami Air and Boyer on behalf of Miami Holdings, Inc., an entity Boyer owned and created. To orchestrate his fraud, Boyer created entities such as WAA Holdings, Inc., WAA Holdings LLC, and Miami Holdings, LLC, all of which he caused to default-below and have names similar to Appellants.[1] As a function of his duties, Boyer had access to Appellants' financial information, bank accounts, employee data, and other confidential information but was required to report to Appellants' officers, Romero and Iraq Pacheco, during the scope of his employment.

However, in early 2021, Boyer sought to secretly fund his purchase of Appellants' equity by taking out loans in Appellants' name and pledging Appellants' own assets which he did not own or control. Boyer admitted he secured the loans with guarantees and liens against Appellants' property without their knowledge and/or the required authorization. Despite Halevi's knowledge that Boyer had not yet purchased Appellants' equity from Romero, Halevi willingly made a loan to Boyer's entities WAA Holdings, Inc., and WAA Holdings, LLC, in addition to Appellants, to fund Boyer's purchase of Romero's equity in Appellants. Halevi then

[1] At or around the time of the Halevi loan, Boyer and Plasco used this same tactic of impersonating themselves as CEO of Appellants to falsely obtain a $5 million PPP loan from the U.S. Department of Treasury and then absconded with these government funds. *See* A01074–1118.

secured the loan with liens and guarantees purportedly made by the very entities Boyer sought to purchase.

The senior secured promissory note dated March 17, 2021 (the "Note") is signed by Boyer as CEO for Appellants despite publicly available corporate filings in Florida and Delaware showing Boyer held no such title. Notwithstanding this dispositive fact, a week after he signed the Note, Boyer also signed an Affidavit as Appellants' CEO that purported to authorize Halevi to confess judgment against Appellants. Prior to executing the loan documents, Halevi's due diligence team of attorneys and financial advisors relied solely on Boyer's representations and documentation. Halevi received conflicting information concerning Appellants' ownership and corporate structure, but it never investigated further.

Halevi's agents were confused by Boyer's entities and their relationship to Appellants. Halevi conducted one site visit before its loan closed, but only met with Boyer and never asked anyone else about Boyer's purported authority. Instead, Halevi ignored red flags and allowed Boyer to sign all the loan documents on Appellants' behalf despite being on notice that Romero's consent had to be obtained on behalf of Appellants to properly pledge their assets in this secured transaction.

On June 3, 2021, Halevi initiated a confession of judgment action, pursuant to 10 *Del. C.* § 2306 and Rule 58.1 of the Superior Court Civil Rules, against

Appellants, WAA Holdings, Inc., WAA Holdings, LLC, Miami Holdings, LLC, Timco Engine Center, Inc., Boyer, and Joel Plasco.

On August 6, 2021, counsel entered an appearance on behalf of all defendants below. The Superior Court held an initial hearing under Rule 58.1 on August 6, 2021, but postponed the hearing because Halevi had not properly served process on all defendants. On September 10, 2021, Appellants' then-counsel filed an Objection to Entry of Confessed Judgment. One week later, on September 17, 2021, Romero filed a motion to intervene.

In his motion to intervene, Romero explained that he was Appellants' 100% owner, and that Boyer never completed his purchase of Romero's equity. Thereafter, prior counsel withdrew from the case, and no new counsel entered an appearance. Appellants thus remained the only represented defendants, and were the only defendants to appear at trial.

The Court held a one-day Zoom trial on May 12, 2022.[2] The parties submitted 50 trial exhibits and four witnesses testified live: Avi Geller and Saul Kopelowitz on behalf of Halevi, and Iraq Pacheco and Tomas Romero on behalf of Appellants. The

[2] Following trial, on June 1, 2022, the Court entered default judgment against the defaulted defendants jointly and severally, in favor of Halevi, in the principal amount of $8,891,413.53, plus pre-judgment interest accrued through May 25, 2022 of $7,779,219.63, plus post-judgment interest accruing from and after May 25, 2022 at the legal rate of 7.25% on principal.

parties lodged Boyer's and Plasco's deposition transcripts because, despite being issued trial subpoenas, they did not appear at trial.

Halevi and Appellants filed simultaneous Post-Trial Opening and Answering Briefs, and post-trial briefing was completed on September 13, 2021. On December 7, 2021, Halevi filed a letter motion seeking to reopen the trial record. Appellants filed their opposition to Halevi's motion on December 21, 2022. Thereafter, the Superior Court did not rule on Halevi's motion or the post-trial briefing for over 15 months. The Court held a post-trial argument on March 13, 2024.

On March 19, 2024, the Superior Court entered an Order in Halevi's favor against Appellants in the principal amount of $4,075,000, plus interest, fees and costs at a contractual rate (the "March 19 Order"). A01034; Ex. C. On March 26, 2024, Appellants and Romero timely moved for reconsideration pursuant to Superior Court Civil Rule 59(e), which Halevi opposed on April 2, 2024. Because the judge who presided over trial and authored the March 19 Order retired at the end of March 2024, Appellants' Rule 59(e) motion was assigned to a different judge.

Halevi submitted a letter to the Superior Court on April 4, 2024, requesting entry of a final judgment because "it would be helpful for the judgment to specifically indicate the interest rate and the names of the Defendants against whom the judgment was entered." A01053. Halevi's proposed order and judgment awarded it $4,075,000 in principal plus interest of $20,958,232.59, based on "the contract rate

of 5% per month . . .” A01055. Halevi provided no argument, calculation or information to support its interest calculation. On April 18, 2024, Appellants filed an opposition to Halevi’s request for entry of a final judgment. A01057.

On April 22, 2024, the Superior Court issued an order denying Appellants’ Rule 59(e) motion for reconsideration (the “April 22 Order”). A01065; Ex. B. Contemporaneously, the Superior Court entered an Order and Judgment in favor of Halevi and against the Appellants in the principal amount of $4,075,000.00, plus interest of $20,958,232.59, for a total judgment amount of $25,033,232.59, plus post-judgment interest (the “Final Judgment”). A01072; Ex. A.

On May 17, 2024, the Appellants moved for relief from the Final Judgment pursuant to Superior Court Rules 60(b)(2) and 60(b)(6) primarily because evidence uncovered after trial showed the extent of Boyer’s fraudulent scheme involving additional lenders. On May 21, 2024, the Appellants timely filed their Notice of Appeal from the March 19 Order, April 22 Order, and Final Judgment.

SUMMARY OF ARGUMENT

1. The Superior Court erred in finding that Halevi reasonably believed Boyer had apparent authority to bind Appellants because Halevi failed to exercise ordinary prudence and reasonable diligence in ascertaining the scope of Boyer's authority. During its due diligence, Halevi ignored conflicting documents and Appellants' public corporate filings, all of which showed Boyer's lack of authority. Halevi was duty bound to conduct further investigation to ascertain the extent of Boyer's authority and could not reasonably rely on Boyer's apparent agency.

2. The Superior Court erred by failing to comply with Superior Court Civil Rules 58.1 and/or 58. 2 by entering a confessed judgment against Appellants without determining that Halevi proved that Appellants knowingly, voluntarily, and intelligently waived their rights.

3. The Superior Court erred by enforcing the Affidavit because the Note in a fully integrated document and does not provide for confessed judgment as a remedy, does not comply with Superior Court Civil Rules 58.1 and/or 58.2, and provides for confessed judgment as a remedy to a promissory note that does not exist.

4. The Superior Court abused its discretion by awarding Halevi compound interest when Halevi failed to provide Appellants with proper notice of the compound interest amount and its calculation, by incorrectly calculating the total

interest amount, and because the interest improperly constitutes an unconscionable liquidated damages windfall.

STATEMENT OF FACTS

A. Appellants' Background and Structure.

Caribbean Sun is a Delaware corporation with a principal place of business in Miami, Florida. A00269, A00039. Since 2010, Romero has been Caribbean Sun's CEO and its sole shareholder. A00630–631 (Romero Tr. 167:20–168:5); A00106; A00569 (Pacheco Tr. 106:5–6); A00629 (Romero Tr. 166:5–8).

Iraq Pacheco is Caribbean Sun's Chief Financial Officer and is responsible for the company's finances and administration. A00568 (Pacheco Tr. 105:12–16); A00269. Pacheco serves as Caribbean Sun's President in Florida; and Romero is designated as its President in Delaware. A00569 (Pacheco Tr. 106:18–20).

Each year, Caribbean Sun files publicly available annual reports with the Secretaries of State for both Florida and Delaware. A00576 (Pacheco Tr. 113:15–18); A00520 (Geller Tr. 57:2–6); A00034–42, A00052, A00079, A00236, A00271. These annual reports from July 8, 2020-onwards appropriately identify the officers of Caribbean Sun and do not identify Boyer. Significantly, a month before Halevi closed the loan, Caribbean Sun's February 5, 2021 annual franchise tax report filed with the Delaware Secretary of State identifies Romero as CEO, and Romero and Pacheco as its only directors/officers. A00032. Likewise, at the time Halevi closed the loan, Caribbean Sun's public report with the Florida Secretary of State did not identify Boyer as a director or officer. A00042.

Out of the plethora of Caribbean Sun's publicly available annual reports, there was one filed by Boyer without Romero's authorization on June 15, 2020, which inappropriately identified Boyer as president. A00052. Pacheco testified that as soon as this was discovered, the report was amended to remove Boyer three weeks later on July 8, 2020. A00573–574 (Pacheco Tr. 110:16–111:22); A00652 (Romero Tr. 189:2–20); A00042. But for that three-week period in June-July 2020, Boyer's name has not appeared on any of Caribbean Sun's public annual reports. A00522 (Geller Tr. 59: 3–15). Conversely, Caribbean Sun has consistently identified Romero and Pacheco as its officers and directors in its public annual reports. A00034–40, A00052, A00079, A00271.

Miami Air is a Delaware corporation with its principal place of business in Miami, Florida. *See* A00041, A00043, A00080, A00270. Romero purchased Miami Air out of bankruptcy in May 2020 and is its sole shareholder. A00567 (Pacheco Tr. 104:22–23); A00570 (Pacheco Tr. 107:18–21); A00535–536 (Geller Tr. 72:20–73:8); A00630 (Romero Tr. 167:9–11).

Miami Air also filed annual reports with the states of Florida and Delaware. Boyer has never been identified in any of the Miami Air annual reports. A00041, A00080, A00270. On February 5, 2021, a little over a month before Halevi closed the loan, Miami Air filed an Annual Franchise Tax Report with the Delaware Secretary of State that identifies Romero and Pacheco as Miami Air's officers and

directors. A00080. Likewise, when Halevi closed the loan, Miami Air's Florida annual report did not identify Boyer as a director or officer. A00041.

Boyer executed all of Halevi's loan documents as Appellants' CEO but later admitted that he never had that title. A00733 (Boyer Dep. 140:8–16). As collateral, Boyer pledged Appellants' assets despite Halevi's actual knowledge that the loan funds were to be used by Boyer to buy Romero's equity in both Appellants. A00531 (Geller Tr. 68:1–5). Boyer testified that Romero and Pacheco were not informed and "never reviewed any documentation relating to the loan" and "they wouldn't have known any details at all" about his loan with Halevi. A00735 (Boyer Dep. 145:5–17); *see also* A00744 (Boyer Dep. 181:10–21.) Boyer also admitted that he was acting outside the scope of the authority Romero gave him when he signed Halevi's loan documents. A00707 (Boyer Dep. 33:10–16).

Avi Geller ("Geller"), Halevi's corporate representative who conducted the primary due diligence, admitted that Halevi did not attempt to reconcile the discrepancies in Appellants' ownership per the documentation reviewed. Halevi failed to investigate further and review Appellants' publicly available filings to determine whether Boyer had authority to bind Appellants. A00522–523 (Geller Tr. 59:16–60:4); A00539–540 (Geller Tr. 76:20–77:9).

Most importantly, Halevi made no efforts to contact Romero. A00523-524, 527 (Geller Tr. 60:22-61:18; 64:9-14). But instead, chose to rely on Boyer's

representations alone despite Boyer providing Halevi with contradictory information in its due diligence package. The first time Halevi ever attempted to communicate with Romero was after Boyer defaulted on the loan. A00653–654 (Romero Tr. 190:8–20, 191:3–4). Halevi's agents never questioned how Boyer, the potential buyer of Appellants' equity, could pledge Appellants' assets and confess judgment as collateral for the same loan being used to buy the equity, without reviewing public disclosures or questioned the owner to determine if Boyer had authority to pledge the assets he sought to buy.

B. Alan Boyer's and Joel Plasco's Companies, Scheme to Defraud, and Lack of Apparent Authority.

Boyer was never an officer or director of Appellants. He was employed from June 2020 through July 2021 as a financial advisor by Miami Air to help it and Caribbean Sun obtain loans under the CARES Act. A00330; A00615 (Pacheco Tr. 152:2–9); A00700 (Boyer Dep. 8:13–19). Ultimately, Boyer expressed an interest in buying Miami Air and Caribbean Sun from Romero. On March 10, 2021, Boyer and Romero signed a Letter of Intent, under which Romero sold Boyer the exclusive right to buy his equity, but Boyer was not able to secure the funds needed to close the deal. A00133; A00632–633 (Romero Tr. 169:21–170:2).

The trial evidence showed that to purchase the exclusive right to buy Romero's equity, Boyer paid Romero $5,000,000. A00133. But Halevi never proved that any of those funds originated from its loan to Boyer's entity. Rather, Halevi

advanced $3,725,000 to Boyer's entity, WAA Holdings, and $350,000 to Halevi's brokers. A00545–546 (Geller Tr. 82:20–83:1). Halevi did not advance any funds to Caribbean Sun or Miami Air. A00546 (Geller Tr. 83:2–14). The record is devoid of any documentation showing that the funds Halevi sent to Boyer's entity were used by Boyer to pay Romero. Around the time of the first payment by Halevi to Boyer's entity, Boyer was expecting loans from a myriad of lenders. A00707 (Boyer Dep. 35:10–22). Halevi knew this. A00484–485 (Geller Tr. 21:20–22:3). Halevi's Note and Securities Purchase Agreement expressly recognize that WAA Holdings sought another $13,000,000 loan before Boyer executed the Note. A00145, A00216.[3]

Romero never authorized Boyer to sign loan documents on Appellants' behalf. A00636 (Romero Tr. 173:12–23). Boyer admitted that when he signed the loan documents, he "was acting outside the authority of Tomas [Romero]." A00707 (Boyer Dep. 33:10–16); *see also* A00636 (Romero Tr. 173:12–15). Romero fired Boyer after he found out that Boyer signed loan documents with Halevi on Appellants' behalf without Romero's permission. A00652 (Romero Tr. 189:2–7).

[3] The March 19 Order found that there "was no contradictory evidence" that the money Boyer paid to Romero in connection with his effort to buy all of Romero's equity were the same funds Halevi wired to WAA Holdings. March 19 Order at p.5. This finding is erroneous because there is evidence in the record of multiple other loans Boyer sought. However, Halevi offered no evidence showing what Boyer did with the money it sent to WAA Holdings.

Boyer admitted that neither Romero nor Pacheco were aware that he was purporting to pledge Appellants' assets as collateral. A00706 (Boyer Dep. 32:2–11); A00708 (Boyer Dep. 37:5–14). Pacheco and Romero were unaware that Boyer confessed judgment on Appellants' behalf. A00744 (Boyer Dep. 181:10–17) (Boyer testifying "Mr. Romero and Mr. Pacheco were not aware of any specifics of the loan itself with regard to any item."). Geller admitted that Halevi made no effort to tell Romero about Halevi's confession of judgment. A00527 (Geller Tr. 64:9-14).

For Plasco's part, he admitted that he has "no relationship" with Romero and never discussed the Halevi loan with either Romero or Pacheco. A00814 (Plasco Dep. 81:7–21, 81:22–82:8); A00816 (Plasco Dep. 90:8–20). Plasco believed that Boyer was authorized to bind Appellants to the Halevi loan documents based solely on what Boyer told him. A00818 (Plasco Dep. 97:2–99:6). Plasco has never been an employee, officer, director, or agent of Appellants.

C. Halevi's Due Diligence Before Making the Loan.

i. Halevi's experienced due diligence team.

Halevi had an ensemble of agents who assisted with due diligence prior to executing the loan documents. Geller oversaw the due diligence, negotiations and structuring of the loan. A00475 (Geller Tr. 12:19–21.) Geller, Shaul Kopelowitz ("Kopelowitz") and his son, Yechiel Kopelowitz, are the officers of Leonite Capital, LLC, which, together with an entity called Leonite LLC, participated in and funded

part of Halevi's loan. A00474 (Geller Tr. 11:13–20); A00551–552 (Kopelowitz Tr. 88:14–89:4). Halevi's principals boasted they have been involved in hundreds of similar loan transactions. A00475 (Geller Tr. 12:4–9); A00552 (Kopelowitz Tr. 89:11–16). Siegfried Eggert ("Eggert") of Grizzly Research was also hired by Leonite and Halevi to conduct purported due diligence. A00475–476 (Geller Tr. 12:22–13:7). Geller described Eggert's duties as "spen[ding] some time collecting documents and talking to people and putting together the investment case." A00478 (Geller Tr. 15:7–10).

Halevi was also represented by counsel in negotiating and preparing its loan documents. A00476 (Geller Tr. 13:16–20). Yet, Geller could not identify any steps Halevi took to obtain the consent of Romero or Pacheco to bind Appellants to the loan documents or obtain a confession of judgment against them. A00523–527 (Geller Tr. 60:22–61:12, 64:2–14).

Halevi understood from the very beginning that the purpose of its loan was to buy Romero's equity in Caribbean Sun and Miami Air. A00531 (Geller Tr. 68:1–5); A00209 at § 5.2. Despite knowledge that Boyer had not yet purchased Caribbean Sun and Miami Air from Romero, Halevi solely relied upon Boyer's representations. The documents that Halevi collected during due diligence were provided by Boyer or one of his intermediaries. A00479 (Geller Tr. 16:19–23). Pacheco was not

contacted by anyone on Halevi's behalf before the loan closed requesting documents or otherwise. A00595–596 (Pacheco Tr. 132:21–133:1, 132:8–20).

According to Geller, Halevi's due diligence consisted of "a bunch of phone calls with Boyer, Weston, and possibly Plasco, but I don't recall how involved at that point. We received a Drop Box with a bunch of due diligence materials, pro formas, financials, debt schedules and other materials related to the performance of the company." A00478 (Geller Tr. 15:6–10). Geller acknowledged that for the due diligence materials Halevi received, "it was Alan Boyer who presented the documents." A00479 (Geller Tr. 16:22–23).

ii. Due Diligence red flags and confusion.

Kopelowitz conducted a site visit at Appellants' office a month before Halevi closed the loan. Kopelowitz did not meet with or speak to Pacheco or Romero. A00553–554 (Kopelowitz Tr. 90:1–23, 91:2–11). Although Kopelowitz thought Boyer had authority to bind Appellants, he admitted that Halevi's loan was to fund a buyout of Romero's equity in Appellants. A00561 (Kopelowitz Tr. 98:2–5). Boyer never told Kopelowitz his title during the meeting but Kopelowitz concluded that, "no doubt he was running the place." A00555 (Kopelowitz Tr. 92:14–16).

Boyer, however, testified that Romero is "omnipresent in the organization," that Romero had "the big office at the end of the hallway, a gigantic office that everything leads to him," and that "it is clear to everyone that he is the guy." A00755

(Boyer Dep. 228:3–23). Ultimately, Kopelowitz testified that despite conducting the only pre-closing site visit, he had no knowledge of Appellants' capital structure. A00561 (Kopelowitz Tr. 98:14–17).

Halevi also conceded that the documents Boyer produced elicited "some confusion about the entities, a couple of similarly named entities, so we went back and forth on that a couple of times." A00553 (Geller Tr. 18:9–12). Despite Halevi's confusion, Romero and Pacheco were never contacted. Geller testified that at the time the loan was made it was his understanding that all of the entities including Appellants were going to be consolidated under WAA Holdings, Inc. but they had not been yet. A00491 (Geller Tr. 28:5–13).

Yet Geller confirmed that a certain Private Placement Memorandum ("PPM") Boyer provided Halevi during due diligence, under which WAA Holdings sought to raise $21 million, showed that Romero was the sole owner of Appellants. A00537 (Geller Tr. 74:10–21). Indeed, the pro forma ownership summary reviewed as part of Halevi's due diligence shows Romero was the "100%" owner of Appellants. A000106. Halevi's Securities Purchase Agreement, Section 5.2 entitled use of proceeds, provides that the loan was going to be used "solely to fund the buy-out of an existing individual shareholder" which Halevi understood was Romero. A00209 at § 5.2; A00531–532 (Geller Tr. 68:1–69:1).

Halevi had no clear understanding of who, other than Boyer, was purporting to act on Appellants' behalf. Geller's testimony also revealed that Halevi had no clear understanding of who Boyer worked with. A00477 (Geller Tr. 14:6–17). Romero and Pacheco testified that Weston was never employed by Caribbean Sun or Miami Air but worked with Boyer. A00601 (Pacheco Tr. 138:6–10); A00634–635 (Romero Tr. 171:23–172:2). Romero said that he met Weston a couple of times and threw him out of the office and threatened to call the police after he caught Weston trying to write Romero's signature. A00634 (Romero Tr. 171:13–22).

iii. Falsified Documentation provided by Boyer to Halevi.

Among the documents Halevi received in due diligence were certain purported meeting minutes and corporate resolutions that were allegedly from Appellants. Some of these documents purport to bear Boyer's signature. *See* A00228–33. Yet Boyer denied that he signed those documents. A00738–739 (Boyer Dep. 160:24–164:11); A00758 (Boyer Dep. 239:22–240:12). Halevi took no steps to verify the authenticity of these documents and could not identify their source. A00528–530 (Geller Tr. 65:10–67:7). Geller said he thought Boyer sent them to Halevi's lawyer, but he could not point to any document in the record or produced by Halevi supporting his contention. A00528–530 (Geller Tr. 65:10–66:-5, 67:4–7).

Halevi also relies on two corporate resolutions purportedly signed by Pacheco. *See* A00053–54. Pacheco denied signing those documents or even seeing them

before the litigation (A00582–592 (Pacheco Tr. 119:2–129:1)) and Halevi took no steps to verify their authenticity. A00515–517 (Geller Tr. 52:15–54:6).

D. The Loan Documents.

The Senior Secured Promissory Note is dated March 17, 2021 and is in the nominal amount of $7,000,000 (defined above as the "Note"). A00145. Alan Boyer signed the Note as "CEO" of Caribbean Sun and Miami Air. A00156. The misnumbered notarization pages show that Boyer purported to give his notarized signature to the Note six different times between March 17, 2021, and March 19, 2021. A00157–160. The first paragraph of the Note provides that funding of the loan "is conditioned upon a simultaneous closing of Borrowers' thirteen million dollar ($13,000,000) additional financing." A00145.

Section 9 of the Note is entitled "Default Remedy." A00148. Confessed judgment is not identified as a remedy available to Halevi in the event of a default of the Note. Section 17 of the Note includes an integration clause that provides that all "provisions contained herein are the final terms of this Note which have be (sic) negotiated between, and agreed upon by, the parties herein" and that "in the event of any conflict or inconsistency regarding the collateral pledged by the Borrowers to secure this Note, the Security Agreement will control." A00153. The Note does not define the term "Security Agreement," but provides that "Simultaneously with the execution of this Note, the Borrowers and Lender will execute one or more Security

Agreement(s). . .” A00146.

At trial, Halevi presented a Security and Pledge Agreement that Boyer signed purportedly for Appellants. A00164. That document has an Event of Default section and a Rights and Remedies section, but neither section provides that Halevi may confess judgment upon default. A00171–172.

The only document Halevi could point to other than the materially false Affidavit that provided for confessed judgment is a Securities Purchase Agreement that Boyer signed purportedly on behalf of Appellants. A00200. Halevi heavily relies on the Securities Purchase Agreement to support its confession of judgment [A00492 (Geller Tr. 29:15–20)] and it was cited by the Superior Court. March 19 Order at p.4.[4] Buried deep on page 16, Section 7(d) of the Securities Purchase Agreement is a reference to “Confession of Judgment.” A00215 at § 7(d). That Section reads:

> Company shall have delivered executed Subscription Documents or such other instruments as contemplated by this Agreement; provided that the Confession of Judgment shall be delivered in escrow to Purchaser’s attorney to be released upon an affidavit of Purchaser that an Event of Default has occurred.

Id. The Purchaser is defined as “Halevi Enterprises, LLC, a Delaware limited liability company (the ‘Purchaser’).” *Id*. at 000784 (emphasis omitted). There is no evidence that Halevi provided “an affidavit of Purchaser that an Event of Default

[4] The March 19 Order references a “Stock Purchase Agreement” but no document with that title was entered into evidence. See A00460-63.

has occurred" as required by Section 7(d) of the Securities Purchase Agreement. Accordingly, Halevi failed to satisfy a condition precedent to confess judgment.

Boyer purportedly signed the Affidavit of Confessed Judgment on Appellants' behalf on March 24, 2021, one week after the Note. A00255–259. The Affidavit purports to confess judgment in Halevi's favor in the amount of $7,000,000 plus interest. A00252–253. Paragraph 8 of the Affidavit proclaims that the "sums confessed pursuant to this Confession of Judgment are justly due and owing to Halevi under the following circumstances: Defendants entered into certain Senior Secured Promissory Note ("Note") dated March 22, 2021 in the principal amount of Seven Million and 00/100 US Dollars ($7,000,000) in favor of Halevi Enterprises LLC." A00254. Geller confirmed that there is no promissory note dated March 22, 2021. A00544 (Geller Tr. 81:9–11).

The Affidavit does not state that Appellants are waiving any rights, nor contain a warrant of attorney to confess judgment. For his part, Boyer testified that Halevi never told him that the Affidavit purported to confess judgment against Appellants and that he did not know he was confessing judgment on Appellants' behalf. A00759–760 (Boyer Dep. 244:8–245:24). ("Q: Would you have knowingly and voluntarily signed a confession of judgment form on behalf of Caribbean Sun or Miami Air? A: Not on behalf of the entities, no.").

ARGUMENT

I. THE SUPERIOR COURT ERRED IN HOLDING THAT HALEVI REASONABLY BELIEVED BOYER HAD APPARENT AUTHORITY AND FULFILLED ITS DUTY TO INVESTIGATE THE EXTENT OF HIS AUTHORITY GIVEN THE FACTS AND CIRCUMSTANCES

A. Question Presented.

Does Delaware law permit a lender to reasonably believe that someone is an apparent agent of a borrower when: (A) that belief cannot be traced to the borrower's manifestations; and (B) the lender fails to ascertain and/or further investigate the scope of the apparent agent's authority where the lender (i) obtained its documents from the agent, (ii) ignored documents it received contradicting the agent's apparent authority, and (iii) failed to investigate further as to the scope of the apparent agent's authority, including but not limited to, reviewing Appellants' publicly available documents and/or contacting Appellants' sole owner.

Appellants raised this issue below [A00452–54; A00899–902; A00932–946; A00989–90, A01003–09] and the issue was considered by the Superior Court. Order at p. 2.

B. Scope of Review.

Questions of apparent authority are questions of fact. *Billops v. Magness Const. Co*., 391 A.2d 196, 199 (Del. 1978). This Court reviews the Superior Court's findings of fact for clear error and the Superior Court's "legal conclusions *de novo*." *Parke Bancorp Inc. v. 659 Chestnut LLC*, 217 A.3d 701, 710 (Del. 2019).

Generally, this Court "will not set aside a trial court's factual findings unless they are clearly wrong and the doing of justice requires their overturn. Factual findings are not clearly erroneous if they are sufficiently supported by the record and are the product of an orderly and logical deductive process." *Backer v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 94 (Del. 2021) (quotations omitted).

C. Merits of Argument.

1. The Superior Court's factual findings are clearly erroneous.

In its March 9, 2024 Order, nearly two years after trial, the Superior Court did not address numerous material facts in the trial record nor sufficiently support its findings by citations to the record. The factual findings with respect to the Superior Court's holding that Halevi reasonably believed Boyer had apparent authority are, in their entirety, as follows:

> Boyer identified himself as CEO of [Appellants.] Boyer repeatedly identified himself to [Halevi] as CEO and as an equity holder in [Appellants]. During [a] site visit with Halevi, Boyer had access to all [Appellants'] facilities, employees, records and bank accounts.

Order at p. 2 (cleaned up).

The Superior Court's findings erred in multiple ways. First, the trial evidence showed that Boyer did not repeatedly identify himself as CEO or an equity holder. Second, the trial record includes substantial evidence conflicting Boyer's apparent status as CEO or equity holder. Third, Halevi admitted that during the site visit it got

all its information from Boyer. Fourth, Appellants exhibited no manifestations from which Halevi could infer Boyer's apparent authority.

First, while Boyer signed the loan documents as CEO, Kopelowitz admitted he could not recall Boyer making any representations to him about Boyer being CEO or his title at all. A00555–556 (Kopelowitz Tr. 92:23–93:4). Likewise, the trial evidence shows that Boyer did not repeatedly tell Halevi he was an equity owner of Appellants; conversely, Halevi knew the loan was to fund Boyer's purchase of Romero's equity in Appellants. *See* A00209 at § 5.2 ("Company shall use the proceeds of sale and issuance of the Note solely to fund the buy-out of an existing individual shareholder."). Geller admitted that Halevi knew the loan was to buy Romero's equity. A00531 (Geller Tr. 68:1–5).

Second, Halevi's witnesses acknowledged at trial that during due diligence Halevi viewed documents showing Romero was the 100 % owner of Appellants. Boyer's entity, WAA Holdings, provided Halevi a PPM on March 1, 2021, that unambiguously states that Romero was Appellants' only owner. A00106, A00128–129; A00533–537 (Geller Tr. 70:14–73:8). Kopelowitz, Halevi's agent who conducted the site visit, admitted that he had no idea what Appellants' capital structure was, but assumed on Boyer's representations alone that he was running the place. A00561 (Kopelowitz Tr. 98:14–1).

Halevi also had conflicting documentation concerning Boyer's status as CEO. Boyer provided Halevi with Miami Air's Payroll Support Program loan documents. A00272. Those loan documents were signed by Romero as CEO and Pacheco as CFO. A00274–275, A00293–294 (dated February 24, 2021); A00585–588 (Pacheco Tr. 122:7–125:19); A00588–A00590 (Pacheco Tr. 125:20–127:22). At minimum, Romero's and Pacheco's signing of the PSP loan applications as CEO and CFO should have compelled Halevi to make further inquiries about the scope of Boyer's and Plasco's authority. Halevi's corporate representative made no efforts to reconcile the discrepancies and Halevi assumed, solely based on Boyer's representations, he had Appellants' authority.

Third, the March 19 Order's emphasis on Boyer's access during Halevi's one site visit is misplaced because although Halevi received Caribbean Sun's and Miami Air's payroll records, which identify the names and salaries of various employees (A00330), Kopelowitz could not identify the name or job title of anybody that he says he met with. A00563 (Kopelowitz Tr. 100:9–23). And despite traveling to Appellants' Miami office, Kopelowitz did not ask anyone about Boyer's role or title within either company. A00564 (Kopelowitz Tr. 101:1–4).

Likewise, the evidence showed that Halevi did not know who Boyer's intermediaries were or what roles they played. A00477 (Geller Tr. at 14:6–17); A00560 (Kopelowitz Tr. 97:4–15). Halevi knew that it was going to be paying

$350,000 in brokerage fees to intermediaries but took no steps to verify the authenticity of the documents Boyer and his intermediaries provided. A00515–516 (Geller Tr. 52:15–53:17) (referencing A00053)); A00516–517 (Geller Tr. 53:18–54:6 (referencing A00054)); A00527–529 (Geller Tr. 64:15–66:5 (referencing A00230)); A00529–530 (Geller Tr. 66:6–67:7) (referencing A00232)); *see also* A00756–757 (Boyer Dep. 231:22–233:6) (testifying that Michael Romano and another gentlemen received the brokerage fees).

Fourth, Geller could not identify a single communication that anyone at Halevi had with Romero or Pacheco. A00516, 546 (Geller Tr. 53:9-11; 83:19–23). In fact, Halevi took no steps to obtain the consent of Romero or Pacheco to bind Appellants to Halevi's loan documents. A00523–524 (Geller Tr. 60:22–61:12); A00527(Geller Tr. 64:2–8); A00527(Geller Tr. 64:9–14).

In conclusion, the March 19 Order's findings of fact are not sufficiently supported by the record, are contradicted by evidence in the record, and are not entitled to deference.

2. The Superior Court erred in holding Halevi acted reasonably.

Delaware law has long held that a person dealing with an agent must act with "ordinary prudence and reasonable diligence" in ascertaining the scope of the agent's authority. *Arthur Jordan Piano Co. v. Lewis*, 154 A. 467, 472 (Del. Super. 1930). While due diligence will not necessarily 'ferret out' fraud, it can identify red flags

or raise questions that an inquiring lender may follow up on. A person dealing with an agent must act with ordinary prudence and reasonable diligence, and is duty bound to ascertain the extent of the authority. *Limestone Realty Co. v. Town & Country Fine Furniture & Carpeting, Inc*., 256 A.2d 676, 679 (Del. 1969) ("too good to be true" offer not binding on principal where counterparty had good reason to suspect the agent made an offer in excess of agent's actual authority and offer exceeded agent's actual authority). Accordingly, Delaware law holds that to act with ordinary prudence and reasonable diligence, "the third person must make a preliminary investigation as to the agent's apparent authority and additional investigations if the facts so warrant." *Int'l Boiler Works Co. v. Gen. Waterworks Corp*., 372 A.2d 176, 177 (Del. 1977).

Halevi cannot be permitted to claim protection under apparent authority while ignoring facts illustrating Boyer's lack of authority. For example, Halevi had loan documents showing that Romero was Miami Air's CEO, and the PPM showing that Romero was Appellants' sole owner. A000106, A000128–129; A00274–275; A00293–294. Halevi did not act with ordinary prudence and reasonable diligence when it chose to ignore those documents and instead, rely on Boyer's representations and documents falsely showing Romero as one of several shareholders of Appellants. Halevi understood that its loan was to buy Romero's equity in Appellants; indeed, Halevi's loan documents say so. A00209.

It was unreasonable for Halevi to have no actual understanding of Appellants' corporate structure before allowing Boyer to falsely sign as CEO and pledge assets that Halevi knew Boyer had yet to acquire. Ordinary prudence and reasonable diligence would dictate that a lender make some inquiry to someone other than Boyer about his status. But Halevi admitted that it never spoke to Romero or Pacheco about the loan. A00523–524 (Geller Tr. 60:22–61:12); A00527(Geller Tr. 64:2–14); A00546 (Geller Tr. 83:19–23). And when Halevi made its only site visit, they did not ask anyone about Boyer's role or authority. A00564 (Kopelowitz Tr. 101:1–4). The March 19 Order does not address any of these facts.

Given these facts and circumstances, Delaware law required Halevi to conduct additional investigations into Boyer's role in Appellants' corporate structure to comply with the reasonable diligence and ordinary prudence standard. *Int'l Boiler Works Co.*, 372 A.2d at 177. At bare minimum, Halevi's additional investigation should have included contacting Romero and/or Pacheco who are listed on the contradictory loan documents, but Halevi did not do that. It also stands to reason that as part of the additional investigation the lender would be obliged to check the borrower's publicly filed corporate disclosures to see who the company identified as its principals. Halevi admitted that it did not review Appellants' public corporate disclosures before closing its loan, which showed Boyer was neither Appellants' officer nor director at the time Halevi closed the loan.

Yet the Superior Court held that "Halevi had no duty to review corporate documents filed with either Delaware or Florida to confirm the authority and status of Boyer." March 19 Order at p. 2. This holding is inconsistent with Delaware law. Reviewing public corporate disclosures is an ordinary course due diligence activity undertaken by sophisticated bankers and the investing public alike. Permitting a lender to form a belief of apparent authority, given these facts, without even looking at public corporate disclosures, would set the bar extraordinarily low on what constitutes "ordinary prudence and reasonable diligence" to bind Delaware entities to millions of dollars of debt.

3. The Court erred in holding that Halevi could rely on Boyer's conduct alone absent any manifestations from Appellants.

Under settled Delaware law, "[i]n order to hold a defendant liable under apparent authority, a plaintiff must show reliance on indicia of authority originated by principal, and such reliance must have been reasonable." *Billops*, 391 A.2d at 198. "[A]pparent agency . . . requires that a person's belief in the agency relationship be traceable to the principal's manifestations." *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725 (Del. Ch. 2014) (quotations omitted). When dealing with apparent authority, the emphasis shifts to third party reliance on the acts of the principal and the agent as opposed to any express or implied grant by the principal. *Finnegan Const. Co. v. Robino-Ladd Co.*, 354 A.2d 142, 144–45 (Del. Super. Ct. 1976). Apparent authority can never be derived from the acts of the agent alone. *Id.*

But Halevi's belief was derived solely from Boyer's acts and representations. For example, Halevi never spoke to Romero or Pacheco about the loan or otherwise take any steps to obtain their consent to bind Appellants. A00523–524 (Geller Tr. 60:22–61:12); A00527(Geller Tr. 64:2–14); A00546 (Geller Tr. 83:19–23). Halevi did not ask anyone other than Boyer about Boyer's role and authority. A00564 (Kopelowitz Tr. 101:1–7). And, while Halevi had no clear idea who Boyer's intermediaries were, all the documents that Halevi relied on were sent by Boyer or his intermediaries. A00477 (Geller Tr. 14:6–17); A00479 (Geller Tr. 16:19–23).

Here, the trial evidence showed that Appellants did nothing whether by manifestation or otherwise to create an impression in Halevi that Boyer was authorized to execute Halevi's loan documents on Appellants' behalf. Moreover, the Superior Court made no findings describing any such manifestations by Appellants. The Superior Court erred by holding Halevi's belief was reasonable even though Halevi derived its belief solely from the acts and representations of Boyer.

II. THE SUPERIOR COURT ERRED BY ENTERING A CONFESSED JUDGMENT AGAINST APPELLANTS WITHOUT DETERMINING WHETHER APPELLANTS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED THEIR RIGHTS.

A. Question Presented.

Does Delaware law permit the Superior Court to enter a confessed judgment against a party where there is no apparent authority and without finding that the party knowingly, voluntarily, and intelligently waived their rights as required by Super. Civ. R. 58.1 and 58.2.

Appellants raised this issue below. [A00453, A00896–99, A00903; A00947–A00951; A00988]. The Superior Court did not address this issue below.

B. Scope of Review.

This Court reviews the Superior Court's legal conclusions de novo. *Parke Bancorp Inc.*, 217 A.3d at 710.

C. Merits of Argument.

1. There was no apparent authority to bind Appellants to the Confession of Judgment and therefore, Appellants did not agree to waive their due process rights.

The evidence shows that Boyer fraudulently signed Halevi's loan documents as Appellants' CEO. The March 19 Order confirms that the "evidence during the hearing demonstrated that Boyer lacked actual authority to bind Caribbean and Miami." *Id*. at 2. Neither Romero, Pacheco, or any other insider or senior manager of Appellants knew about Halevi's loan and confession of judgment Affidavit. As a

result, the Order relies solely on Boyer's apparent authority to conclude that Appellants effectively waived their rights. It holds that "as a result of apparent authority, Caribbean and Miami agreed to confess judgment and waived any otherwise available due process rights." March 19, 2024 Order p.4.

The March 19 Order, without support, makes the inference that because Boyer had apparent authority to bind Appellants, that Appellants therefore had notice, and therefore knowingly agreed to waive their rights. The Superior Court simply imputed Boyer's knowledge on Appellants without any basis. Further, a defendant does not effectively waive their constitutional rights to notice and hearing before entry of judgment where the subject of the confession of judgment clause was not presented to the defendant by the creditor. *See RBS Citizens, N.A. v. Caldera Mgmt.*, 2009 WL 3011209, at *3–5 (D. Del. Sep. 16, 2009). The March 19 Order makes no findings that Appellants had actual knowledge or presentment of Halevi's confession of judgment Affidavit and, thus, must be vacated.

2. The Superior Court failed to make required findings of fact that Appellants effectively waived their rights as required by Super. Ct. Civ. R. 58.1(g)(3).

The Superior Court held that Civil Rule 58.1 governed Halevi's action. March 19 Order p. 4. "[Superior Court Civil] Rule 58.1(g)(3) provides that if a debtor objects to an entry of confessed judgment, the Court shall hold a hearing at which the burden shall be on the plaintiff to prove that debtor effectively waived debtor's

right to notice and a hearing prior to the entry of judgment against debtor." *Customers Bank v. Zimmerman*, 2013 WL 6920558, at *2 (Super. Ct. Nov. 22, 2013). To show effective waiver, the plaintiff must show that the waiver was "knowing, voluntary and intelligent." *Pellaton v. Bank of New York*, 592 A.2d 473, 476 (Del. 1991) (quoting *D.H. Overmyer Co., Inc. v. Frick*, 405 U.S. 174, 187 (1972)). "In order for a waiver to be knowing, voluntary and intelligent, it must be an intentional relinquishment or abandonment of a known right or privilege." *Id*. "The validity of the waiver depends upon the totality of the circumstances." *Mazik v. Decision Making, Inc*., 449 A.2d 202, 204 (Del. 1982).

The March 19 Order states that an evidentiary hearing was held under Rule 58.1(g)(3). Indeed, there was a hearing on May 12, 2022, after which the parties submitted post-trial briefing on Appellants' objections and defenses to the confession of judgment. But the March 19 Order makes no findings required under Rule 58.1(g)(3) to illustrate that Halevi met its burden to prove that Appellants effectively waived their rights. *See Zimmerman v. Customers Bank*, 94 A.3d 739, 744 (Del. 2014), *as revised* (June 12, 2014).

In considering the totality of the circumstances of whether a party effectively waived their rights, the Superior Court may consider:

> "(i) the defendant's business sophistication and experience with similar documents/provisions; (ii) whether the defendant consulted with an attorney in negotiating the document; (iii) whether defendant took the time to read and understand the terms; (iv) whether defendant had an

> opportunity and time to review the document; (v) was there a quid pro quo in exchange for the provision honored; (vi) where the provision is located within the agreement and whether it was placed in a deceptive manner or obscured; (vii) whether the provision is placed so as to be completely beyond the defendant's contemplation of its purpose and separated from other provisions of the agreement; (viii) whether there was any unfair surprise; and (ix) whether the provision is placed with special attention such as underlined or in bold letters."

Preferred Fin. Servs., Inc. v. A & R Bail Bonds LLC, 2018 WL 587023, at *3 (Del. Super. Ct. Jan. 26, 2018), *adopted*, 2019 WL 315331 (Del. Super. Ct. Jan. 23, 2019), *aff'd*, 217 A.3d 60 (Del. 2019).

The March 19 Order is completely silent as to any of these factors, which reveal that Appellants did not voluntarily or knowingly waive any rights. For example, factors (i) through (iv) consider whether the defendant had the aptitude to read and understand the documents, had and took an opportunity to do so, and consulted with counsel. The undisputed evidence shows that neither Romero nor Pacheco nor any other insider of Appellants' were aware of the Halevi loan. Moreover, neither Caribbean Sun nor Miami Air were represented by counsel in connection with the Halevi loan.

Factor (v) asks whether there was a quid pro quo for the confession of judgment. The evidence shows that Boyer did not execute the Affidavit until March 24, 2021, a full week after the Note was signed. *Compare* A00145 *with* A00252. Furthermore, Halevi had already disbursed $1,825,000 to WAA Holdings on March 23, 2021. A00267. Thus, the Affidavit could not have been consideration for the

loan because Halevi disbursed loan funds before Boyer even signed the Affidavit. Further, since the Note did not have a confess judgment remedy, the Affidavit could not have been in exchange for the funds lent under the Note.

Factor (vi) examines where the confessed judgment provision is located in the loan documents and whether it was conspicuous. Here, neither the Note nor the Security and Pledge Agreement reference confession of judgment. The only loan document that mentions confession of judgment other than the Affidavit is the Securities Purchase Agreement. But that document does not conspicuously identify Halevi's right to confess judgment. Rather, buried on page 16 of the Securities Purchase Agreement at Section 7(d), the document inconspicuously contains a reference for confession of judgment but does not identify it as a remedy. A00215 at § 7(d). The document defines "Purchaser" as Halevi. A00200. The record is clear that Halevi never delivered an event of default affidavit to satisfy this condition precedent to confessing judgment.

Factor (vii) examines whether the confessed judgment provision was separated from other provisions in the agreements. Here, the Note does not provide for confessed judgment as a remedy. Indeed, the Affidavit references a March 22, 2021 Note that does not exist. And the confession of judgment provision is not separated in any way in the Securities Purchase Agreement. A00215 at § 7(d).

Factor (viii) also favors Appellants. This factor asks whether there was unfair surprise in connection with the confession of judgment. Here there undoubtedly was unfair surprise. The evidence shows that neither Halevi, Boyer, or Plasco told Romero or Pacheco about the Affidavit. Halevi did not even attempt to contact Romero until after Boyer defaulted. A00653–654 (Romero Tr. 190:8–20, 191:3–4).

Finally, factor (ix) questions whether the confessed judgment language is placed with special attention such as bold or underline. Here, it does not. The confessed judgment language in the Securities Purchase Agreement is neither in bold nor underlined. A00215 at § 7(d).

The Superior Court committed reversable error by failing to analyze these factors and made no findings to show that Halevi proved Appellants effectively waived their rights. For this reason alone, the March 19 Order and Final Judgment should be vacated and this matter remanded.

3. Halevi failed to comply with both Super. Ct. Civ. R. 58.1 and 58.2.

Appellants also contend the Superior Court erroneously determined that the additional procedural requirements of Rule 58.2 did not apply. After an initial hearing, there was an evidentiary hearing after which the Superior Court, not the Prothonotary, entered the confession of judgment. *Zimmerman*, 94 A.3d at 742–43. In either case, both Rule 58.1 and 58.2 required Halevi to present a "warrant of

attorney" and it is indisputable that neither the Note nor the Affidavit contain any such warrant.

Moreover, proceeding under Rule 58.1, Halevi sought to confess judgment "based on the attached Senior Secured Promissory Note, Personal Guarantees, and Affidavit Pertaining to Confession of Judgment." A00332 at ¶ 1. Halevi's Notice of Entry of Confessed Judgment did not reference or attach the Stock Purchase Agreement, which is the only Halevi loan document other than the Affidavit that references confession of judgment. *See* A00331-390. Rule 58.1(a)(2) required Halevi to "lodge with the Prothonotary" the "original document authorizing confession of judgment with a completely legible photocopy for the Prothonotary and each debtor against whom judgment is requested." Super. Ct. Civ. R. 58.1(a)(2). But because Halevi did not lodge the Stock Purchase Agreement with the Prothonotary when it filed its petition, the trial court should not have considered it. *But see* March 19 Order at p. 4 ("The SPA contains a confession of judgment.").

III. THE SUPERIOR COURT ERRED BY HOLDING THAT THE AFFIDAVIT CONTAINING THE CONFESSED JUDGMENT IS LEGALLY ENFORCEABLE.

A. Question Presented.

Whether the Affidavit containing the confession of judgment provision is legally enforceable when (i) the Note has an integration and remedies provision that do not include a confession of judgment, and (ii) the Affidavit authorizes confession of judgment for a promissory note that does not exist.

Appellants raised this issue below [A00453; A00904–05; A00951–54; A00986–90, A00993–998] and the issue was considered by the Superior Court. Order at p. 3-5.

B. Scope of Review.

This Court reviews the Superior Court's legal conclusions de novo. *Parke Bancorp Inc.*, 217 A.3d at 710.

C. Merits of Argument.

As the Superior Court correctly observed: the "Note underlying the loan has an integration clause and does not provide for confessed judgment as a remedy." March 19 Order at p. 4; *see also* A00146, 148 at §§ 7, 9. Nevertheless, the Superior Court held that because the Note was one of "several documents required to close the loan" and that because one of those documents, the Stock Purchase Agreement, contained a confession of judgment provision, Halevi's Affidavit is legally

enforceable. *Id*. But in so holding, the Superior Court erroneously considered all of Halevi's documents to be part of one integrated transaction and, therefore, disregarded the Note's integration clause. Moreover, the Superior Court discounted that the conditions precedent to confessing judgment under the Affidavit or Stock Purchase Agreement had occurred.

Plainly, Halevi's Note does not provide for confession of judgment as a remedy in the Events of Default or Default Remedy provisions. A00146–148 at § 7, 9. In addition, the Note fails to specifically reference the Securities Purchase Agreement relied on in the March 19 Order. Instead, the Note references a "Security Agreement" or "Security Agreements." A00146–148 at §§ 5, 8, 9, A00154 at § 22. Presumably, the "Security Agreement" is a reference to Halevi's Security and Pledge Agreement (A00164) or its Pledge and Security Agreement (A00185), neither of which contain a confession of judgment provision.

More pointedly, Section 17 of the Note contains an integration clause providing, "All provisions contained herein are the final terms of this Note which have be (sic) negotiated between, and agreed upon by, the parties herein." A00153 at § 17. Further, Section 9 of the Note contains a Default Remedy provision that does not list a confessed judgment as an available remedy. A00148 at § 9. Consequently, when Halevi relies on the Affidavit to support its right to confess judgment, it is relying on parol evidence outside the "provisions contained" in the Note.

The Affidavit provides that Halevi can confess judgment against "Defendants" "in the original principal amount of Seven Million and 00/100 US Dollars ($7,000,000.00), issued by Defendants to Halevi on March 22, 2021 (the 'Note')." A00253 at § 5. The Affidavit further provides that, "[i]n order to secure these obligations, Defendants agreed to simultaneously deliver with the execution of the Note this Confession of Judgment." *Id*. at § 6.

But the Affidavit was not delivered simultaneously with the Note, which is dated March 17, 2021, not March 22, 2021. See A00145. Geller admitted that the March 22, 2021 promissory note referenced in the Affidavit does not exist. A00471 (Geller Tr. 81:9–11); *see* A00460. The Affidavit cannot therefore confess judgment under the Note, which is a different document. Moreover, the evidence showed that the Confession of Judgment was not delivered "simultaneously" with the execution of the Note. A00253 at § 5. The misnumbered notarization pages of the Note show that Boyer purported to give his notarized signature to the Note six different times between March 17, 2021, and March 19, 2021. A00157–160. While Boyer signed the Affidavit on March 24, 2021. A00255–259. Halevi did not wait for the Affidavit to begin funding the loan as it disbursed $1,825,000 to WAA Holdings on March 23, 2021. A00267. Halevi thus failed to satisfy a condition precedent.

Despite all of this, the March 19 Order holds that "the integration clause in the Note does not prevent the other transaction documents from being considered."

Id. at p. 4. Moreover, the March 19 Order held that because the various documents and loan funds were all signed and sent within a day, they can all be read together. *Id*. But temporal proximity is not dispositive to interpreting the documents under Delaware law. The trial court should only read multiple agreements together where the parties make a clear manifestation of their intent to do so. *Town of Cheswold v. Cent. Delaware Bus. Park*, 188 A.3d 810, 819 (Del. 2018). Here, Halevi's documents do not contain a clear manifestation to read the Note together with Affidavit and the Securities Purchase Agreement. The Superior Court erred when it read the Affidavit, Note, and Securities Purchase Agreement together.

IV. THE SUPERIOR COURT ERRED BY AWARDING HALEVI A WINDFALL OF COMPOUND INTEREST

A. Question Presented.

Whether the Superior Court erred by awarding Halevi compound interest in the amount of $20,958,232.59.

Appellants raised this issue below [A00905–06; A00954–57; A01015–16 and A01057–64]. The Superior Court did not consider this issue.

B. Scope of Review.

This Court reviews the trial court's award of pre-judgment interest for abuse of discretion. *Energy Transfer, LP v. Williams Companies, Inc.*, 2023 WL 6561767, at *22 (Del. Oct. 10, 2023).

C. Merits of Argument.

The Note provides a four-month term and a maturity date of July 17, 2021. A00145. In exchange for Halevi advancing $3,725,000 to WAA Holdings, Boyer's company, Halevi contended that all defendants were obligated to repay $7,000,000 on July 17, 2021.

Without any evidentiary support by way of affidavit, balance statement, or calculation, on April 4, 2024, Halevi sought over $20 million in pre-judgment interest for the first time. A01052–56. Appellants never received proper notice of the prejudgment interest calculation from Halevi or the Superior Court. At the March 13, 2024 hearing, Halevi erroneously asserted that the Note explicitly contemplated

compound interest, when it did not. *See* A00982–93, A00145 at § 2. Moreover, both before and with its April 4, 2024 request for entry of a judgment, Halevi did not provide an interest calculation.

Delaware law required Halevi to affirmatively request a specific award of interest. *Chrysler Corp. (Del.) v. Chaplake Hldgs., Ltd.*, 822 A.2d 1024, 1037 (Del. 2003) (citing *Collins v. Throckmorton*, 425 A.2d 146, 152 (Del. 1980)). While Halevi requested pre-judgment interest generally, it did not provide notice of how it calculated interest or even which provision of which contract it is relying on.

Moreover, the compound interest rate of 5% per month imposed in the Final Judgment is erroneous as demonstrated by the Default Remedy provision in the Note. *Compare* A00145 at § 2 *with* A00148 at § 9 (stating "[u]pon an Event of Default a liquidated damages charge equal to ten percent (10%) of the outstanding amount due under the Note will be assessed.") (emphasis added). The Note's Default Remedy provision does not provide for compound interest but instead "liquidated damages." *Id*. at § 9. Halevi's "liquidated damages" provision that resulted in $20+ million in interest is "unconscionable or not rationally related to any measure of damages a party might conceivably sustain." *Delaware Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 651 (Del. 2006) (quotation omitted). Halevi presented no evidence at trial demonstrating that its interest award represented a good faith estimation of the actual damages it incurred.

Although Delaware's prejudgment-interest statute can be displaced by a "contract rate," there is no such rate here. 6 *Del. C.* § 2301(a). The Note does not set an all-purpose rate, but instead contains conflicting rates and confusing language about how such rates are applied. *Compare* A00145 at Introduction *with* A00145 at § 1 *and* A00148 at §9. Because the contract fixes the rate of interest to be paid before maturity but contains other punitive provisions as to the interest to be paid thereafter in case of default, the Court ought to "apply the statutory rate of interest, rather than the contract rate." *Corso v. Concordia Healthcare USA, Inc*., 2023 WL 2930255, at *1 (D. Del. Apr. 13, 2023).

The Superior Court simply entered Halevi's proposed form of judgment and awarded Halevi $20,958,232.59 in pre-judgment compound interest without stating its basis for adopting Halevi's interest calculation. *Compare* A01055–56 *with* A01072–73. Here the award is punitive on its face and in its effect. The award of five times the principal amount of the judgment is devasting to Appellants.

Calculating interest is a matter of the Court's discretion and is "subject to principles of fairness." *Schneider Nat'l Carriers, Inc. v. Kuntz*, 2022 WL 1222738, at *32 (Del. Super. Ct. Apr. 25, 2022) (citing *Levey v. Browstone Asset Mgt., LP*, 2014 WL 4290192, at *1 (Del. Ch. Aug. 29, 2014)); s*ee also Delaware River & Bay Auth. v. Kopacz*, 584 F.3d 622, 634 (3d Cir. 2009) (prejudgment interest awards

"must be compensatory rather than punitive"). Here, the interest calculation as applied by the Final Judgment lacks any rational basis and is unconscionable.

The Superior Court abuses its discretion when, as here, it awards compound interest. *LCT Capital LLC v. NGL Energy Partners LP*, 2023 WL 4102666, at *5-9 (Del. Super. Ct. June 29, 2023), *remanded on other grounds* 2024 WL 2716005 (Del. May 28, 2024) (noting that the Superior Court's award of compound interest is "purportedly disfavored by this Court's precedents"). Indeed, the interest award does not simply make Halevi whole, it awards Halevi an unfair and unjust windfall at Appellants' expense. The Final Judgment must therefore be vacated in the interests of justice.

CONCLUSION

Appellants respectfully request this Court vacate the March 19 Order and Final Judgment. Halevi did not act prudently and diligently and its belief in Boyer's apparent authority was not reasonable. Appellants never effectively waived their rights and Halevi's Affidavit is not legally enforceable. Finally, the Final Judgment creates an unjust windfall of liquidated damages that is unduly punitive and has no rational basis.

Dated: July 9, 2024
Wilmington, Delaware

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