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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.	)	

APPELLEE'S ANSWERING BRIEF

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Dated: August 8, 2024

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NATURE AND STAGE OF PROCEEDINGS

In March of 2021, Appellee Halevi Entreprises LLC ("Halevi") advanced money to WAA Holdings, Inc., WAA Holdings, LLC, Caribbean Sun Airlines, Inc. d/b/a World Atlantic Airlines Inc. ("Caribbean Sun"), Miami Holdings, LLC, Miami Air International Inc. ("Miami Air"), Timco Engine Center, Inc., Alan Boyer ("Boyer"), and Joel Plasco ("Plasco") (collectively, the "Borrowers"). Although the relevant loan has matured, none of the Borrowers have paid any money back to Halevi.

On June 3, 2021, Appellee Halevi Entreprises LLC ("Halevi") initiated this action by filing the *Notice of Entry of Judgment by Confession Pursuant to 10 Del. C. § 2306 and Rule 58.1 of the Superior Court Civil Rules of the State of Delaware*.

Trial was held on May 12, 2022. Defendants WAA Holding, Inc., WAA Holdings LLC, Miami Holdings, LLC, Timco Engine Center Inc., Boyer and Plasco failed to appear at the May 12, 2022 hearing, and the Court subsequently entered default and judgment against them 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.

Appellants Caribbean Sun Airlines, Inc. d/b/a World Atlantic Airlines Inc. ("Caribbean Sun") and Miami Air International Inc. ("Miami Air") (collectively,

the "Appellants"), as well as Intervenor Tomas Romero ("Romero") appeared at trial.

After post-trial briefing and oral argument, on March 19, 2024, the Superior Court entered an Order (the "March 19 Order") (A01029 – A01034) granting judgment in favor of Halevi. In response, Caribbean Sun, Miami Air, and Romero filed a motion for reconsideration under Superior Court Civil Rule 59(e). Such motion did not point to any new evidence or new law, doing nothing more than rehashing arguments and reasserting facts that the Superior Court had already heard and considered.

On April 22, 2024, the Superior Court issued an Order (the "April 22 Order") (A01065 – A01071) denying the motion for reconsideration stating, "[Appellants] have not demonstrated that the Court overlooked controlling precedent or legal principles or misapprehended the law or facts. [Appellants] have only claimed, inaccurately, that amendment [of the March 19 Order] should be granted because Halevi failed to complete an investigation of the officers of Caribbean and Miami." (A01070 – A01071) The Superior Court then entered a final judgment (the "Judgment") (A01702 – A01703) against Appellants in the principal amount of $4,075,000.00, plus interest on principal at the contract rate of 5% per month from March 23, 2021, or $20,958,232.59, for a total judgment of $25,033,232.59, plus

post-judgment interest accruing at the contract rate of 5% per month from after March 19, 2024, plus allowed fees and costs identified in the relevant contract..

Appellants have appealed the March 19 Order, the April 22 Order and the Judgment and filed their opening brief on July 9, 2024. This is Halevi's answering brief. Halevi respectfully requests that this Honorable Court affirm the decisions of the Superior Court.

SUMMARY OF ARGUMENT

1. Appellants state that "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."

Appellee denies that the Superior Court erred in its findings, which are based upon competent evidence and assessments of credibility of oral testimony, and which are not clearly erroneous. In particular, Halevi did exercise ordinary prudence and reasonable diligence in that the corporations allowed Boyer to act for them as CEO, with the position's typical and recognized duties, and then ratified his signature on loan documents by accepting the benefits of the loan. The Court correctly found that, in the circumstances, "Halevi had no duty to review corporate documents filed with either Delaware or Florida to confirm the authority and status of Boyer."

2. Appellants state that: "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."

Appellee denies that Rule 58.2 applies. Appellee did not move for Entry of Judgment by Confession under Rule 58.2, but rather only under Rule 58.1. Regarding Rule 58.1, at trial, Appellee showed that the Appellants knowingly, voluntarily, and intelligently waived their rights through their agent, Boyer.

3. Appellants state that: "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."

Appellee admits that the Note is a fully integrated document but denies that the Superior Court erred in enforcing the Affidavit of Confession of Judgment. The Securities Purchase Agreement ("SPA"), which is incorporated by reference into the Note, specifically requires a confession of judgment as a condition to closing. As set forth above, Rule 58.2 does not apply, and Appellee complied with Rule 58.1.

4. Appellants state that: "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."

Appellee denies that the Superior Court abused its discretion in the award of the interest to which the parties agreed in the Note. In particular, notice of the calculation was given.

STATEMENT OF FACTS

In this confession of judgment action, after trial with documentary evidence and oral testimony, the Superior Court entered Judgment for the lender on an unpaid promissory note.

On or about March 17, 2021, the Borrowers, including the Appellants, executed a $7,000,000.00 Senior Secured Promissory Note (the "Note") in favor of Halevi, supported by a collateral pledge. The Note and the collateral pledge were signed by Boyer as CEO of each of the corporate Borrowers, including Appellants. Personal guarantees were signed by Boyer and Plasco. (*See* A00145 – A00163; A00234 - A00242; A00243 - A00251; A00451). After the Note and other loan documents were executed, on March 23, 2021 and March 24, 2021, Halevi wired $3,725,000 of loan funds to defaulted Defendant WAA Holdings, Inc., and $350,000 to third-party brokers. (B0002 – B0003; A00452). Iraq Pacheco, the purported CFO of the Appellants, testified that the funds that were wired to WAA Holdings, Inc. were then provided to Appellant Miami Air (A00621 – A00623 (Pacheco Tr. 158:10-14, 159:21-160:5)).

As a condition of closing, Borrowers were required to provide a confession of judgment as described in the SPA. (A00215 at section 7(b)). Plasco, on his own behalf, and Boyer, on behalf of himself and all the corporate Borrowers, executed an Affidavit Pertaining to Confession of Judgment by Non-Resident Pursuant to 10

Del. C. § 2306 (the "Affidavit") in favor of Halevi. (A00252 – A00261). As in the Note, Boyer identifies himself in the Affidavit as CEO of each of the corporate Borrowers, including Appellants. (*See* A00252 – A00261; A00451; A00484 (Geller Tr. 21:16 – 21:18)).

Prior to signing the Note, Boyer repeatedly represented to Halevi's representative, Avi Geller, that he was the CEO of each of the corporate Borrowers, including both Appellants, and that he was an equity holder in both Appellants. (A00489 (Geller Tr. 26:1- 26:5); A00453). [1] Documentation provided by Appellants bolstered that representation:

- A00228 - A00229 (Officer's Certificate indicating the Boyer was the CEO of Caribbean Sun);
- A00053 (Special Meeting Minutes appointing Boyer as president of Caribbean Sun);

[1] "Q. And I believe you testified previously that it was your understanding that Mr. Boyer was the CEO of both Caribbean Sun and Miami Air; is that correct?
A. Yes.
Q. In your experience working on loan transactions, does the CEO normally have authority to sign loan documents?
A. Yes.
Q. And in your experience working on loan transactions, does the CEO normally have authority to consent to liens on behalf of the company?
A. Yes." (A00513 - A00514 (Geller Tr. 50:23-51:12)).

- A00054 (Corporate Resolution appointing Boyer as president of Caribbean Sun); and A00055 - A00078

Halevi was even given a copy of a loan agreement that was signed by Boyer as CEO of Caribbean Sun on the same page that Romero signed as president and CEO of Miami Air (A00077). Halevi had no reason to disbelieve Boyer or to disregard the above corporate documents. Halevi's representatives testified that they believed that Boyer was an officer and an equity holder of the Appellants based, not just on his statements, but also on multiple documents. (A00489 (Geller Tr. 26:1-5); A00496 (Geller Tr. 33:1-13); A000497 (Geller Tr. 34:13-17); A00497 (Geller Tr. 35:10-14); A00498 – A00499 (Geller Tr. 36:17-37:6); A00502 – A00503 (Geller Tr. 39:19-40:7); A00513 (Geller Tr. 50:15-22); A00514 (Geller Tr. 51:13-23); A00558 (Kopelowitz Tr. 95:19-23)).[2]

In fact, Boyer was, at one point at least, the president of Caribbean Sun. (A00704 - A00705 (Boyer Dep. 23:24-24:12, 26:22-27:1); A00651 (Romero Tr.

[2] Appellants' brief, at page 2, footnote 1 states, "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." This purported fact was not in evidence at trial and was alleged by Appellants in a post-Judgment Rule 60(b) motion. Thus, these purported facts were not relied upon by the Superior Court in making its decisions that are the subject of this appeal and, along with the related portions of the appendix (A01074 – A01118, A01123–A01132), such purported facts should be stricken. *See Delaware Elec. Coop. v. Duphily*, 703 A.2d 1202 (Del. 1997).

188:11-13))[3]. Prior to March 2021, Alan Boyer was identified as the President of Caribbean Sun on certain publicly available reports filed with the State of Florida Division of Corporations. (A00453; B0001). In their verified interrogatory responses, Appellants Caribbean Sun and Miami Air admitted that Boyer was president of Caribbean Sun. At trial, however, their purported 100% owner, Mr. Romero, testified to the exact opposite -- going as far as to testify that the Appellants did not participate in the preparation of discovery responses and did not direct their counsel to affix Mr. Pacheco's signature to the discovery verification. (A00617 (Romero Tr. 154:9-23)). The trial court assessed the credibility of this and the rest of Appellants' testimony at trial in this matter and declined to rely on its credibility. There is no clear error in this. The Appellants' representatives showed that they could not be trusted to tell the truth.

Appellants rely here – as they did at trial – on failure to name Boyer as the President or Director of Caribbean Sun or Miami Air in publicly available reports filed with the State of Delaware Secretary of State (A00453). This is not a basis to overturn the finding of apparent authority, however, because those reports do not list all officers and directors of either company. (A00039; A00079; A00080). Each

[3] *See* B0001. Note that representatives of Appellants claimed at trial that they were not aware that Boyer was named as president in this document when it was filed and took actions to remove him once it was discovered. However, Appellants' verified discovery responses indicate that Boyer actually was president of Caribbean Sun for some period of time.

of these documents only lists one officer and two directors, and the information Appellants filed with the Secretary of State does not align with the trial testimony of Appellants' representatives about the identity of officers and directors. (A00567 (Pacheco Tr. 104:14 – 17); A00570 (Pacheco Tr. 107:6 -8) (Pacheco testifies that he is the CEO of both Appellants but also testifies that Romero is CEO of Appellant Caribbean Sun.)).

It is clear that Boyer held himself out as a representative of both Appellants with authority to enter into the loan and to bind those companies and that Appellants gave Halevi no reason to doubt those representations. During site visits, Halevi observed that Boyer had access to all of Appellants' facilities, employees, records and bank accounts. (A00555 (Kopelowitz Tr. 92:6-93:17)). As Halevi representative Shaul Kopelowitz testified:

> Q. Did you have any impression of what his actual title was with either of the companies?
>
> A. I don't know as far as title. I know that he was allowed to do everything, that he was running the place. He went into all their operations, everybody let him in. He was accessing their computer."

A00558 (Kopelowitz Tr. 95:12-18)).

Even as late as April 2022, Boyer had access to Appellants' bank account statements and appeared to be attempting to negotiate deals on behalf of those companies.

Further, the evidence shows that Halevi had no reason to doubt the authenticity of the signatures on any of the loan documents or related corporate documents that were provided by Boyer. (A00497 – A00498 (Geller Tr. 34:4-7, 35:6-9)). In fact, Boyer himself (as well as his partner, Plasco) believed that Boyer and Plasco had authority to enter into the loan on behalf of Appellants and sign relevant loan documents. (A00797 (Plasco Dep. 14:13-17); A00798 (Plasco Dep. 17:1-8); A00817 - A00818 (Plasco Dep. 96:7-12, 96:20-97:10); A00707 (Boyer Dep. 33:17 – 34:7) A00732 (Boyer Dep. 133:18 – 134:8) A00734 (Boyer Dep. 141:2 – 21))[4]. Appellant Miami Air had Boyer on its payroll for some time –paying him significant amounts for what Appellants now claim was nominal work related to assisting with obtaining Paycheck Protection Program ("PPP") loans through the United States Small Business Administration. (A00330; A00591 (Pacheco Tr. 128:3-6); A00593 (Pacheco Tr. 130:12-17); A00614 - A00615 (Pacheco Tr. 151:22-152:13)).

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[4] "Q. Did you understand that you had authority to sign for a Caribbean Sun loan as a borrower?
A. That's a -- did I believe that I had the authority to enter into this loan on behalf of the company and provide the funds to Mr. Romero as a deposit? Yes. Mr. Romero says differently so...
Q. What led you to believe that you did have the authority?
A. Everyone was aware of the loan."
A00734 (Boyer Dep. 141:2 – 21)

The evidence and testimony further showed Caribbean Sun and Miami Air's sloppy record keeping, disregard for normal corporate procedures, and general disregard for the truth. Mr. Romero and Mr. Pacheco testified that the companies did not have regular shareholder or director meetings (A00624 (Pacheco Tr. 161:18-22); A00630 - A00631 (Romero Tr. (167:15-168:1); A00645 (Romero Tr. 182:15-20). Romero further testified that there was confusion as to who the actual directors and officers of each of the companies were; that responsibilities and titles were determined willy-nilly (A00817 (Plasco Dep. 94:10-21); A00644 - A00645 (Romero Tr. 181:22-182:4, 182:21-23)); that there was a complete misunderstanding and non-understanding of the companies' bylaws and corporate formalities (A00645 - A00646 (Romero Tr. 182:8-12, 183:11-184:12)); and that the companies' public filings changed without any corresponding resolutions or meetings (A00520 (Geller Tr. 57:7-13); A00610 - A006111 (Pacheco Tr. 147:6-11, 148:11-23)). Most egregiously, Caribbean Sun claimed to have two different presidents – one for Delaware and one for Florida. (A00608 - A00609 (Pacheco Tr. 145:9-146:2); A00612 (Pacheco Tr. 149:9-12); A00647 - A00649 (184:13-185:21)).

Given these wild statements and complete lack of any protocols, the court below did not err in declining to credit Appellants' testimony regarding who the

actual officers and directors of the companies were and who had authority to enter into the loan with Halevi.[5]

Appellants contended below that Tomas Romero ("Romero") is the sole owner of both Appellants and that Boyer never had authority to act on behalf of those entities. (A00625 (Pacheco Tr. 162:15-22); A00628 - A00629 (Romero Tr. 165:23-166:2). The court below correctly disregarded these assertions based on the relevant documents and testimony. For instance, it is uncontested that Boyer had authority to work on PPP loans on behalf of the companies. (A00614 (Pacheco Tr. 151:8-10).

Finally, it is uncontested that none of the Borrowers ever made any payments to Halevi (A00452). Thus, the Superior Court awarded Halevi judgment for the amount due under the Note, plus interest, costs and fees.

[5] There is even inconsistency in testimony about what Boyer's job with the companies actually was and when and why Boyer was terminated. In his deposition testimony, Joel Plasco was clear about how Appellants would consistently give out officer titles without proper appointments and how Boyer represented that he had authority to enter into agreements on behalf of Appellants. (A00797 (Plasco Dep. 14:13-17); A00798 (Plasco Dep. 17:1-8); A00812 (Plasco Dep. 74:23-75:21); A00813 (Plasco Dep. 80:9-17); A00817 (Plasco Dep. 94:10-21)).

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY FOUND THAT HALEVI REASONABLY BELIEVED THAT BOYER HAD APPARENT AUTHORITY TO ENTER INTO THE SUBJECT LOAN TRANSACTION

A. Question Presented.

Does Delaware law allow a lender to rely on an agent's apparent authority when making a loan when such agent provides significant evidence that he has authority to act on behalf of the principal and there are corroborating circumstances, including that the principal does not indicate that the agent lacks authority?

B. Scope of Review.

It is undisputed that the existence or not of apparent authority is a question of fact. *Billops v. Magness Const. Co*., 391 A.2d 196, 199 (Del. 1978). The Court reviews questions of fact for abuse of discretion and accepts a trial judge's findings unless they are clearly wrong. *Alston v. Pritchett*, 2015 WL 849689, at *2 (Del. Feb. 26, 2015) (*citing Reserves Dev. LLC v. Crystal Properties, LLC*, 986 A.2d 362, 367 (Del. 2009)). "A deferential standard of review is applied to factual findings by a trial judge. Those factual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous." *Burrell v. State*, 953 A.2d 957, 960 (Del. 2008) (*citing Albury v. State*, 551 A.2d 53, 60 (Del. 1988)).

When a question of law is at issue, the standard of appellate review is *de novo*. *Brown v. State*, 897 A.2d 748, 750 (Del. 2006).

C. Merits of Argument

1. The Superior Court correctly applied the facts to find that Boyer had apparent authority to bind Appellants and it was reasonable for Halevi to rely on Boyer's representations.

The question here is whether Boyer had apparent authority to act on behalf of Appellants Miami Air and Caribbean Sun. The trial court, after reviewing evidence, taking testimony, and observing the witnesses, held that he did. There is nothing in the record indicating this was clear error, and the decision below should be affirmed.

"Apparent authority may be defined as that authority which, though not actually granted, the principal knowingly or negligently permits the "agent" to exercise or which he holds him out as possessing.' If a third party relies on the agent's apparent authority in good faith and is justified in doing so by the surrounding circumstances, the principal is bound to the same extent as if actual authority had existed." *Old Guard Ins. Co. v Jimmy's Grille, Inc.*, 860 A2d 811 (2004), quoting *Finnegan v. Robino-Ladd Co.*, 354 A.2d 142 (Del. Super. 1976). "[A]pparent authority is such power as a principal holds his [a]gent out as possessing or permits him to exercise under such circumstances as to preclude a denial of its existence." *Vichi v Koninklijke Philips Elecs, N.V.*, 85 A3d 725, 799 (Del Ch 2014) (cited by Appellants).

Since Boyer signed all of the relevant loan documents, whether in his own capacity or on behalf of Appellants, and since Appellants have taken the position that Boyer did not have authority to do so, determining Boyer's authority was a threshold issue for the Superior Court – which rightly found that Boyer had apparent authority to sign the relevant loan documents.

In the normal course of business dealing, there are three separate sources of an agency relationship – actual authority, implied authority, and apparent authority. *Liberty Mut. Ins. Co. v. Enjay*, 316 A.2d 219, 222 (Del. Super. Ct. 1974). Apparent authority, which the Superior Court found here, "is such power as a principal holds his [a]gent out as possessing or permits him to exercise under such circumstances as to preclude a denial of its existence." *Liberty Mut.*, 316 A.2d at 219. A review of the record and caselaw shows that Boyer had authority to enter into the loan and bind Appellants.

Here, the Superior Court found that Boyer had apparent authority (i.e., the power of an agent to act on behalf of a principal, even though not expressly or impliedly granted). This power arises if a third party reasonably infers, from conduct, that the principal granted such power to the agent. Apparent authority is present when the agent or employee expresses to third parties that he has the authority to act on behalf of the employer, but that assertion is false or untrue. If the employee makes this representation and the third-party reasonably believes the

representation, then the employee is deemed to have apparent authority. As such, the employer would be bound by the contract.

The concept of apparent agency or authority focuses not upon the actual relation of a principal and agent, but the apparent relationship. Manifestations which create a reasonable belief **in a third party** that the alleged agent is authorized to bind the principal create an apparent agency from which spring the same legal consequences as those which result from an actual agency. *Finnegan v. Robino-Ladd Co.*, 354 A.2d 142 (Del. Super. 1976). Ordinarily, an agent can bind the principal on an apparent authority basis only if the third person involved reasonably concludes that the agent is acting for the principal. *Guyer v. Haveg Corporation*, 205 A.2d 176, 180 (Del. Super. 1964), *aff'd, Haveg Corporation v. Guyer*, 226 A.2d 231 (Del. Supr. 1967); 3 C.J.S. Agency s 391 (1973).

In dealing with the agent, the third-party must act with "ordinary prudence and reasonable diligence" in ascertaining the scope of the agent's authority and he will not be permitted to claim protection if he ignores facts illustrating the agent's lack of authority. *Arthur Jordan Piano Co. v. Lewis*, 154 A. 467, 472 (Del. Super. 1930); *Limestone Realty Co. v. Town & Country F.F. & C., Inc.*, 256 A.2d 676, 679 (Del. Ch. 1969).

When, in the usual course of the business of a corporation, an officer or agent (here, Boyer) has been allowed to manage certain of its affairs, and when this is

known to the other party to the contract (here, Halevi), the authority of the officer or agent to act for the corporation is implied from the past conduct never challenged by the corporate officials. *Mulco Products, Inc. v. Black*, 127 A.2d 851 (Del. 1956); *Kelly v. International Re-Insurance Corp.*, 174 A. 267 (Del. Ch. 1934).

In *American Soc'y of Mech. Eng'rs v. Hydrolevel*, 456 U.S. 566 (1982), the Supreme Court upheld apparent authority as a legitimate doctrine under agency law, holding, "Under general rules of agency law, principals are liable when their agents act with apparent authority . . . An agent who appears to have authority to make statements for his principal gives to his statements the weight of the principal's reputation."

Further, the "power of position" refers to apparent authority that is created by appointing someone to a position which carries recognized duties (i.e., manager or CEO). In such a situation, there will be apparent authority to do the things which are regularly and typically entrusted and expected of someone with the position title. *See Pasquarella v. 1525 William St., LLC*, 120 A.D.3d 982 (N.Y. App. Div. 2014). Halevi showed at trial that, in its experience, signing authority often lies with the company's CEO or president.[6]

[6] A00513 - A00514 (Geller Tr. 50:23-51:12).

Here, Boyer consistently held himself out as the CEO or president of both Caribbean Sun and Miami Air and indicated that he had the authority to enter into the relevant loan documents and bind those companies. Based on Boyer's oral[7] and written representations, it was reasonable for Halevi to believe that he was the CEO of both Caribbean Sun and Miami Air and to believe that he had authority to enter into the loan. Halevi did not rely only on what Boyer said. It also had the following representations from the Appellants: (1) the executed Officer's Certificate, Special Meeting Minutes and Corporate Resolution appointing Boyer as president of Caribbean Sun; (2) and publicly available records that reflected his position[8] as president; and (3) the loan agreement that Boyer signed as CEO of Caribbean Sun – on the *same page* on which Romero signed as president and CEO of Miami Air.[9]

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[7] "Q. Did Mr. Boyer ever identify himself as a officer or director of any of the borrowers or entities?
A. He told me that he runs the place and that he's in charge of everything. He had all the numbers. He had everything." (A00555 (Kopelowitz Tr. 92:17-22)).

"Q. Do you have any understanding as to what Mr. Boyer's position with the company was -- I'm sorry -- position with Caribbean Sun was at the time that the loan closed?
A. That they were both one company, in essence, and that he was running everything.
(A00558 (Kopelowitz Tr. 95:6-11)).

[8] *See* B0001.

[9] *See* A00228 - A00229 (Officer's Certificate indicating the Boyer was the CEO of Caribbean Sun); A00053 (Special Meeting Minutes appointing Boyer as president

Moreover, a company cannot allow an agent to continually agree to transactions, perform those agreements, then later deny that the company is bound to a subsequent agreement. A company is estopped from denying in a later transaction that the agent had authority to bind the company. *See Southern Amusement Co. v. Ferrell,* 125 Va. 429, 99 S.E. 716 (1919). Here, this axiom is demonstrated not only by the document that shows Boyer's and Romero's signatures on the same page (A00077)[10], but also by the testimony of Plasco. When

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of Caribbean Sun); A00054 (Corporate Resolution appointing Boyer as president of Caribbean Sun); and A00055 - A00078 (loan agreement signed by Boyer as CEO of Caribbean Sun on the same page that Romero signed as president and CEO of Miami Air). Halevi relied upon them to determine that Boyer had the authority necessary to enter into the loan:

"Q. This document appears to appoint Alan Boyer as president of Caribbean Sun. When you first saw this document, did you have any reason to doubt that that was true?
A. No." (A00497 (Geller Tr. 34:13-17));

"Q. And when you first saw this document, did you have any reason to believe that any of the signatures on this document are not authentic?
A. No.
Q. Do you have any reason to believe that any of the signatures on any of the Halevi loan documents are not authentic?
A. No." (A00509 (Geller Tr. 46:7-14)).

[10] While Mr. Romero testified that he did not sign this document, the Court could have disregarded this testimony, in view of the many examples of lack of credibility noted above. In any event, the document is relevant to show Halevi's reasonable reliance on its indicia of authority: it was provided to Mr. Geller at trial, and he testified that he had seen this document before and had no reason to doubt its authenticity when determining whether or not Boyer had authority to sign the loan documents on behalf of Appellants. (A00508 - A00509 (Geller Tr. 45:2 – 46:10)).

asked about the work that he performed on behalf of Appellants in obtaining PPP loans in relation to his work on the loans at issue in this case, he testified: "Well, no one disputed I had the authority to get the PPP loans because that was obviously something that they wanted. Now people are disputing the authority for me to sign other things because they don't want those pieces. So it was okay for them to give me authority to sign a PPP loan on behalf of the company and accept that. Now that this has gone in a different direction people have changed their view on my representing the company." (A00821 (Plasco Dep. 111:23-112:11)).

Finally, the court below correctly found that Appellants kept the benefits of the transaction they now want to deny. They should not receive the benefit of the loan without some consideration. If Appellants accept the benefits of the loan, they "must assume its burdens." Where a company retains the benefits of a contract made by its agent without authority this can act as ratification of the contract. *See Southern Amusement Co. v. Ferrell,* 125 Va. 429, 99 S.E. 716 (1919), *citing Planters Bank v. Loe*, 193 Va. 411, 69 S.E.2d 455 (1952); *see also Kern v. J.L. Barksdale Furniture Corp.*, 224 Va. 682, 685 (1983) (quoting Restatement (Second) of Agency § 99 (1958)); *Scotsman v. Crawford*, 53 Va. Cir. 183 (Cir. Ct. 2000). Here, while the flow of funds memo indicates that the bulk of the loan proceeds were paid to Defendant WAA Holdings, Inc., the funds ultimately ended up in the coffers of Caribbean Sun. (A00621 - A00623 (Pacheco Tr. 158:10-14,

159:21-160:5)). While Appellants argue that Boyer did not have authority to enter into the loan, they received the benefit of that transaction and should not be able to now shirk the associated burden.

As notes above, sufficient facts and evidence were admitted at trial that allowed the Superior Court to find that Boyer held himself out as CEO and an equity holder (A00488 (Geller Tr. 25:7-26:4)) of the Appellants, that he had access to Appellants' facilities, employees, records and bank records, and that Appellee reasonably relied upon these facts and evidence to determine that Boyer had authority to bind the Appellants.

2. The Superior Court correctly found that Halevi could rely on Boyer's conduct.

Appellants seem to have created their own standard of due diligence that a lender must do to confirm that an agent has authority to sign loan documents on behalf of a company. In their opening brief, Appellants admit that Boyer signed various documents as CEO, that Halevi visited the Appellants' facilities to meet with Boyer, that Boyer had access to the facilities as well as the Appellants' books and records, and that Halevi relied upon Boyer's representations as well as documentary evidence. But Appellants think that Halevi did not go far enough. Even though Halevi was in constant communication with the Appellants' apparent CEO, Appellants seem to think that Halevi was required to be skeptical of the CEO's representations, was required to ask other employees whether or not the

CEO had authority to enter into loans for the companies, was required to talk to the purported equity holder and purported CFO[11] of the companies and was required to scrutinize the documents provided by the CEO and his broker for authenticity.

As noted by the Superior Court, Halevi acted with ordinary prudence and reasonable diligence in ascertaining the authority of Boyer to enter into the relevant loan. The facts that were available to Halevi at the time did not warrant additional investigation under the holding of *Int'l Boiler Works Co. v. Gen. Waterworks Corp*., 372 A.2d 176 (Del. 1977). Appellants attempt to place the blame on Halevi for believing Boyer's statements and the documents that were provided by him. Appellants attempt to paint Halevi as a negligent lender that did not take the necessary steps to confirm that Boyer had authority to enter into the loan – but the steps that Appellants describe as necessary are extreme in any situation.

While Appellants harp on Halevi not reviewing public documents to confirm Boyer's authority and take issue with the Superior Court stating that Halevi had no duty to review such documents, they point to no caselaw stating that a review of past public filings as a prerequisite to making a loan. Further, whether or not public documents identify Boyer as an officer or equity holder in either of the Appellants

[11] As noted above, even if Halevi had sought further information about the CEO's authority, the Appellants' sloppy record keeping, and general lack of corporate formality would not have shown whether or not Boyer was CEO and whether or not he had authority to act in such capacity. Note also that publicly available documents did, at one time, show that Boyer was president of at least one of the Appellants.

is irrelevant as the evidence established that such public documents do not list all officers, directors, equity holders or authorized persons of any company. Further, at least one public document did list Boyer as president of Caribbean Sun, Halevi's representatives testified that they had no reason to doubt the reliability or authenticity of any documents that they were provided (including a document that was signed by both Boyer and Romero (A00055 - A00078) showing their respective positions with the companies), and WAA Holdings, Inc., a company owned by Boyer and Plasco (A00800 (Plasco Dep. 28:14-24)), identifies Caribbean Sun and Miami Air as its "operating subsidiaries" in its private placement memorandum. (A00104). Clearly, Halevi's reliance on these documents and Boyer's statements was reasonable and did not require Halevi to dive into the extreme investigation that Appellants propose.

Further, Halevi was not required to rely on some acts or representations of the Appellants to determine that Boyer had apparent authority. As the Superior Court stated in the April 22 Order (A01070), "Delaware law has consistently found the existence of apparent authority when it was reasonable for the third party to believe, through the documents and the circumstances surrounding the negotiations of the transaction, the alleged agent manifested an impression that he worked in concert with the defendant on the alleged project." (citing *Int'l Boiler Works Co.,* 372 A.2d at 177 (Del. 1977)).

II. THE SUPERIOR COURT CORRECTLY FOUND THAT RIGHTS WERE KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED

A. Question Presented

Did Appellants knowingly, voluntarily, and intelligently waive their rights?

B. Scope of Review

The Court reviews questions of fact for abuse of discretion and accepts a trial judge's findings unless they are clearly wrong. *Alston v. Pritchett*, 2015 WL 849689, at *2 (Del. Feb. 26, 2015) (*citing Reserves Dev. LLC v. Crystal Properties, LLC*, 986 A.2d 362, 367 (Del. 2009)). "A deferential standard of review is applied to factual findings by a trial judge. Those factual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous." *Burrell v. State*, 953 A.2d 957, 960 (Del. 2008) (*citing Albury v. State*, 551 A.2d 53, 60 (Del. 1988)).

When a question of law is at issue, the standard of appellate review is *de novo*. *Brown v. State*, 897 A.2d 748, 750 (Del. 2006).

C. Merits of Argument

1. Boyer had apparent authority to bind Appellants and therefore, Appellants knowingly, intelligently and voluntarily waived their rights.

The Appellants argue that they could not have knowingly, intelligently and voluntarily waive their rights because "[n]either Romero, Pacheco, or any other

insider or senior manager of Appellants knew about Halevi's loan and confession of judgment Affidavit." Opening brief at 31. However, this argument completely ignores the Superior Court's finding that Boyer had apparent authority to enter into the loan transaction at issue on behalf of the Appellants. As discussed above, Boyer had apparent authority to act on behalf of Appellants, including waiving any rights of Appellants. Thus, Romero, Pacheco or any others' knowledge is irrelevant as Boyer had authority to sign the loan documents on behalf of Appellants and, thus, knowingly, intelligently and voluntarily waived Appellants' rights.

2. The Superior Court correctly found that Appellants waived their rights.

To obtain a judgment by confession, the creditor must show that the debtor "knowingly, intelligently and voluntarily" waived its rights to due process and gave up its rights to a hearing on the validity and amount of the debt.

The plaintiff bears the burden of proving that the defendant has knowingly, intelligently, and voluntarily waived notice and an opportunity to be heard. Super. Ct. Civ. R. 58.1(d)(5). If the plaintiff carries his burden, the burden shifts to the defendant to raise defenses to prevent an entry of judgment. Super. Ct. Civ. R. 58.1(h)(3)(III); *Preferred Fin. Services, Inc. v. A & R Bail Bonds LLC*, 2019 WL 315331, at *3 (Del. Super. Jan. 23, 2019), *aff'd*, 217 A.3d 60 (Del. 2019).

When determining whether rights were waived "knowingly, intelligently and voluntarily," the Court should look to the totality of the circumstances. For

example, the Court could look at "(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. Services, Inc. v. A & R Bail Bonds LLC*, 2018 WL 587023, at *3 (Del. Super. Jan. 26, 2018), *adopted*, 2019 WL 315331 (Del. Super. Jan. 23, 2019), *aff'd*, 217 A.3d 60 (Del. 2019); *see also, Pennsylvania H., Inc. v. Kauffman's of Delaware, Inc.*, 1997 WL 855701, at *1 (Del. Super. Dec. 23, 1997). The Court should make its determination based on an orderly and logical deductive process. *Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 438 (Del. 2000).

The Appellants were given their day in court, and in trial, attempted to demonstrate why they should not be held liable for the debt owed to Halevi. By ruling in Halevi's favor and entering the Judgment, the Superior Court clearly found

that Appellants had knowingly, voluntarily and intelligently waived their rights even if the March 19 Order does not specifically state as much.

However, should the Court choose to reexamine this finding, the "totality of the circumstances" factors favor Halevi.

Boyer, the signatory to the Affidavit on behalf of Appellants, acting on his apparent authority, is a sophisticated businessperson with a degree in accounting, accreditation and licensing through FINRA, and many years of experience with aviation-related businesses and investment-related businesses. (A00699 - A00700 (Boyer Dep. 4:22–7:20)). Prior to getting involved in the aviation business, Boyer was CEO of a large investment banking and wealth services firm. (A00700 (Boyer Dep. 6:18–7:20)). Beyond his own representations about his experience and business acumen, even Halevi's representatives were impressed by him.[12] Clearly, a sophisticated businessman like Boyer would have experience with waiver provisions and, if he was concerned about such a provision, would have brought his concerns to the attention of Halevi.

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[12] "Q. What was your impression of Mr. Boyer at this meeting?
A. He seemed to be from my experience a stand-up person and a credible person and he knew his business. He seemed -- his employees seemed to respect him and it looked like he had the place under control, that, you know, the ship was going to sail well."
(A00555 (Kopelowitz Tr. 92:6-13))

Further, while it is unclear whether or not Boyer personally consulted with an outside attorney in reviewing the loan documents on behalf Appellants, it is uncontroverted that Boyer consulted with Defendant Plasco, who is a former attorney with Jones Day, an investment banker and has experience in "putting together some aviation businesses as a principal." (A00794 (Plasco Dep. 4:5-4:10); A00795 (Plasco Dep. 6:10-6:11). Plasco surely was qualified to explain the purpose and implications of signing the Affidavit. In fact, Plasco signed the Affidavit in his personal capacity as guarantor which should have revealed to Boyer that it was acceptable to sign. (A00260). Boyer also testified that he worked with a business consultant, Michael Weston, who was paid a $350,000 broker fee. (B0002 – B0003; A00708 (Boyer Dep. 40:17-21); A00730 (Boyer Dep. 126:16-22)). So, even if Boyer did not specifically consult with outside counsel prior to signing the Affidavit on behalf of Appellants, he was counselled by his attorney business partner and a business advisor who told him to sign the Affidavit.

Although Boyer did testify that he did not read the Affidavit before signing it, that should not relieve Appellants of the confession of judgment. In *Harrington Raceway Inc. v. Vautrin,* 2001 WL 1456873 (Del. Super. Ct. Aug. 31, 2001), the Superior Court found that a party knowingly, intelligently, and voluntarily waived its rights to notice and a hearing even when the party willingly signed the relevant document but complained that he signed without having adequate time to read the

document. *See also, Pellaton v. Bank of N.Y.*, 592 A.2d 473 (Del. 1991)(Where defendant did not read the loan documents before signing them, instead relying on his advisor, the waiver and confession of judgment provisions of the relevant note were still given effect.)

Further, the quid pro quo offered in exchange for the signing of the Affidavit was the funding of the loan. At trial, Halevi's representative, Avi Geller, testified that the loan documents required a confession of judgment as a condition to closing which is also identified in the conditions to closing section of the SPA. (A00215; A00492 (Geller Tr. 29:7-20)).

3. Halevi complied with Super. Ct. Civ. R. 58.1 and Super. Ct. Civ. R. 58.2 does not apply.

First, Appellants argue that the Superior Court erred by ruling that Superior Court Civil Rule 58.2 does not apply. Halevi has not moved under that rule. Halevi has sought judgment by confession under Superior Court Civil Rule 58.1. This is plainly stated in the *Notice of Entry of Judgment by Confession Pursuant to 10 Del. C. § 2306 and Rule 58.1 of the Superior Court Civil Rules of the State of Delaware* (B0004 – B0063) and in the Joint Pretrial Stipulation and [Proposed] Order.[13] It is unclear why Appellants believe that Halevi has sought judgment in open court per Rule 58.2 as Halevi has only ever sought judgment by confession through Rule 58.1

[13] *See* A00453: "Does the Affidavit comply with Superior Court Civil Rule 58.1 and 10 Del. C. § 2306?" (emphasis added).

and followed all of the procedures delineated in that rule in bringing this matter before the Court. Appellants appear to argue that the fact that they requested a trial and that the Superior Court held a trial then Halevi was required to follow the Rule 58.2 procedures. This is a twisted reading of the rule.

Further, Appellants argument that Halevi did not comply with the lodging requirements of Superior Court Civil Rule 58.1 is specious. Halevi lodged the relevant note, guarantees and affidavit with the Prothonotary when it initiated this case in the Superior Court (B0004 – B0063). Appellants seem to take issue with Halevi's failure to lodge the Stock Purchase Agreement with the Prothonotary. This argument fails for several reasons. First, Appellants gloss over the fact that the Affidavit Pertaining to Confession of Judgment, the original document evidencing confession, was lodged with the Prothonotary. Second, the Stock Purchase Agreement shows that a confession of judgment was a condition to the loan closing, but the Affidavit Pertaining to Confession of Judgment actually shows that Appellants agreed to waive their rights. Finally, even if the Stock Purchase Agreement was not lodged with the Prothonotary at the initiation of this case, it was admitted into evidence at trial. Thus, not only was it part of the record prior to the entry of judgment, Appellants had a copy.

III. THE SUPERIOR COURT CORRECTLY FOUND THAT THE AFFIDAVIT IS ENFORCEABLE.

A. Question Presented

Is the Affidavit signed by the Appellants enforceable?

B. Scope of Review

When a question of law is at issue, the standard of appellate review is *de novo*. *Brown v. State*, 897 A.2d 748, 750 (Del. 2006).

C. Merits of Argument

1. The Affidavit and SPA Cure the Absence of a Specific Confession of Judgment Provision in the Note

Like any other loan transaction – large or small – this loan consisted of a set of documents that were necessary for the completion of the transaction. While the Note may be the operative document in governing the lending and paying back of funds, the loan package consisted of not only the Note, but also two security and pledge agreements (A00164 – A00184; A00185 – A00199), several guarantees (A00234 - A00242; A00243 - A00251), the SPA, the Affidavit, a Certification of Beneficial Owners of Legal Entities (A00141 – A00144), and various corporate documents (A00228 - A00229; A00053; A00055 - A00078; A00230 – A00231; A00232 – A00233), all of which were either integrated into the Note or required for closing. The SPA specifically requires a confession of judgment as a condition to closing, and the Affidavit is sufficient to create a confession of judgment. These

documents were part of the overall loan transaction and the absence of any specific term in the Note is cured by taking the loan documents as a whole.

Delaware is a state that recognizes the freedom of parties to contract. The Court need only look to the Note, the SPA, and the Affidavit to determine that the confession of judgment is valid. While the Note includes an integration clause that indicates that the Note could "not be modified or amended except by written agreement signed by Borrowers and Lender," the Note also anticipates that other documents will be necessary to complete the loan – including the SPA and the Affidavit. In fact, an event of default shall occur should the Borrowers fail "to execute any of the Transaction Documents." The Affidavit also creates a separate right for Halevi – the right to confess judgment for any amounts owed by the Borrowers.

2. The Affidavit Complies With Superior Court Civil Rule 58.1 and 10 Del. C. § 2306

While there is not a confession of judgment provision in the Note, the Affidavit could not be clearer as to what it was, its purpose, and its terms. (A00252 – A00261) In bolded capital letters at the top of the document, it states, "**AFFIDAVIT PERTAINING TO CONFESSION OF JUDGMENT BY NON-RESIDENT PURSUANT TO 10 DEL. C. § 2306.**" There is nothing that Halevi could have done to highlight this further. Paragraph 2 of the Affidavit clearly states, "ALAN BOYER, … as Guarantor and on behalf of all [Borrowers] … hereby

confess judgment in favor of HALEVI ENTERPRISES, LLC…" Paragraph 6 of the Affidavit states, "[Borrowers] hereby authorize entry of a monetary judgment obtained pursuant to the Confession of Judgment in the Delaware State Superior Court." Finally, paragraph 8 states, "The sums confessed pursuant to this Confession of Judgment are justly due and owing Halevi…" These provisions are clear, conspicuous, and unambiguous. *See Customers Bank v. Zimmerman*, 2013 WL 6920558, at *4 (Del. Super. Nov. 22, 2013). There is no ambiguity as to the language of the Affidavit and, consequently, the Court should rule that the standard has been met to show that there was a knowing, intelligent, voluntary waiver of the confession of judgment. *See Gifford v. 601 Christiana Inv'rs, LLC*, 158 A.3d 885 (Del. 2017).

IV. THE SUPERIOR COURT ENTERED THE CORRECT AMOUNT OF JUDGMENT

A. Question Presented.

Did the Superior Court award appropriate interest to Halevi?

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.

1. Halevi is able to confess judgment in the principal amount of $7,000,000.

The face amount of the Note is $7,000,000. The Note anticipated a short-term loan, whereby the loan would mature four months after entry into the loan agreements. Under the terms of the Note, the borrowers were obligated to make monthly interest payments prior to the July 17, 2021 maturity date and then pay $7,000,000 upon the maturity date. There is nothing in the Note that limits repayment to amounts that were actually advanced under the Note. The parties to the Note made an agreement (on the principal, interest and costs) and the Appellants should be held to such agreement. Halevi took the risk that it could not be paid – a very real risk now that it still has not been paid by Borrowers, including the

Appellants. It is not a windfall for Halevi to be paid the amount that the parties contracted to. [14]

2. The Superior Court did not abuse its discretion in awarding pre-judgment interest.

A court has broad discretion to establish fair terms for an award of interest. *In re Columbia Pipeline Group, Inc. Merger Litig.*, 316 A.3d 359, 406 (Del. Ch. 2024). The Superior Court's award of interest was not an abuse of discretion. Halevi made known from its first filing in this case that it sought interest at a rate of "5% per month" per the Note. (B0004 – B0063). While Appellants take issue with the Superior Court accepting the interest amount requested by Halevi, the Superior Court is certainly able to calculate the total amount due. The relevant loan documents outline how interest, fees and costs are calculated, and the Superior Court should be able to make that calculation without further input from the parties. Clearly, the Superior Court agreed with Halevi's calculation as it did not deviate from Halevi's requested amount. Neither Halevi nor the Superior Court should be required to "show their work" in determining an interest award.

[14] Even if the Court does determine that the Judgment constitutes a windfall, the Superior Court is not prohibited from awarding the amount identified in the Judgment. The freedom to contract is fundamental to Delaware law and can require courts to enforce a contract that provides a windfall to a party. *In re Oxbow Carbon LLC Unitholder Litig.*, 2018 WL 818760 (Del. Ch. Feb. 12, 2018).

Appellants call the interest award punitive and an abuse of discretion. But, cases Appellants cite do not support their position. In *Delaware Bay Surgical Servs., P.A. v. Swier*, 900 A.2d 646, 648 (Del. 2006), the Court upheld an award of liquidated damages, declining to find it was punitive. *LCT Capital LLC v. NGL Energy Partners LP*, 2023 WL 4102666, (Del. Super. Ct. June 29, 2023), addressed compounding of statutory post-judgment interest – not contractual interest.

In fact, Halevi was granted judgment in the amount the parties contracted for – principal, plus an agreed interest rate. Delaware courts enforce the negotiated terms of a contract, windfall or not. *See Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072, 1075 and n. 283 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012), *as corrected* (July 12, 2012) ("I conclude that ... consistent with Delaware's pro-contractarian public policy, the parties' agreement ... should be entitled to specific performance. … Equity respects the freedom to contract"); *Greenville Ret. Community, L.P. v. Koke*, 1993 WL 328082, at *6 (Del. Ch. Aug. 11, 1993)("That this result represents a windfall to defendants is not a happy circumstance, but is a cost of maintaining our legal system of clear rules that facilitate wealth creating transactions"); *Libeau v. Fox,* 880 A.2d 1049, 1056 (Del.Ch.2005) ("When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy

interest even stronger than freedom of contract."). Appellants' arguments are without merit.

CONCLUSION

WHEREFORE, for the reasons outlined herein, the Court should affirm the decisions of the Superior Court.

Dated: August 8, 2024

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CERTIFICATE OF SERVICE

I, Kevin S. Mann, hereby certify that on August 8, 2024, a true and correct copy of the foregoing *Appellee's Answering Brief* was served upon the following individuals as indicated:

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