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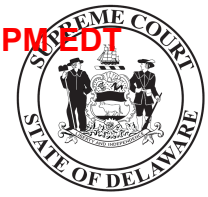


**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| 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' REPLY BRIEF

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Dated: August 23, 2024

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## INTRODUCTION[1]

This appeal involves a confession of judgment and underlying promissory note being enforced against Appellants based on documents that none of their officers or executives signed or knew about. Despite this, the court below found Appellants responsible under a strained theory of apparent authority. Absent from the trial court's findings are any reasonable steps, or even any attempts, by Halevi to verify any of the representations of purported agent/defaulted defendant Alan Boyer, even in the face of contradictory evidence and even in light of Halevi's contractual obligation to secure public filings of Appellants—which they never did. The record is completely devoid of any attempt by Halevi to square these contradictory documents. Instead, the court below held that Halevi needed only rely on the words and actions of Boyer, the agent, irrespective of the principal and irrespective of any publicly filed documents which they did not obtain and review.

In its Answering Brief, Halevi either ignores or purposely brushes aside in the most summary manner critical arguments which bear directly on central issues of this appeal. Appellants' arguments concerning the exorbitant and punitive interest amount were not addressed head on. Halevi advanced $4,075,000 to third parties, but now has a judgment exceeding $25 million, without having explained to the court

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in Appellants' Opening Brief.

below how this figure was calculated. Under settled Delaware law, the Superior Court's March 19 Order must be reversed and this matter remanded back to the trial court for further proceedings.

## COUNTER-STATEMENT OF FACTS

Halevi's Answering Brief embellishes and misapprehends numerous material facts in the trial record. For example, Halevi contends that Boyer "repeatedly represented" to Halevi representative Avi Geller that he was Appellants' CEO. Ans. Br. at p. 8. But Geller did not testify that way. Instead, Geller merely testified that Boyer signed Halevi's loan documents as CEO. *See* A00484 (Geller Tr. 21:14-18); A00485-86 (Geller Tr. 22:20-23:4); A00490 (Geller Tr. 27:12-17). It is undisputable that Halevi's loan documents represent Boyer as Appellant's CEO. But outside of the representations contained in Halevi's loan documents, there is no evidence in the trial record that Boyer represented that he was Appellants' CEO. To the contrary, Boyer testified that he did not intend to sign the loan documents as CEO, and that he never held the title of Appellants' CEO. A00733-34 (Boyer Dep. 140:8-24). Boyer further testified that while he worked for Miami Air, all the documents he worked on identified Tomas Romero as CEO. A00718 (Boyer Dep. 78:10-79:10). And consistent with the testimony of Halevi representative Shaul Kopelowitz, Boyer testified that he never verbally told Halevi that he was CEO or a director of either Caribbean Sun or Miami Air. *Compare* A00555 (Kopelowitz Tr. 92:14-16) *with* A00754 (Boyer Dep. 222:19-224:3).

Halevi then contends that it did not only rely on Boyer's representations in the loan documents, but also relied on "[d]ocumentation provided by Appellants [which]

bolstered that representation." Ans. Br. at p. 8; *see also id*. at p. 20. This contention is pure fiction. Halevi cannot point to any evidence in the trial record demonstrating that Appellants provided documentation or information to Halevi before it executed its loan with Boyer. To the contrary, Geller confirmed at trial that Halevi got all of its documentation from Boyer or Boyer's intermediaries, and that Halevi had no clear understanding of who worked for Boyer. A00479 (Geller Tr. 16:19–23); A00477 (Geller Tr. at 14:6–17); *see also* A00560 (Kopelowitz Tr. 97:4–15).

Romero denied that he ever saw any loan document with his signature and Boyer's signature before the litigation. A00633 (Romero Tr. at 170:10-16). This is not surprising given that Geller admitted at trial that Halevi took no steps to verify the authenticity of the documents Boyer provided, nor could he identify any document in the record showing the source of the documents Halevi now relies on. A00528-30 (Geller Tr. 65:10-67:7).[2] And according to Boyer, he provided documentation to Halevi's broker, Mike Romano, who then in turn provided the information to Halevi. A00755-56 (Boyer Dep. 228:24-229:22). Halevi's brokers, incidentally, were paid $350,000 by Halevi when Halevi closed its loan with Boyer. Ans. Br. at p. 7 (citing B0002-B0003; A00452).

[2] Appellants objected to the admissibility of each of the documents Halevi now relies on, but the trial court never ruled on Appellants' objection. *See* A00461, A00494-95 (31:21-32:7).

Next, Halevi makes much of the fact that Boyer was identified as President of Caribbean Sun on its Amended Annual Report filed with the Florida Secretary of State from June 15, 2020 through July 8, 2020. Halevi goes so far as to accuse Romero of lying about it. Ans. Br. at p. 10. Appellants have not denied that, whether authorized or not, according to the Amended Annual Report, Boyer was identified as serving as Caribbean Sun's President for about three weeks in the summer of 2020. But what Halevi does not say is that but for that three-week period nine months before the loan funded, none of Appellants' other publicly available filings—neither before nor after—identified Boyer as an officer or director of either Miami Air or Caribbean Sun. A00522 (Geller Tr. 59:3-15); *see also* A00034-42, A00052, A00079, A00236, A00271.

Halevi further asserts that Boyer believed that he had authority to enter the loan on behalf of Appellants and sign loan documents on their behalf. Ans. Br. at p. 12. But this assertion misapprehends the entirety of Boyer's testimony. When asked if he had authority to pledge Caribbean Sun's assets, Boyer said that he was not authorized, that neither Romero nor Pacheco knew he was pledging Caribbean Sun's assets, and that when he pledged Caribbean Sun's assets, he was "acting on behalf of the company, but I was acting outside of the authority of Tomas [Romero]." A00706-07 (Boyer Dep. 32:5-33:16).

Finally, Halevi harshly criticizes Appellants' record keeping and internal governance even though they never requested any records from Appellants at the time of the loan. Ans. Br. at pp. 13-14. Halevi's Answering Brief fails to note, however, that Halevi itself recognized 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). This confusion should have counseled Halevi to conduct more diligence and further investigate whether Boyer was authorized to bind Appellants. But the trial record is clear, in the face of what Halevi now calls "sloppy record keeping" [Ans. Br. at p. 13], Halevi never asked anyone other than Boyer about his role and his level of authority and never spoke with Romero or Pacheco about the loan it was making to Boyer. A00553–554 (Kopelowitz Tr. 90:1–23, 91:2–11); A00564 (Kopelowitz Tr. 101:1–4).

## ARGUMENT

### I. Halevi Cannot Show That It Met Its Burden Of Acting With Reasonable Diligence.

#### A. The Superior Court misapplied the applicable standard.

Halevi fails to address Appellants' key argument disputing Boyer's apparent authority centering on Halevi's review of contradictory documentation by its self-proclaimed large and sophisticated due diligence team.[3] Halevi makes no effort to defend the trial court's holding that Halevi had no duty to investigate further to determine whether Boyer had authority to bind Appellants, despite Halevi's own loan documents requiring it to review Appellants' recent publicly available corporate filings. A00215 at § 7(i). Likewise, Halevi does not address that it was in possession of numerous contradictory documents.[4] Boyer expressly denied that he was the CEO or President of Appellants at any point in time. A00733 (Boyer Dep. 140:8–16).

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[3] A00475 (Geller Tr. 12:19–21). 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); (Geller Tr. 12:22–13:7). Halevi was also represented by counsel in negotiating and preparing its loan documents. A00476 (Geller Tr. 13:16–20).

[4] A00053 (Special Meeting Minutes appointing Boyer as president 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). Throughout the trial and in Halevi's own Answering Brief, Halevi admits the foregoing documents provided by Boyer and relied upon Halevi in order to enter into the loan. *See* Ans. Br. at p. 21.

Likewise, the Private Placement Memorandum ("PPM") Boyer gave Halevi showed Romero was Appellants' sole owner. A00537 (Geller Tr. 74:10–21). At no point in time during the due diligence process did Halevi call Romero or Pacheco, nor did Halevi conduct a simple internet search regarding Appellants' ownership, despite Halevi's corporate representative admitting that the documents provided by Boyer were confusing. A00523–527 (Geller Tr. 60:22–61:12, 64:2–14); A00553 (Geller Tr. 18:9–12); A00595–596 (Pacheco Tr. 132:21–133:1, 132:8–20). Halevi's due diligence agent, Shaul Kopelowitz, who conducted the only site visit prior to the loan closing admitted that he had no knowledge of Appellants' capital structure. A00561 (Kopelowitz Tr. 98:14–17). Halevi's Answering Brief offers no explanation for why it acted with reasonable diligence if it made no effort to verify the veracity of the documents being provided to them.

Delaware law is well settled that a third-party has the burden of establishing that it acted with ordinary prudence and reasonable diligence. Halevi candidly acknowledges that it had this duty. As Halevi puts it, "[i]n 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." Ans. Br. at p. 18 (quoting *Arthur Jordan Piano Co. v. Lewis*, 154 A. 467, 472 (Del. Super. 1930)

and *Limestone Realty Co. v. Town & Country F.F. & C., Inc*., 256 A.2d 676, 679 (Del. Ch. 1969) (emphasis added)).

Delaware law is clear that "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." *Int'l Boiler Works Co. v. General Waterworks Corp.*, 372 A.2d 176, 177 (Del. 1977). This Court further held that:

> In dealing with the agent the third person 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. In this regard, the third person must make a preliminary investigation as to the agent's apparent authority and additional investigations if the facts so warrant.

*Id.* Likewise, apparent authority must arise from the manifestations of the principal, not the purported agent. *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725 (Del. Ch. 2014). Thus, "[i]t is important to note that apparent authority can never be derived from the acts of the agent alone." *Finnegan Const. Co. v. Robino-Ladd Co.*, 354 A.2d 142, 144 (Del. Super. Ct. 1976).

Halevi claims that with respect to Boyer and the loan it made to Boyer's company, WAA Holdings, Inc., it had no obligation to conduct an additional investigation. Ans. Br. at p. 24. But Halevi cannot escape numerous critical facts, none of which were addressed by the trial court in its March 19, 2024 Order, showing that its reliance on Boyer's assertions was not reasonable and that Halevi did not act with ordinary prudence and chose to ignore the contradictory information.

First, Halevi received all its documentation and information from Boyer or from Boyer's intermediaries, but Halevi had no clear understanding of who worked for Boyer. A00479 (Geller Tr. 16:19–23); A00477 (Geller Tr. at 14:6–17); *see also* A00560 (Kopelowitz Tr. 97:4–15). Halevi never spoke to Romero or Pacheco about the loan or otherwise took 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). When Halevi made its only site visit, they did not ask anyone about Boyer's role or authority. A00564 (Kopelowitz Tr. 101:1–4).

Second, Halevi's own loan documents drafted, reviewed, and produced by Halevi for Boyer's signature to bind the Appellants also indicate that Halevi should have investigated further. Specifically, Section 5.2 of Halevi's Securities Purchase Agreement, prepared by Halevi, states, "Company shall use the proceeds of sale and issuance of the Note solely to fund the buy-out of an existing individual shareholder." A00209 at § 5.2. And documentation that Boyer provided to Halevi also showed that Romero was the sole owner of Appellants' equity. A00537 (Geller Tr. 74:10–21); A00531–532 (Geller Tr. 68:1–69:1).

Third, Halevi's own corporate representative admitted confusion since before the loan closing and during the negotiations and drafting of the underlying loan

documents at issue including the securities agreement. A00553 (Geller Tr. 18:9–12). Moreover, Halevi's representatives admitted that they were unclear about Appellants' capital structure. A00561 (Kopelowitz Tr. 98:14–17).

Fourth, Appellants' publicly filed corporate disclosures showed that but for a three-week period of time in the summer of 2020, Boyer was never identified by Appellants as an officer or director. A00576 (Pacheco Tr. 113:15–18); A00520 (Geller Tr. 57:2–6); A00034–42, A00052, A00079, A00236, A00271. At the time that Halevi closed the loan, both Miami Air's and Caribbean Sun's publicly filed corporate disclosures did not identify Boyer as an officer or director of either company. A00032–42 A00052, A00079, A00271;A00080; A00522 (Geller Tr. 59: 3–15).

The Superior Court's March 19 Order held that Halevi had no duty to look at Appellants' publicly filed corporate disclosures in ascertaining the scope of Boyer's authority. (A01029 – A01034). That holding simply cannot be reconciled with Halevi's duty to act with ordinary prudence and reasonable diligence, and Halevi offers no compelling support for the Superior Court's holding. Moreover, neither Halevi nor the Superior Court addressed Caribbean Sun's removal of Boyer from its Florida Amended Annual Report in July 2020, after Romero discovered that Boyer had been identified as Caribbean Sun's President. A00652 (Romero Tr. 189:2-20). Caribbean Sun's act of removing Boyer as President from its public corporate

disclosures in Florida directly shows that Caribbean Sun did not ascent to but instead challenged Boyer being held out to public with such a title. A00573–574 (Pacheco Tr. 110:16–111:22); A00652 (Romero Tr. 189:2–20); A00042.

Yet, Halevi never contacted Romero until after the default of the loan documents, and Halevi took no steps to get Romero's consent to enter the loan on Appellants' behalf. A00523–527 (Geller Tr. 60:22–61:12, 64:2–14). Halevi cannot claim protection now by virtue of their crafted loan documents executed by Boyer when his authority to sign on Appellants' behalf should have been highly suspect to Halevi at the time of the execution.

Halevi relies upon unauthenticated documents to show that there were manifestations of the principal which Halevi allegedly could reasonably rely on. But a quick review of the documents in the entirety reek of utter confusion. The Special Meeting Minutes and Corporate Resolution allegedly appointing Boyer as president of Caribbean Sun by Romero on June 30, 2020 and allegedly signed by Pacheco as Caribbean Sun's secretary. (A00053). This directly conflicts with the single Florida annual report reviewed by Halevi dated June 15, 2020, allegedly appointing Boyer as president of Caribbean Sun and Pacheco as CFO, instead of secretary, just 15 days prior to the corporate resolution or special meeting minutes. *Compare* A00053-A00054 *with* A00052. It is also undisputed that Halevi did not contact Pacheco during the loan process—from due diligence through execution—even though

Pacheco was clearly an officer of Caribbean Sun with authority to contractually bind Caribbean Sun. A00595–596 (Pacheco Tr. 132:21–133:1, 132:8–20).

Halevi also argues that they relied on a master loan agreement dated August 7, 2020. (A00077). The signature pages of the loan agreement are conspicuous since the pages are not numbered and do not include the same footnote identifier as the foregoing pages to the loan agreement. Regardless, the agreement is allegedly signed by Boyer as CEO of Caribbean Sun but Romero as CEO of Miami Air. Yet if Halevi was truly relying on this master loan agreement, it surely would have asked why it identified Romero as CEO instead of Boyer when Boyer signed Halevi's loan documents as Miami Air.

Although glossed over in Halevi's Answering Brief, Halevi also had 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. The PPM also provides, "[t]he primary use of proceeds of this Offering is to purchase the common stock of World Atlantic Airlines and Miami Air owned by Tomas Romero." A00081-A00132. Geller knew that at the time that the loan was made that the entities including the Appellants were in various stages of purchase by Boyer's company WAA Holdings, Inc., but failed to attempt to reconcile who was Appellants' true owner. A00491 (Geller Tr. 28:2-13).

Halevi was clearly on notice that Boyer was not the sole equity owner of Appellants, and it was questionable at best as to whether Boyer was the CEO of appellants. Instead of contacting Appellants' sole equity owner, Romero or Pacheco, a key officer of Appellants, to further investigate the extent of Boyer's authority, Halevi prepared loan documents package evidencing Halevi's uncertainty regarding Boyer's authority. For example. the loan documents list several entities besides Appellants as borrowers, but Halevi solely prepared officer certificates and corporate resolutions for Appellants signed by Boyer on March 17, 2021, to affirm that he was the "newly appointed CEO of Appellants" as part of the loan package. A00228-229; A00054.

### B. The evidence demonstrates a lack of apparent authority regarding the execution of the confession of judgment.

Under well settled Delaware law, "a principal is bound by an agent's apparent authority which he knowingly permits the agent to assume [or] which he holds the agent out as possessing." *Toe No.2 v. Blessed Hope Baptist Church, Inc. of Harford Cnty*., 2012 WL 1413552, at *3 (Del. Super. Ct. Jan. 31, 2012) (quoting *Crumlish v. Price*, 266 A.2d 182, 183–84 (Del.1970). As noted above, Caribbean Sun immediately corrected its Florida annual report that showed Boyer was President as soon as Romero discovered it. Appellants did not ratify or permit Boyer's misrepresentation of allegedly serving as Appellants' CEO or President to any members of the public. Halevi's Answering Brief includes the misplaced argument

of the "power of position" referring to apparent authority that is created by appointing someone to a position which carries recognized duties. Ans. Br. at p. 19. Despite Boyer's fraudulent signing as the CEO of Appellants, there is no record evidence of Appellants knowingly appointing Boyer as CEO of either company, and the evidence shows that Caribbean Sun specifically did not intend to identify him as President when it removed him as such. Therefore, Geller's testimony that in Halevi's experience CEOs or presidents of corporations have signing authority for transactions similar to the one at issue completely misses the mark. A00513-514 (Geller Tr. 50:23-51:12). While someone who is actually CEO may have apparent authority, just because someone calls themselves CEO, does not make it a manifestation by the principal. But Halevi did nothing to verify Boyer's title within Caribbean Sun or Miami Air.

Halevi argues that Appellants are estopped from denying Romero's authority pursuant to the proposition that a company cannot allow an agent to continually agree to transactions, perform those agreements, then later deny that the company is bound by subsequent agreement. Ans. Br. at pp. 21-22. One factor considered to determine apparent agency is the length of time that the agent performed similar acts on behalf of the company. *Liberty Mut. Ins. Co. v. Enjay Chemical Co.* (Now Exxon Corp.), 316 A.2d 219 (Del. Super. 1974). In the *Liberty Mutual* case, also relied upon by Halevi, the court held that the employee had apparent authority since he had

accepted the aggrieved parties' checks for nine years, and although the employee fraudulently cashed some of the checks into his personal account without the employer's knowledge, the sheer length of time that the employee had performed such similar acts for the employer was a part of the Court's determination of apparent authority. *Id*. at 223.

Here, Boyer 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). Further, Boyer was only served as President under Caribbean Sun's Florida annual reports for a period of three weeks in July 2020, some nine months before Halevi closed its loan. This short period of time does not indicate that Caribbean Sun, let alone Miami Air, held Boyer out as an authorized agent.

The record evidence is undisputed that Boyer never had the authority to enter any transactions where he pledged Appellants' assets or executed a senior promissory note or securities agreement on behalf of Appellants. Boyer's limited authority to sign PPP loans for Appellants does not impute Boyer with the requisite authority to sign any other loan agreements besides the PPP loans. The Virginia Supreme court case, *Southern Amusement Co. v. Ferrell-Bledsoe Furniture Co*, 99 S.E. 716 (Va. 1919), cited by Halevi offers no direct support for Halevi's counter-proposition.

And the record evidence is clear that Appellants did not know about the terms of the loan, did not know about the documents sent by Boyer to Halevi for its due diligence, did not meet with Halevi's agents or talk with them before Halevi and Boyer signed the loan documents, and did not know that Boyer was misrepresenting himself as CEO of Appellants during the loan negotiations with Halevi. A00706 (Boyer Dep. 32:2–11); A00708 (Boyer Dep. 37:5–14), 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.").

The record evidence is clear that WAA Holdings, Inc., Boyer's entity, is the only entity that received the money from Halevi. A00267. No funds were sent to Caribbean Sun by Boyer or Halevi. Pacheco's trial testimony confirming that Miami Air received $5 million dollars from WAA Holdings, Inc. does not confirm that Halevi's funds were included in the $5 million. A00621-623 (Pacheco Tr. 158:10-14 159:21-160:5). This is particularly so since there were other potential sources of those funds as Boyer was attempting to secure up to $50 million in funding to purchase Appellants' equity from Romero. A00133. Halevi's argument that Appellants should be estopped from keeping the $5 million sent to Miami Air by Boyer is without merit for two reasons. First, there is no evidence that Caribbean Sun received any funds. Second, Halevi is not left without a potential remedy if this Court vacates the Superior Court's Final Judgment and reverses the March 19 Order.

Contemporaneously with filing its confession of judgment action, Halevi also filed a plenary action against Appellants, asserting breach of contract, fraud, and other torts. *See Halevi Enterprises LLC v. Plasco et al.,* CA No. N21C-07-071-KMV (Del. Super. Ct.). The plenary action was stayed during the pendency of the confession of judgment action. If Halevi is entitled to a remedy, it still has an opportunity to pursue one. But the Superior Court erred when it misapplied settled Delaware law concerning apparent authority and there is no reason to contort settled legal principles to provide Halevi relief, if it is entitled to any relief.

### C. Halevi's argument that Appellants' knowingly, intelligently, and voluntarily waived their rights is unavailing.

Halevi's argument that Appellants' knowingly, intelligently, and voluntarily waived their rights depends entirely on the Superior Court's holding that Boyer had apparent authority to bind Appellants. Ans. Br. at p. 27-30. But Halevi does not address the Superior Court's other holding, that the "evidence during the hearing demonstrated that Boyer lacked actual authority to bind Caribbean and Miami." March 19 Order at p. 2. Since Boyer was not an officer or director of either Caribbean Sun or Miami Air, there is no reason why Boyer's knowledge should be imputed to Appellants and neither the Superior Court nor Halevi offer any such reason.

Even if Boyer and Plasco knew what they were doing when they signed Halevi's loan documents, Appellants had no knowledge of what Boyer or Plasco

were doing. Moreover, even if Boyer had apparent authority to bind Appellants to the Note and other loan documents, a confession of judgment involves a waiver of rights. Such waiver is the basis for Delaware's requirement that a lender demonstrate that the borrower knowingly, intelligently, and voluntarily entered into the loan agreement containing confession of judgment as a remedy. Neither Halevi nor the Superior Court have identified any evidence demonstrating that Appellants—as opposed to Boyer and Plasco—knowingly, intelligently, and voluntarily waived their rights.

## II. Halevi's Affidavit Is Not Enforceable Against Appellants.

Halevi argues that the Affidavit is enforceable because the Note, Affidavit, and Securities Purchase Agreement are either incorporated into the Note or required for closing. Ans. Br. at pp. 33-34. After Halevi began funding the loan to Boyer's entity, WAA Holdings, Inc. between March 22, 2021 through March 23, 2021, the confession of judgment was signed by Boyer on March 24, 2021, or a week after the bulk of the loan documents were executed. A00255-259, A00267. When Halevi's corporate representative was questioned as to why Halevi required a confession of judgment, he stated that it was in anticipation of litigation. A00492 (Geller Tr. 29:1-9). But the Affidavit was not a requirement for closing because Halevi began funding the loan before Boyer even signed the Affidavit.

Moreover, Halevi's Answering Brief fails to address that the Affidavit purports to confess judgment against a promissory note dated March 22, 2021, but the Note that Boyer signed was dated March 17, 2021. Geller admitted that there is no promissory note dated March 22, 2021. A00471 (Geller Tr. 81:9–11); *see* A00460. Halevi offers no explanation for this discrepancy and instead relies entirely on the provisions of the Securities Purchase Agreement. Ans. Br. at pp. 33-34.

But Halevi did not even follow the Securities Purchase Agreement, which lists conditions (a)-(j) under Section 7 entitled "Conditions to the Purchaser's Obligation to Purchase." A00215. Section 7(D) contemplates the confession of judgment execution. However, there were numerous provisions under Section 7 not honored by Halevi, including 7(i), which requires a certificate evidencing the formation and good standing of each company in such entity's jurisdiction of formation be issued by the secretary of state. *Id*. Halevi has never demanded that Appellants produce the secretary of state filings and only relied upon the incorrect and outdated annual report filed by Boyer on June 15, 2020, and provided to Halevi by Boyer. Had Halevi followed its own obligation in Section 7 of the Securities Purchase Agreement, it would have seen that Appellants did not identify Boyer as an officer or director on any of the corporate filings that were operative at the time the loan closed.

In essence, Halevi chose to ignore its contractual obligation to obtain these critically important secretary of state certifications in the very same document it now

claims entitles it to a confession of judgment. The record resounds of proof that those public certificates, if obtained by Halevi as it was required but failed to do, would have conclusively shown a direct contradiction to the loan documents (drafted by Halevi) that listed Boyer as CEO of Appellants (the critical falsehood in this case).

### III. Halevi's Interest Award is an Unlawful and Unexplained Windfall.

Halevi incorrectly reframes Appellants' interest argument into an argument better suiting their purpose. In its summary of argument section, Halevi incorrectly claims that it provided notice to Appellants of the total amount if calculated as interest at the time of the judgment. But Halevi fails to identify when or how the interest rate or the aggregate interest were calculated. The March 19 Order provided an award of $4,075,000.00. Halevi provided a figure for roughly three years of interest totaling $20,958,232.59—more than five times the principal amount (again in just three years). A01053. No explanation was given for how this figure was calculated or what rate was used, yet the court below entered the interest figure without further inquiry. *Id*. And the loan documents provide little help as they are a jumble of different rates that overlap and frankly confuse.

Further compounding the confusion, the trial court issued inconsistent judgments against the Defendants including different principal amounts, interest accrual dates, and prejudgment interest rates. The judgment entered against

defaulted defendants Boyer and Plasco, and their defaulted companies was for a principal amount of $8,891,413.53, while the judgment against the Appellants reflected the principal amount of $4,075,000.00. Tellingly, the Final Judgment against Appellants provides a date of accrual in correlation to the prejudgment interest commencing as of March 23, 2021. No such accrual date is provided in the defaulted defendants' final judgment entered on May 25, 2022, with a prejudgment interest amount totaling $7,779,219.63. Simply put, the judgment entered against the defaulted defendants was far less drastic and punitive than that against the Appellants.

Geller's testimony regarding the promissory note demonstrates that the final judgments did not even correspond to the provisions of the Note in direct contradiction to Delaware law. *Compare, e.g.,* A00483 (Geller Tr. 20:3-6, 20:7-9 ("The note was supposed to mature on July 17, 2021") *with* A00484 (Geller Tr. 21:1-7 ("Payment would have been due sometime around May 2021").

This inconsistent testimony by Halevi's corporate representative demonstrates that the court below incorrectly allowed prejudgment interest to accrue beginning on May 23, 2021, the date of Halevi's initial payment to defendant WAA Holdings, Inc., Boyer's company. These final judgments, rather than being based by a close reading of the applicable agreement and careful calculation, were instead based on

Appellee's whim with no requirement that they provide a factual basis for their calculation and reasoning.

Appellee's Answering Brief also fails to address Appellant's argument regarding the punitive nature of the trial court's interest award. The Note clearly states that the default interest rate is a "liquidated damage[]." A00148 at § 9. It is settled in Delaware that a liquidated damage provision cannot be overly onerous or punitive as it would violate Delaware public policy. *Delaware Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 651 (Del. 2006).

This appeal presents that exact issue here because the Final Judgment imposes an overly onerous and punitive liquidated damage by way of pre-judgment interest nearing almost $21 million. Assuming, *arguendo*, that Halevi correctly calculated the interest due under the Note, as Halevi represented to the court below, a default interest provision in the Note resulting in $20,958,232.59 in interest during approximately 3 years on a $4,075,000.00 principal amount equals an effective interest rate of about 171% per annum. This is clearly punitive in nature.

At minimum, this matter should be remanded for (1) a proper calculation of interest and findings with regard to how interest was calculated, and (2) with instructions regarding the punitive nature of this interest.

## CONCLUSION

This Court should reverse the trial court's holding that Boyer had apparent authority to bind Appellants to Halevi's loan documents, vacate the Final Judgment, and remand this matter to the trial court for further proceedings. The Superior Court committed reversable error by not addressing numerous material facts showing that Halevi did not act with ordinary prudence and reasonable diligence. The Superior Court also committed reversible error in enforcing Halevi's legal defective Affidavit. The Superior Court also committed reversible error by awarding Halevi an unfair and unjust liquidated damages award of over $20 million in interest.

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