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IN THE SUPREME COURT OF THE STATE OF DELAWARE

EDWARD LEE, MATTHEW DURGIN, JAEWOO HWANG, RONALD WASINGER, ADAM SEXTON, CHRIS JO, and ZENITH ELECTRONICS LLC, Defendants-Below, Appellants, v. ASHISH CHORDIA, LAMPROS KALAMPOUKAS, RAGHU KODIGE, RAVI SARMA, RICHARD ANDRADES, ASHISH BALDUA, JOHN GEE, KAJAL VIBHAKAR, THE SHAOIE CHAN CHORDIA GST TRUST, THE SAMAY KODIGE GST TRUST, and THE VEVAAN KODIGE GST TRUST, Plaintiffs-Below, Appellees, and ALPHONSO INC., a Delaware corporation, Nominal Defendant-Below, Appellee.	Case No. 315, 2024 Court Below: Court of Chancery; C.A. No. 2023-0382-NAC

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This is a contract dispute between Silicon Valley founders[1] and the storied electronics company, LG Electronics, Inc. ("LG"), which acquired control of their business, Alphonso Inc. ("Alphonso" or the "Company"). The contract was heavily negotiated as part of a transaction that richly compensated the Key Holders, who earned nearly $23 million in immediate cash, as well as future liquidity rights. When a dispute over control nonetheless arose, the Key Holders sued, seeking to avoid the terms they struck. Instead of applying the contract's straightforward terms, the Court of Chancery (the "Trial Court") injected new obligations that altered those terms, upending the parties' bargain. In doing so, the Trial Court contravened longstanding Delaware law to create new and incorrect jurisprudence around reasonable efforts requirements for at-will employment and the prevention doctrine. The Trial Court erred, and its decision should be reversed.

At the center of this dispute is LG's control over the Key Holders' at-will employment. During negotiations, LG rejected the Key Holders' requests for employment contracts and more secure employment terms. A2104-05; *compare* A2341, *with* A2580-81. The Key Holders abandoned those requests in light of the

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[1] These founders, Appellees Ashish Chordia, Raghu Kodige, Lampros Kalampoukas, Richard Andrades, and Ravi Sarma, together with Appellee Ashish Baldua, non-parties Manish Gupta, Narendra Sirugudi, and Sandeep Beotra, and the Appellee trusts are known as the "Key Holders." A0224 ¶ 10.

substantial economics LG offered, and the parties memorialized their bargain in a stockholders' agreement (the "Agreement" or "SHA") by and among the Key Holders, Alphonso, and Zenith Electronics, LLC ("Zenith"), a wholly owned subsidiary of LG, in December 2020. A3562 (SHA).

The Agreement granted the Key Holders several minority protections, some of which came with an important caveat—they were conditioned on the Key Holders' continued employment, something they agreed that LG now controlled. *See, e.g.*, A3582-83, A3585-87, A3603-04 (*id.* §§ 7.1-.3, 8.1-.2, 13.1). One such right is at issue here. It allowed the Key Holders to designate up to three "Common Directors" to Alphonso's Board (the "Director-Designation Right") provided that *at least one Key Holder remained employed at Alphonso* (the "Designation Condition").[2] A3597 (*id*. § 10.2(b)).

The structure of the Agreement sought to align the parties' interests "to build the value of the business." A1065-67 (Hahm Dep. Tr. at 93:14-95:13). If the Key Holders adhered to LG's long-term vision for Alphonso, they would remain employed and enjoy all of the minority protections under the Agreement. However, if the conduct of the Key Holders diverged from LG's vision, Zenith could exercise

[2] All emphasis has been added unless otherwise noted.

its control to terminate the Key Holders' at-will employment, causing certain rights to fall away. *See* A3600 (SHA § 10.5(c)).

Despite the parties' bargain, the Key Holders were loath to relinquish their grip over Alphonso, and their relationship with LG soured. Ex. A at 15. Focused on maximizing the short-term value of Alphonso—and thus their liquidity rights—the Key Holders fought against LG's strategic direction for Alphonso, launched personal attacks on directors, obstructed Board meetings, misappropriated LG's trademark, and hurled vulgarities at LG employees when they did not get their way. *See, e.g.*, A3664; A3666; A3673; A3677; A3682; A3687; A3718; *see also* A1954-55 (Wasinger Tr. at 575:20-578:19).

On December 16, 2022, after two years of near-constant conflict over Alphonso's direction, Zenith exercised its bargained-for right to end the Key Holders' at-will employment. Pursuant to its contractual right to terminate Alphonso employees, Alphonso's Board of Directors (the "Board") resolved to terminate five executive Key Holders and directed Alphonso's CEO, Adam Sexton, to terminate the two non-executive Key Holders: Andrades and Sarma. A3881-82. Consistent with the parties' bargain, the Designation Condition failed, and the Director-Designation Right fell away. And, consistent with its right to remove the Common Directors if the Designation Condition failed, Zenith executed a

stockholder consent (the "December Consent") to remove Chordia, Kodige, and Kalampoukas from the Board. A3877; A3598 (SHA § 10.3(a)(ii)).

Appellees turned to the Trial Court for relief, arguing that the December Consent was invalid and asking the Court to restore Chordia, Kodige, and Kalampoukas to Alphonso's Board. A0060-61. The Trial Court correctly found in its Post-Trial Memorandum Opinion (the "Opinion," attached as Exhibit A) that Alphonso's Board—helmed by Zenith's appointed directors—was "exercis[ing] [its] bargained-for contract right on December 16, 2022, when it terminated the five executive-officer Key Holders." Ex. A at 53. Accordingly, Zenith did not breach any implied or express contractual obligation by terminating the executive Key Holders. *Id.*

Nevertheless, the Trial Court put its thumb on the scale and rewrote the parties' bargain to invalidate the December Consent. *See id*. at 101-02. The Trial Court held that a reasonable-efforts provision in the Agreement—Section 12.1 (the "Efforts Provision")—obligated Alphonso's management, distinct from its Board, to use reasonable efforts to ensure that the Designation Condition was satisfied so that the Director-Designation Right did not fall away. *See id*. at 55. Accordingly, the Trial Court held that Alphonso breached the Efforts Provision when it fired Andrades and Sarma. *See id*. at 87-88. This reading of the Efforts Provision was advanced by *no* party below—because neither side understood it to be the bargain

they agreed to. With *Alphonso's* purported breach as the predicate, the Trial Court invoked the prevention doctrine to invalidate *Zenith*'s written consent, *see id*. at 95-96, 100-02, even though that equitable doctrine only contemplates remedies against *Alphonso* due to its supposed breach. *See infra* Argument § II.C.1.

The Trial Court erred. Its interpretation of the Efforts Provision and its application of the prevention doctrine contravene Delaware law. Its ruling squares neither with the text of the Agreement nor the intent of the parties. This Court should reverse.

SUMMARY OF ARGUMENT

1. The Trial Court erred in holding that the Efforts Provision compelled Alphonso to use reasonable efforts to ensure that Andrades and Sarma remained employed to satisfy the Designation Condition, so their Director-Designation Right remained "operative." Ex. A at 66. The Efforts Provision does not extend to the Designation Condition. Instead, it requires only that Alphonso "ensure" the parties' "rights" are "effective" by taking certain actions after the parties exercise their rights. The Trial Court's interpretation rewrites the parties' bargain by limiting LG's and Alphonso's right to terminate Andrades and Sarma, which creates a commercially unreasonable result.

2. The Trial Court erred in applying the prevention doctrine to invalidate the December Consent. The prevention doctrine cannot excuse a condition against a party that has not breached an agreement (here, Zenith). The Trial Court also erred in finding that the assumption-of-risk exception inapplicable. Andrades and Sarma conceded at trial that their employment was at-will. By conditioning the Director-Designation Right on their continuing employment, Andrades and Sarma assumed the risk that Alphonso could and would terminate them, which would cause the Director-Designation Right to fall away.

STATEMENT OF FACTS

I. LG IDENTIFIES A STRUGGLING TECH STARTUP AS A STRATEGIC PARTNER FOR ITS SMART TV BUSINESS.

Zenith is a consumer electronics company incorporated in Delaware. As a pioneer of television, inventor of the modern remote control, and the first company to develop high-definition television in North America, Zenith was known in American homes and businesses for its high-quality television receivers and its slogan: "The quality goes in before the name goes on."[3] Zenith now focuses on the development of broadcasting and digital rights management technology.[4]

In 1999, Zenith became a wholly-owned subsidiary of non-party LG Electronics U.S.A. Inc., which is itself a wholly-owned subsidiary of non-party LG. A0224 ¶ 13. LG is a global consumer electronics manufacturer that shares a history of improving televisions. One of LG's products, smart TVs, generates revenue by selling the TV's advertising inventory—*i.e.*, advertising space on its operating system and streaming channels. A1934 (Lee Tr. at 494:3-20); A1843 (Kodige Tr. at 256:3-10). In the 2010s, LG began seeking an opportunity to better monetize its

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[3] Zenith, *Heritage*, https://zenith.com/heritage/ (last visited Sept. 24, 2024).

[4] Defendants Ronald Wasinger, Edward Lee, Matthew Durgin, and Jaewoo Hwang were members of the Board on December 16, 2022. A0224 ¶¶ 14-17. Defendant Adam Sexton was Alphonso's interim CEO and Defendant Chris Jo was a Board member from March to June 2022. A0225 ¶¶ 18-19.

advertising inventory. A1934 (Lee Tr. at 494:2-8). To do so, LG wanted to invest in automatic content recognition ("ACR") technology, which collects data on users' viewing habits to improve the effectiveness of targeted advertising. *Id*. at 494:2-20; A1331 (Chordia Dep. Tr. at 62:13-63:7).

Alphonso was co-founded in 2012 as a Silicon Valley startup by Plaintiffs Chordia, Kodige, Kalampoukas, Andrades, and Sarma, among others. A1781 (Chordia Tr. at 6:18-7:6). By 2014, Alphonso had developed ACR technology. A1331 (Chordia Dep. Tr. at 62:13-63:21). However, Alphonso struggled in a crowded field of competitors and failed to effectively monetize its technology because it could not secure sufficient advertising inventory. A1333-34, 1339 (*id.*at 69:13-70:4, 72:22-74:10, 133:2-4). Although many Alphonso competitors secured inventory deals with smart TV manufacturers between 2017 and 2019, Alphonso never received an offer from a potential partner. A1797-98 (*Id*. at 71:3-74:11).

The industry's lack of interest left Alphonso in a precarious financial position. At the close of 2019, Alphonso had never operated at a profit, had deferred employee compensation numerous times, and faced stagnant or declining revenue growth. A1782, A1796-97 (Chordia Tr. at 11:13-19, 68:8-71:1); A0806-07 (Beotra Dep. Tr. at 36:16-38:2); A3633. In January 2020, LG offered to invest in Alphonso. A1934 (Lee Tr. at 494:21-23). The key condition of LG's investment, from the beginning, was the Key Holders' sale of control. *See* A2095.

II. ALPHONSO AND LG NEGOTIATE A CONTROL TRANSACTION.

Alphonso and LG started negotiating the terms of a potential transaction in March 2020. *Id.* Alphonso's then-Chief Executive Officer Chordia, then-Chief Product Officer Kodige, then-Chief Financial Officer Beotra, and General Counsel Tom Cushing negotiated on behalf of Alphonso and the Key Holders. A1782-83 (Chordia Tr. at 12:18-13:15). LG's primary negotiators were Head of Global Alliances Tom Hahm and Defendant Lee. *Id.*

A. LG Negotiates for Control as a Necessary Condition of the Transaction.

LG was clear from the outset that it would only pursue a transaction where it received a control position. A2096; A0817 (Beotra Dep. Tr. at 78:7-79:8). Hahm was explicit about what that meant for the Key Holders. He informed them that "things might not work out well for the founders," A1800-01 (Chordia Tr. at 84:5-85:1), and LG could "fire [the Key Holders] at any time." A1022-23 (Hahm Dep. Tr. at 50:20-51:3).

Chordia, Kodige, and Beotra recognized that selling control meant that "LG has the right to prevail." A2531-32. LG, through Zenith, would control "all the decisions that need simple board majority," including "CEO hire/fire/comp." A2530. In exchange, they sought cash payments and liquidity options. A2114-20; A1783-84 (Chordia Tr. at 15:5-8, 17:7-18:10). Negotiations shifted to economic concessions the Key Holders could extract for control of Alphonso. Ex. A at 7-8.

In its initial letter of intent on March 5, 2020, LG signaled that it was open to a "trigger-based method to allow for a slow exit" for the Key Holders. A2096. This "Employee Liquidity Option," Beotra noted in a June 8 term sheet, would ensure that the Key Holders could cash out of the enterprise in exchange for giving up control. A2100. LG agreed to provide liquidity via three scheduled tender offers with a guaranteed floor price. A3601 (SHA § 11); A1784, A1800-01 (Chordia Tr. at 17:18-18:18, 82:14-86:18). LG also agreed to give the Key Holders the right to demand an IPO starting three years after closing. A3587 (SHA § 9.1(a)); A1784, A1801 (Chordia Tr. at 17:18-18:18, 86:19-87:4). Beotra further noted that giving up control meant that the Key Holders would need a "control premium" and "upfront cashing out." A2114. LG agreed and offered the Key Holders nearly $23 million in cash upon closing. A3488-89.

B. LG Rejects Employment Protections for the Key Holders.

Before negotiations with LG began, several Key Holders had already executed agreements with Alphonso that clarified that Alphonso could terminate them "at will, at any time, for any or no reason, with or without cause." *E.g.*, A3753-54 (Baldua), A3766-67 (Chordia), A3808 (Kalampoukas), A3816-17 (Kodige). Recognizing that LG would soon hold the power to decide whether to terminate at-

will employees, Beotra proposed three-year employment contracts for certain "Key Employees" in the June 8 term sheet. A2099.

On June 19, LG rejected this term. A2014-05. LG noted that it would not accept bespoke employment protections for the Key Holders because it was Alphonso's philosophy that all "executives and employees should be treated equally." *Id.* No Key Holder challenged LG's revision. Therefore, *all* Alphonso employees—including the Key Holders—would remain at-will and subject to termination at Alphonso's (and LG's) discretion. A2115-16.

C. The Key Holders Expressly Condition Their Right to Designate Directors on Their Continued Employment.

After LG and the Key Holders aligned on key terms on July 30, 2020, A2133, LG circulated an initial draft of the proposed Agreement on October 19, 2020. A2140. There, LG proposed that Alphonso's Common Directors be elected by a majority vote of non-LG stockholders. A2172-73. On October 23, Chordia countered with a proposal that the Common Directors be appointed by an "Employee Key Holder Majority."[5] A2338. In other words, the Key Holders, knowing their employment remained at-will, added a provision that conditioned their right to

[5] The Employee Key Holder Majority is defined to include "the Key Holders who are directors, officers or employees of the Corporation at such time (the 'Employee Key Holders') holding a majority of the shares of Capital Stock then held by all Employee Key Holders." A3579 (SHA § 6.2).

designate Common Directors on their continued employment. In the same markup, Chordia (then, the CEO) also proposed language that gave the Common Directors a veto right over CEO terminations. A2341.

In the next draft, LG rejected Chordia's attempt to give the Common Directors a veto over CEO terminations. A2511. However, LG accepted Chordia's proposal concerning the appointment of the Common Directors. But LG added a clause clarifying the parties' mutual understanding of Chordia's proposal: the Employee Key Holder Majority's designation right "shall be null and void *if no Key Holder serves as an officer or employee of the Corporation at such time*." A2508. The Key Holders and Alphonso agreed. A2577, A2580-81. At trial, Chordia admitted that he understood this meant that the Director-Designation Right would fall away if no Key Holder was an Alphonso employee. A1804 (Chordia Tr. at 97:1-10).

D. The Parties Condition Other Rights on the Key Holders' Continued Employment to Ensure Incentive Alignment.

The Director-Designation Right was not the only right the LG and the Key Holders agreed to condition on the Key Holders' continued employment. For example, in its October 19 draft, LG proposed giving information and inspection rights to "any Key Holder who holds more than 100,000 shares" and "is an employee" of Alphonso (a "Major Stockholder Employee"). A2199, A2212-13 §§ 1.24-1.25, 7.1-7.2. LG also proposed granting a "Right of First Offer" for new

securities to Major Stockholder Employees. A2214 § 8.1. LG, however, made clear that both rights would terminate "if such Major Stockholder Employee is no longer employed by the Corporation." A2213, A2215 §§ 7.3, 8.2.

As another example, in their October 20 draft, the Key Holders proposed a revision to Section 13.1 of the Agreement, which provided for termination only by a written instrument signed by Alphonso, Zenith, and the "Employee Key Holder Majority." A2344 § 13.1(iii). In the next turn of the Agreement, LG clarified that: "[f]or the avoidance of doubt, such execution by the Employee Key Holder Majority shall not be required if no Key Holder serves as an officer or employee of the Corporation at such time." A2514 § 13.1(iii).

The final Agreement contained half-a-dozen provisions that expressly conditioned the Key Holders' rights on their continued employment. A3579, A3582-83, A3585-87, A3597, A3603, A3608 (SHA §§ 6.2, 7.1-.3, 8.1-.2, 10.2(b), 13.1(b)(iii), 13.8). Notably, the Key Holders' liquidity rights were not among them. The Key Holders' conditional rights were intended to ensure that "everybody's incentives [were] aligned to build the value of the business." A1065-67 (Hahm Dep. Tr. at 93:14-95:13). In other words, if the Key Holders were aligned with LG's long-term vision for Alphonso and remained employed at Alphonso, they would retain these conditional rights. But, if the Key Holders failed to align with LG's vision, LG could exercise its control to have them terminated them for any reason. This is

why LG had sought "control over the board, . . . over hiring and firing [the Key Holders], and everything else that a typical board does." A1010 (Hahm Dep. Tr. at 38:14-25).

III. THE AGREEMENT'S KEY TERMS.

On December 23, 2020, the Key Holders, Zenith, and Alphonso (collectively, the "Parties") executed the final Agreement. A3562 (SHA); Ex. A at 12. The Agreement reflected the bargain that the Parties struck: the Key Holders received nearly $23 million in cash and the right to: (i) demand an IPO three years after the transaction's close; (ii) participate in three scheduled tender offers beginning in 2024; and (iii) appoint three directors if a Key Holder remained employed at Alphonso, among other rights. Ex. A at 8-13. In exchange, Zenith received "management control" over Alphonso. A2096; *see also* A2112.

Several provisions of the Agreement are at issue here.

The Director-Designation Right. Under Section 10.2(a), Zenith has the right to designate four directors. A3597 (SHA § 10.2(a)). Under Section 10.2(b), the Employee Key Holder Majority has the right to designate up to three directors if two conditions are met. *Id*. (SHA § 10.2(b)). *First*, the Key Holders must collectively hold twenty percent of Alphonso's outstanding Capital Stock. *Id*. *Second*, at least one Key Holder must be an Alphonso officer or employee. *Id*. Any vacant director

seats not subject to designation under Section 10.2(b) would be filled by Zenith. *See id*. (SHA § 10.2(c)).

The Director Removal Provision. Section 10.3(a) permits a stockholder to remove designated directors from Alphonso's Board if the "[p]erson(s) originally entitled to designate or approve such director . . . is no longer so entitled to designate . . . such director." A3598 (SHA § 10.3(a)).

Board's Termination Rights. Section 10.5(c) vests the Board with the "*exclusive* right" to "hire [and] terminate employment . . . of executive officers of [Alphonso] and any employee . . . who receives an annual compensation . . . equal to $500,000 or more." A3600 (SHA § 10.5(c)).

CEO's Termination Rights. Under Section 10.5(c), Alphonso's CEO has the right to terminate all non-executive officer employees, subject to two express limitations (the "CEO Termination Right"). *Id*. *First*, the CEO must carry out all terminations in accordance with applicable laws and a human resources policy approved by Alphonso's Board. *Id.* *Second*, the CEO cannot terminate any employee who makes over $500,000 per year. *Id*.

Efforts Provision. Section 12.1 of the Agreement provides that "[Alphonso] agrees to use its reasonable efforts, within the requirements of applicable law, to ensure that the rights granted under this Agreement are effective and that the Parties enjoy the benefits of this Agreement. Such actions include, without limitation, the

use of [Alphonso's] reasonable efforts to cause the nomination and election of the directors as provided in this Agreement." A3602 (SHA § 12.1).[6]

IV. LG TURNS AROUND A STRUGGLING ALPHONSO, WHILE THE KEY HOLDERS CAUSE BOARD DYSFUNCTION.

After closing, LG's influence immediately transformed Alphonso from a struggling startup to a key player in the ACR market. For instance, Alphonso previously had no advertising inventory of its own. So, LG granted Alphonso exclusive access to LG's user data and smart TV ad inventory, which spans 165 million smart TVs worldwide.[7] A1844 (Kodige Tr. at 258:8-259:21). To monetize that inventory, LG built out a dedicated ad sales team at Alphonso. A1843 (Kodige Tr. at 255:17-256:2). In Kodige's words, LG's efforts were "foundational" to Alphonso's growth in 2021. A1844 (Kodige Tr. at 259:8-21). Alphonso's revenue nearly tripled from 2020 to 2021—from roughly $28 million to $78 million. A1787, A1790 (Chordia Tr. at 31:21-32:3, 42:18-19).

Despite this progress, friction ensued on the Board. It became clear that LG's "long-term goals" for Alphonso clashed with the Key Holders' desire to maximize

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[6] The Efforts Provision appeared in the first draft of the Agreement. A2176. No party ever suggested revisions to the Efforts Provision, and it was never discussed amongst the parties. *Compare* A2176, *with* A2343, A2583, A2886, A3215, *and* A3417.

[7] LG Ad Solutions, https://lgads.tv (last visited Sept. 24, 2024).

short-term value for a near-term exit. Ex. A at 15; A1850 (Kodige Tr. at 281:4-283:22). The Employee Key Holder Majority had appointed Chordia, Kodige, and Kalampoukas as Common Directors, and Chordia made the Key Holders' intentions clear: They were uninterested in developing a long-term vision for Alphonso, because, in Chordia's own words, they only had "1000 days" to get to an IPO. A3661.

The Key Holders' "brash," "uncautious[,] and overconfident" culture did not mesh well with LG's "cautious," consensus-building approach. A1934-35 (Lee Tr. at 493:8-19, 498:9-15). But the Key Holders' conduct went beyond culture clash. The Trial Court itself found that the Key Holders engaged in repeated "unprofessional behavior" that utterly frustrated LG's bargained-for right to control and manage Alphonso. Ex. A at 82; A2112.

- Chordia co-opted LG's well-known trademark and unilaterally attempted to rebrand Alphonso as "LG Ads," which he said stood for "Large Gonads Advertising." Ex. A at 16-17; A1807 (Chordia Tr. at 110:18-112:17); A3677.
- Chordia "blatant[ly]" circumvented Board authority by hiring an Alphonso executive and officer, Serge Matta, who the SEC investigated for securities fraud and ultimately barred from serving as an officer or director of a public company for ten years. Ex. A at 18-19, 82; A1814, A1817 (Chordia Tr. at 137:23-138:7, 150:10-19); A2094.
- Chordia told LG it has "no authority over Alphonso" and "can go fish" when LG requested a data privacy audit following a New York Times article that called Alphonso data privacy practices "questionable." Ex. A at 20-21; A1811 (Chordia Tr. at 128:4-12); A3678.

- Chordia denigrated LG strategy, noting that he didn't know "f**cking LG English." Ex. A at 26-27; A3687. At the same time, Chordia demanded that LG treat the Key Holders "like they are sent from God." Ex. A at 26-27; A3687.

- In multiple emails to top LG executives, Kodige demanded that LG relinquish its control to fund an employee stock option pool that he and Chordia depleted through their hiring practices. A3741; A3746-47.

As the Trial Court found, the Key Holders' ongoing "unwillingness to abide by the established chain of command" obstructed LG's ability to manage the Company it controlled. Ex. A at 14. This obstruction spilled over into the Board room, leading to an "avalanche of dysfunction" that affected Alphonso's ability to operate. A1916 (Durgin Tr. at 420:1-6). Board meetings would end with few agenda items covered. A1916 (Durgin Tr. at 422:7-423:23); A3722. The acrimony prevented the Board from carrying out even the simplest of board tasks, including approving minutes. A1856-57 (Kodige Tr. at 308:13-309:4).

LG tried to mend the Parties' relationship. On December 28, 2021, Lee reached out to the Key Holders and promised to "listen and support" them further in the new year. A3693. Chordia's response was less magnanimous. He fired back that the Parties "ha[d] massive and significant issues that . . . won't be . . . reconcile[d]," that LG executives were ill-suited to serve on Alphonso's Board, and that if LG did not align with their short-term vision for Alphonso, LG's smart TV business "will shut . . . down after loosing [*sic*] billions." A3692.

V. ZENITH EXERCISES ITS BARGAINED-FOR RIGHTS TO TERMINATE THE KEY HOLDERS AND REMOVE THE COMMON DIRECTORS FROM THE BOARD.

In May 2022, Chordia and Kodige hijacked a meeting with one of LG's most senior executives to issue an ultimatum—give them full control over Alphonso's entire business or buy them out early. A3715. Kodige reiterated this ultimatum in September. A3741. Left with an executive team and Common Directors who refused to engage collaboratively toward Alphonso's long-term benefit, LG considered a reorganization in the fall of 2022. A1957 (Wasinger Tr. at 587:6-20).

LG considered several options: Early buyout offers for the Key Holders; terminating Chordia, Kodige, and Beotra only; and terminating all Key Holders. A1958 (*id*. at 588:3-16). LG was aware that even if Chordia and Kodige were removed from Alphonso management, they would likely remain on Alphonso's Board as Common Directors unless LG terminated all Key Holders. A1961 (*id*. at 601:17-602:8). Given the dysfunctional state of the Board, the threat to Alphonso's operations and long-term health, and the Key Holders' myopic focus on Alphonso's short-term future, LG exercised its ability to terminate all of the Employee Key Holders. A1958 (*id.* at 588:21-589:9, 590:23-591:4).

On December 16, 2022, the Board held a special meeting at which it voted to terminate the executive-level Key Holders—Chordia, Baldua, Beotra, Kalampoukas, and Kodige—pursuant to its powers under Section 10.5(c) of the

Agreement. A3844; A3867. The same resolution named Sexton, whom LG previously interviewed for a leadership role at Alphonso, A0455 (Sexton Dep. Tr. at 21:13-19), as Alphonso's interim-CEO. A3844. Sexton then exercised the CEO Termination Right and terminated the remaining Employee Key Holders, Andrades and Sarma. A1941-42 (Lee Tr. at 523:23-524:2). However, the Key Holders retained their valuable liquidity rights.[8]

With no Key Holders employed at Alphonso, the Designation Condition failed, and the Director-Designation Right fell away. Consistent with its rights under Sections 10.2(c) and 10.3 of the Agreement, Zenith executed the December Consent removing Chordia, Kodige, and Kalampoukas from the Board. A3878-79.

VI. PROCEDURAL HISTORY

Plaintiffs filed their two-count complaint in March 2023. A0032; A0220-21 ¶¶ 1-2. In Count I, Plaintiffs sought an order pursuant to 8 *Del. C.* § 225 that the December Consent was invalid and Chordia, Kodige, and Kalampoukas remained Board members. Count II, which was stayed pending the resolution of Count I, alleges breaches of fiduciary duty. *Id*. Trial for Count I was

[8] As noted above, once no Key Holders remained employed at Alphonso, Zenith could cause Alphonso to consent to terminate the Agreement and all the rights contained therein. A3603 (SHA § 13.1(iii)). But Zenith never did so. The Trial Court found that the Agreement is "still in effect" and "all Liquidity Rights remain in effect." Ex. A at 45.

held in September 2023, A1780, A1897, and post-trial argument was held in December. A2021.

On January 4, 2024, the Trial Court delivered its Opinion. Dkt. 206. The Trial Court concluded that the December Consent was invalid because Alphonso breached the Efforts Provision when Sexton terminated Andrades and Sarma. Dkt. 206, Ex. A at 46. The parties collectively dedicated just a few pages across nearly 300 pages of briefing to the Efforts Provision. Yet, the Trial Court spent nearly 40 pages of its 102-page opinion analyzing the meaning of the Efforts Provision. *Compare* Ex. A at 49-88, *with* A0082, A0150, A0245, A0314, A0393.

After finding Alphonso breached the Efforts Provision, the Trial Court applied the prevention doctrine to fashion a remedy in favor of Plaintiffs. Notably, the prevention doctrine was only raised in a footnote in Plaintiffs' Post-Trial Opening Brief and in a single sentence in their Reply. Ex. A at 95; A0311 n.28; A0353 at 29. Yet the Trial Court used the doctrine to excuse the Designation Condition, which constructively restored Andrades's and Sarma's status as Employee Key Holders—even though they were no longer employees—so long as they continue to hold stock in Alphonso. This remedy undermines the Parties' express agreement to predicate the Director-Designation Right on employment, which LG could terminate for any reason. *Supra* Statement of Facts § III.

The Trial Court's reappointment of Andrades and Sarma as Employee Key Holders was retroactive to December 16, 2022. Therefore, on the date that Zenith issued the December Consent, the Trial Court found that an Employee Key Holder Majority with the right to appoint Common Directors under Section 10.2(b) still existed. Since the Agreement only allows Zenith to remove the Common Directors if no Employee Key Holders exist, A3598 (SHA § 10.3(a)), the Trial Court held the December Consent was invalid. *Id.* at 98-99, 101.

The Trial Court did not decide the proper composition of Alphonso's Board through this remedy. Instead, it granted Andrades and Sarma a "*continuing*" and "*personal*" right to nominate Common Directors, even if they are not employed by Alphonso. Ex. A at 57-58, 101. The Trial Court then ordered Andrades and Sarma to select Common Directors but cautioned them to "give consideration" to who they choose given the Key Holders' troubling misconduct. Ex. A at 102. Andrades and Sarma promptly reinstated Chordia and Kalampoukas to the Board.[9]

This appeal now follows.

[9] Kodige decided to launch a venture that competes with Alphonso which prevented him from being re-appointed. A1709 (Kodige Dep. II Tr. at 112:9-12).

ARGUMENT

I. THE TRIAL COURT ERRED IN INTERPRETING THE EFFORTS PROVISION TO IMPOSE A DUTY UPON ALPHONSO TO PROTECT THE DESIGNATION CONDITION.

A. Question Presented

Did the Trial Court err by holding that the Efforts Provision requires Alphonso to use reasonable efforts to ensure that the Designation Condition remains satisfied? This issue was preserved. A0363-64.

B. Scope of Review

This Court "review[s] questions of contract interpretation *de novo*." *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 760 (Del. 2022).

C. Merits of Argument

The Trial Court held that the Efforts Provision requires Alphonso to use reasonable efforts to ensure the Designation Condition is satisfied. *See* Ex. A at 83. That holding was erroneous for two reasons.

First, the Trial Court's reading of the Efforts Provision is at odds with its plain text. *See infra* Argument § I.C.1. The Trial Court read the Efforts Provision to require Alphonso to take reasonable efforts to ensure that the Designation Condition remains satisfied as to Andrades and Sarma. *See* Ex. A at 60-61. But the plain language of the Efforts Provision does not require Alphonso to ensure that conditions to the Parties' rights remain satisfied. *See infra* Argument § I.C.1.a. Nor can the Trial Court read an obligation to satisfy conditions into the Efforts Provision without

elevating one Party's rights over another's. *See infra* Argument § I.C.1.b. Instead, the plain language of the Efforts Provision only requires Alphonso to take actions after the Parties exercise their rights. *See infra* Argument § I.C.1.c.

Second, the Trial Court's reading of the Efforts Provision is at odds with the bargain the Parties struck. *See infra* Argument § I.C.2. The Parties agreed that the Key Holders would be employed at-will, and they expressly conditioned the Director-Designation Right on the Key Holders' continuing employment. The Trial Court's interpretation creates employment protections for Andrades and Sarma that the Parties rejected. *See infra* Argument § I.C.2.a. The Trial Court justifies its reading by insisting that Andrades and Sarma modified their at-will employment by bargaining for the Director-Designation Right and the Efforts Provision. Ex. A at 82-83. But the notion that two non-executives were able to bargain for protections that five executives did not get is unreasonable, especially when the record shows those non-executives were *not even involved* in negotiating the Agreement. *See infra* Argument § I.C.2.b.

1. The Trial Court's Expansive Interpretation of the Efforts Provision is Unprecedented and Contrary to its Plain Language.

The Trial Court erroneously held that the Efforts Provision required Alphonso to ensure that Andrades's and Sarma's Director-Designation Right remained effective by using reasonable efforts to ensure that the Designation Condition was

satisfied—*i.e.*, that Andrades and Sarma remained employed at Alphonso. *See* Ex. A at 60-61. Nothing in the plain text requires Alphonso to ensure that conditions to the Parties' rights are satisfied.

a. The Trial Court Incorrectly Read an Obligation to Satisfy Conditions into the Efforts Provision.

The Trial Court's insistence that the Efforts Provision obligates Alphonso to satisfy *conditions* to rights under the Agreement writes language into the Agreement that does not exist. The Efforts Provision consists of only two sentences. Notably absent in both sentences is the word "conditions" or anything comparable. *See* A3602 (SHA § 12.1).

Under Delaware law, "it is axiomatic" that courts cannot "rewrite contracts or supply omitted provisions." *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 355 (Del. 2020). The Parties knew how to distinguish between conditions and rights in the Agreement. *See, e.g.*, A3571, 3574, 3592 (SHA §§ 2.2 (subjecting each Stockholder's right to take and hold securities to the "conditions specified in this Agreement"); 2.4(c) (subjecting the Key Holders' right to co-sale to certain terms and conditions); 9.5 (setting express condition precedent on Key Holders' right to demand an IPO.)) That they did not elect to include conditions when outlining the scope of Alphonso's obligations in the Efforts Provision must be construed as deliberate. *See Williams Cos. v. Energy Transfer LP*, 2020 WL 3581095, at *12

n.123 (Del. Ch. July 2, 2020) (explaining that "the use of different language in different sections of a contract suggests the difference is intentional").

Where Delaware courts have found that an efforts provision requires a party to satisfy conditions, they have done so because the contract expressly links the efforts provision to a condition of performance. *See, e.g.*, *Snow Phipps Gp. v. KCAKE Acq., Inc.*, 2021 WL 1714202, at *41 (Del. Ch. Apr. 30, 2021) (requiring efforts to satisfy conditions where the contract obligated the buyer to "use its reasonable best efforts to . . . satisfy all conditions applicable to the Buyer obtaining the Debt Financing"); *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *88 (Del. Ch. Nov. 30, 2020), *aff'd*, 268 A.3d 198 (Del. 2021) (requiring efforts to satisfy conditions where the contract obligated both parties to use reasonable efforts to satisfy lender conditions precedent to securing financing).[10] Here, the Trial Court erred by tying the Efforts Provision to the Designation Condition, even though the Agreement does not.

[10] Delaware precedent abounds with merger agreements that expressly link efforts provisions to closing conditions. *See, e.g.*, *Neurvana Med., LLC v. Balt USA, LLC*, 2020 WL 949917, at *1 (Del. Ch. Feb 27, 2020); *In re Anthem-Cigna Merger Litig.*, 2020 WL 5106556, at *92 (Del. Ch. Aug. 31, 2020); *Himawan v. Cephalon, Inc.*, 2018 WL 6822708, at *1 (Del. Ch. Dec. 28, 2018). The Agreement did not.

b. The Trial Court's Reading of "Effective" Requires Alphonso to Elevate the Key Holders' Rights over Zenith's.

Because an express requirement to satisfy conditions does not exist in the Efforts Provision, the Trial Court's analysis relies heavily on its interpretation of the word "effective." *See* Ex. A at 60-61, 65-66, 69-70 & n.317, 73-74. Under the Trial Court's reasoning, to "ensure" that a right is "effective," Alphonso must "take all reasonable steps" to "make certain" that the rights are "operative; in effect." *Id*. at 64, 66. But, Andrades and Sarma are not the only Parties that have a right to appoint directors under the Agreement. Under the same Section that governs the Director-Designation Right (Section 10.2), *Zenith* has a right to elect directors to the vacant Common Director seats if the Designation Condition is not met. A3597 § 10.2(c).

By construing the word "effective" to require Alphonso to safeguard the Designation Condition for the Key Holders' Director-Designation Right, the Trial Court requires Alphonso to take actions that negate Zenith's competing right. This interpretation elevates one Party's rights over another's, which contradicts the Efforts Provision's instruction that Alphonso ensure "the rights granted under this Agreement are effective." A3602 (SHA § 12.1).

c. Properly Interpreted, the Efforts Provision Obligates Alphonso to Undertake Actions After the Parties Exercise Their Rights.

By its plain language, the Efforts Provision requires Alphonso to "use its reasonable efforts, within the requirements of applicable law, to ensure that the rights granted under this Agreement are effective and that the Parties enjoy the benefits of this Agreement." *Id.* "Such actions include, without limitation, the use of the Corporation's reasonable efforts to cause the nomination and election of the directors as provided in this Agreement." *Id.* The most straightforward reading of these two sentences—which, unlike the majority of efforts provisions interpreted by Delaware courts, do not mention "conditions"—is that Alphonso must use reasonable efforts to take certain actions after the Parties exercise their contractual rights.

In the first sentence, Alphonso agrees to use reasonable efforts to "ensure that the rights granted under this Agreement are effective." *Id*. As noted above, the Trial Court focused on the word "effective" to hold that the Efforts Provision required Alphonso to ensure that the Director-Designation Right remained "operative," to Andrades's and Sarma's benefit, by ensuring satisfaction of the Designation Condition. *See* Ex. A at 82-83. But, as the Trial Court recognized, the word "effective" can also mean "successful in producing a desired or intended result." *Id*. at 65.

Under that construction, the Director-Designation Right is "successful in producing its desired or intended result" if, after the Employee Key Holder Majority exercises its Director-Designation Right to *nominate* the Common Directors, the chosen Common Directors are *elected* to Alphonso's Board. Alphonso cannot nominate or elect directors on its own. But Alphonso can take actions to ensure the nomination and election of directors when either the Employee Key Holder Majority or Zenith exercise their director-designation rights. For instance, Alphonso can "call a special meeting of Stockholders for the purpose of electing or removing directors." A3597-98 (SHA §§ 10.1-.3). Alphonso can also issue the requisite notice to non-consenting stockholders when the Parties exercise their designation rights. *See* A3543 (Bylaws art. II § 11(a)). Zenith and the Employee Key Holder Majority cannot take those actions themselves, but Alphonso must perform them to ensure that the director-designation rights under Section 10.2 of the Agreement are "successful in producing [their] desired or intended result" of electing the designated directors to Alphonso's Board. Ex. A at 65.

The Efforts Provision's second sentence confirms this reading, noting that Alphonso is expected to "caus[e] the nomination and election of the directors as provided in this Agreement." A3602 (SHA § 12.1). As illustrated above, Alphonso can only cause the nomination and election of directors after the Employee Key Holder Majority and Zenith exercise their director-designation rights. Indeed, the

Efforts Provision appears to be substantially similar to those in model agreements. *See* 6A Am. Jur. Legal Forms 2d § 74:1202 § 4.A. And one legal scholar has observed that similar efforts provisions in other stockholder agreements are limited to requiring the corporation to include designated directors "in [the] corporate proxy slate" and exerting "[c]orporate efforts to elect" those designees. *See* Ex. D at Tbl. 1. These actions "ensure" that rights belonging to the Parties "are effective" when exercised. A3602 (SHA § 12.1).

Properly read, the Efforts Provision simply requires Alphonso to use reasonable efforts to take actions after the Parties exercise their rights under the Agreement.

2. The Trial Court's Interpretation of the Efforts Provision Rewrites the Parties' Bargain.

The Trial Court's reading of the Efforts Provision is also erroneous because it substitutes the Trial Court's preferred result for the bargain that the Parties struck. The Agreement contains no express provision that protects Andrades and Sarma in the manner the Trial Court found. Indeed, it took the Trial Court nearly 40 pages of analysis to tease bespoke protections for Andrades and Sarma out of the Efforts Provision. Were the Trial Court correct that the Parties intended the Efforts Provision to provide such protections, "then the drafters…chose an implausibly circuitous and tortured means of implementing that agreement." *White v. Curo Tex.*

Hldgs., LLC, 2017 WL 1369332, at *15 (Del. Ch. Feb. 21, 2017). The Trial Court's reading "discovered a substantive limitation" that is neither apparent from the face of the Agreement nor consistent with the Parties' understanding of their Agreement. *Id.* "What results is a facially unreasonable reading" that must be reversed. *Id*.

a. The Trial Court's Interpretation Impermissibly Modifies Alphonso's Right to Terminate Andrades's and Sarma's At-Will Employment.

The Trial Court construes the Efforts Provision as a "bargained for" right that modifies the "at-will employment relationship" between the Parties. Ex. A at 83. Under the Trial Court's reasoning, Alphonso had to take "all reasonable steps" before terminating Andrades and Sarma. Ex. A at 77. But that is not the terminable, "at-will" employment that the Key Holders agreed to. In return for millions in immediate cash and the prospect of much more later, the Key Holders agreed to hand control over "all the decisions that need simple board majority" to Zenith, including the right to terminate Key Holder employees for any reason, at any time. A2112; A2530; *see also Ogus v. SportTechie, Inc.*, 2020 WL 502996, at *2, *6 (Del. Ch. Jan. 31, 2020). The Trial Court's erroneous reading is reversible error.

It is undisputed that all Key Holders, including Andrades and Sarma, were at-will employees.[11] Every Key Holder who testified at trial admitted that they understood their employment with Alphonso was "at-will." A1804 (Chordia Tr. at 97:8-14); A1842 (Kodige Tr. at 252:15-17); A1862 (Kalampoukas Tr. at 332:22-24); A1908 (Andrades Tr. at 389:3-5); A1910 (Sarma Tr. at 399:18-21).[12] As at-will employees, the Key Holders could "be terminated for any reason, with or without cause, at any time." *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000). Delaware law affords an employer the "freedom to terminate an at-will employment contract for its own legitimate business, or even highly subjective, reasons." *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 103 (Del. 1992). Alphonso was thus entitled to terminate Andrades's and Sarma's employment for any reason at any time.

When the Key Holders sold control of Alphonso to Zenith, the power to cause Alphonso to terminate Andrades's and Sarma's employment for any reason at any time also passed to Zenith. Indeed, during the Parties' negotiations, LG's lead negotiator, Hahm, was clear that giving up control to LG meant that LG could "fire

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[11] Under Delaware law, "a court may consult undisputed background facts to place the contractual provision in its historical setting." *Fox v. Paine*, 2009 WL 147813, at *5-6 (Del. Ch. Jan. 22, 2009), *aff'd*, 981 A.2d 1172 (Del. 2009).

[12] Chordia also testified that the employment terms for Alphonso's employees were specifically addressed during negotiations, and the Parties agreed that all would remain at-will employees. A1804 (Chordia Tr. at 97:8-14).

[the Key Holders] at any time." A1023 (Hahm Dep. Tr. at 51:1-3). In light of this warning, the Key Holders proposed three-year employment contracts to change their at-will status. A2104-05. When LG rejected that term, the Key Holders took the deal in front of them: In exchange for subjecting themselves to LG's discretion and the risk of an at-will termination, the Key Holders received nearly $23 million and liquidity rights to cash out of the "valuable enterprise" they sold to LG. A2100; A3489. Andrades, Sarma, and every other Key Holder agreed that Zenith, through its control of Alphonso, could terminate their at-will employment *for any reason and at any time*. That was the deal.

Not surprisingly, the Director-Designation Right is not the *only* right that was conditioned on the Key Holders' continuing employment. Given the substantial liquidity rights the Agreement provided, LG limited many of the Key Holders' rights such that the Key Holders held them *only* for as long as Key Holders were employed by Alphonso. Those rights would fall away if and when the Key Holders were no longer Alphonso employees. *See, e.g.*, A3582 (SHA §§ 7.1 (information rights); 7.2 (inspection rights)). The Key Holders not only accepted these terms—they *introduced* an employment condition to several minority rights, including the one at issue in this dispute. *See* A2338 (introducing the Designation Condition to the Director-Designation Right); A2344 (introducing an employment condition to termination right). LG made its intent clear when it added language like the

following to Section 10.2(b): "this director designation right by the Employee Key Holder Majority . . . shall be null and void *if no Key Holder serves as an officer or employee of [Alphonso] at such time.*" *See* A3597 (SHA §10.2). In other words, Andrades, Sarma, and every other Key Holder knew that Zenith, through its control of Alphonso, could cause some rights to fall away because each of them remained employed at-will.

The Trial Court's novel interpretation of the Efforts Provision overrides the Parties' clearly expressed intent for at-will employment and termination. The Trial Court's reading rewrites the Agreement, limiting a mechanism that LG expressly bargained for to protect Alphonso from misaligned Key Holders into one that does the exact opposite. "When [courts] interpret contracts, [their] task is to fulfill the 'parties' shared expectations at the time they contracted." *Leaf Invenergy Co. v. Invenergy Renewables LLC*, 210 A.3d 688, 696 (Del. 2019). Because the Trial Court's reading of the Efforts Provision cannot be squared with the Parties' undisputed, mutual intent, it cannot be a correct interpretation of the Agreement.

b. The Trial Court's Finding That the Parties Intended to Secure Better Deal Terms for Andrades and Sarma than Other Key Holders is Commercially Unreasonable.

The Trial Court's finding that the Efforts Provision was intended to modify Andrades's and Sarma's at-will employment is also premised on its finding that

"Andrades and Sarma struck a heartier deal than the other Key Holders." Ex. A at 61. But the Trial Court's interpretation gives Andrades and Sarma rights that no Party ever intended them to have. Indeed, neither Party ever advanced this interpretation below precisely because *neither Party* believed that happened. That underscores the extent to which the Trial Court has fundamentally rewritten the Parties' Agreement.

According to the Trial Court, while the Board's power to remove Chordia, Kodige, Beotra, and other executive Key Holders was unfettered, the Efforts Provision "infused Andrades and Sarma's employment status with certain protections since [the Designation Condition] was a precondition" to the Director-Designation Right. Ex. A at 55. The Trial Court found that Andrades and Sarma held special employment protections that the other Key Holders did not hold.

Contrary to the Trial Court's ruling, nothing in the Agreement singles out Andrades or Sarma—who were not involved in any of its negotiations—for special treatment. *See generally* A3562. Rights granted to the Key Holders are granted to *all* Key Holders. *See, e.g.*, A3587 (SHA § 9 (granting the right to demand an IPO to "any Key Holder")). Restrictions upon the Key Holders restrict *all* Key Holders. *See, e.g.*, A3562 (*id.* § 7.5(a) (listing restrictive covenants that bind "[e]ach Key Holder individually")). Throughout the Agreement, the Parties elected to treat all Key Holders equally. *See generally* A3562. The Agreement cannot be said to

expressly bestow greater rights on Andrades and Sarma than it does on the other Key Holders.

Not only is it undisputed that Andrades and Sarma were never at the bargaining table, but it defies commercial sense that the Key Holders who *did* negotiate the Agreement would have bargained for protections for Andrades and Sarma without protecting themselves. All Parties agree that only three Key Holders—Chordia, Kodige, and Beotra—were involved in negotiating the Agreement. Ex. A at 4. While Chordia, Kodige, and Beotra held highly compensated C-suite titles, Andrades and Sarma were never Alphonso executives. The Trial Court's insistence that Andrades and Sarma secured better, bespoke protections for themselves from outside the negotiating room—protections that Alphonso's top executives could not secure—is absurd. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) (rejecting interpretation that "reach[es] an absurd, unfounded result.")

II. THE TRIAL COURT ERRED IN ITS APPLICATION OF THE PREVENTION DOCTRINE.

A. Question Presented.

Did the Trial Court err in applying the prevention doctrine? This issue was preserved for appeal.[13] Ex. A at 95-102.

B. Scope of Review.

"Whether . . . an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed *de novo*." *Lingo v. Lingo*, 3 A.3d 241, 243 (Del. 2010).

C. Merits of Argument.

To craft a remedy for Alphonso's supposed breach, the Trial Court turned to the prevention doctrine. Ex. A at 95. The prevention doctrine is an equitable doctrine that prevents a *breaching party* from taking advantage of the failure of a condition caused by its *own* breach by excusing said condition. *See Williams Cos. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *16-17 (Del. Ch. June 24, 2016) (declining to apply the prevention doctrine after finding that defendant had not breached the reasonable efforts clause), *aff'd*, 159 A.3d 264 (Del. 2017); *see also* 13 Williston on Contracts § 39:6 (4th ed.). After finding that Alphonso's supposed breach caused the Designation Condition to fail and that no exceptions applied, Ex.

[13] If this Court reverses the Opinion on the grounds in Argument I, it need not consider Argument II.

A at 95-100, the Trial Court excused the Designation Condition against *all* Parties to the Agreement instead of just the breaching party, Alphonso. *See* Ex. A 100-101.

Having excused the Designation Condition, the Trial Court reinstated Andrades and Sarma as Employee Key Holders and granted them a continuing right to appoint Common Directors even though they were no longer employed. *See* Ex. A at 101. Because the validity of the December Consent was premised on no Employee Key Holder possessing the Director-Designation Right, A3598 (SHA § 10.3(a)), the Trial Court invalidated Zenith's December Consent. Ex. A at 100.

The Trial Court erred in its prevention doctrine analysis for two reasons. *First*, the Trial Court erroneously applied the prevention doctrine to excuse the Designation Condition against Zenith, a non-breaching party. *See infra* Argument § II.C.1. *Second*, the Trial Court erroneously held that Andrades and Sarma did not assume the risk of the Designation Condition's failure when they agreed to condition their Director-Designation Right on their continued at-will employment. *See infra* Argument § II.C.2. Each error provides an independent basis to reverse the Trial Court's Opinion.

1. The Prevention Doctrine Cannot Excuse a Condition as to a Non-Breaching Party.

The prevention doctrine precludes a breaching party from "escap[ing] contractual liability by rel[ying] upon the failure of a condition precedent where the

party wrongfully prevented performance of that condition precedent." *BitGo Hldgs., Inc. v. Galaxy Digit. Hldgs., Ltd.*, 319 A.3d 310, 333 (Del. 2024). The doctrine is premised on "the long-established principle of law that a party should not be able to take advantage of *its own* wrongful act." 13 Williston on Contracts § 39:6 (4th ed.).

Here, the Trial Court found that Alphonso, and only Alphonso, breached the Efforts Provision. It did not find that Zenith breached any term of the Agreement. *See* Ex. A at 87-88, 95-96; *see also* Ex. A at 54 (noting that "if plaintiffs are going to demonstrate a breach of the Stockholders' Agreement's express terms, it must arise from Alphonso's breach" of the Efforts Provision). Therefore, a proper application of the prevention doctrine would excuse the Designation Condition as to Alphonso.

Instead, the Trial Court improperly applied the prevention doctrine to excuse the Designation Condition against all Parties to the Agreement, including Zenith—a non-breaching party. Consequently, Zenith lost its right to remove the Common Directors and to elect their replacements once no Key Holder remained employed at Alphonso. A3597 (SHA §§ 10.2(c), 10.5(c)). The Trial Court does not cite, and Appellants have been unable to find, *any* analogous application of the prevention doctrine by any other court. *Cf. D.R. Horton, Inc. - N.J. v. Bunting Macks LLC*, 2024 WL 3045169, at *6 (Del. Ch. June 18, 2024) (noting the prevention doctrine is an "awkward fit" where the breaching party is not "rely[ing] on the non-occurrence

of a condition precedent to avoid any obligation under the Agreement."). Such an application is erroneous and must be overturned.

2. The Key Holders Assumed the Risk That the Designation Condition Would Fail.

The prevention doctrine has a well-recognized exception that bars its application here: It "does not apply where, under the contract, one party assumes the risk that fulfillment of the condition precedent will be prevented." *Mobile Commc'ns Corp. of Am. v. MCI Commc'ns Corp.*, 1985 WL 11574, at *4 (Del. Ch. Aug. 27, 1985). Delaware courts have applied the assumption-of-risk exception when contract terms "subject one party to the discretion, satisfaction, or decision of the other party." *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 2021 WL 4344172, at *12-13 (Del. Super. Ct. Sept. 23, 2021) (finding that the parties were "sophisticated operators" and knew "FDA approval is a risk assumed" where payment obligations were conditioned on FDA approval).

To apply this exception, the Trial Court must ask "whether or not the contract allocated the risk of the condition's nonoccurrence." *Bobcat N. Am., LLC v. Inland Waste Hldgs*, LLC, 2019 WL 1877400, at *6 (Del. Super. Ct. Apr. 26, 2019). Additionally, "[a] contract between sophisticated parties experienced in their industry, weighs in favor of finding an assumption of risk." *Id.* at *8.

As at-will employees, Andrades and Sarma assumed the risk of the Designation Condition's non-occurrence. At-will employment "generally permits the dismissal of employees without cause and regardless of motive." *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 437 (Del. 1996). An employer may terminate an at-will employee for "personal motivations," *Pressman*, 679 A.2d at 444, or even for "no reason at all." *Light Years Ahead, Inc. v. Valve Acq., LLC*, 2021 WL 6068215, at *12 (Del. Super. Ct. Dec. 22, 2021). In *Pressman*, this Court observed that employers can freely terminate at-will employees due to "[d]islike, hatred, or ill will," particularly because "personality clashes have the potential to interfere seriously with the achievement of an organization's mission." 679 A.2d at 444.

It is undisputed that the Key Holders asked for but did not secure any employment protections for themselves when negotiating the Agreement. A2115-16; *see also* A2338. And at trial, Andrades and Sarma openly confirmed their understanding that they could be fired at any time, for any reason. A1908 (Andrades Tr. at 389:3-5); A1910 (Sarma Tr. at 399:18-21). Yet, the Key Holders agreed to condition the Director-Designation Right on their employment. A3597 (SHA § 10.2(b)). These undisputed facts demonstrate that Andrades and Sarma assumed the risk that they would lose their Director-Designation Right upon their termination. *See Humanigen*, 2021 WL 4344172 at *13 ("[T]he conditional language itself—that

[the Director-Designation Right shall be null and void if no Key Holder serves as an officer or employee]—confirms that there is a risk of the condition's nonoccurrence. And, as both parties are sophisticated operators . . . they know [termination of at-will employment] is a risk assumed, triggering an exception to the prevention doctrine.")

The Trial Court held that the assumption-of-risk exception did not apply because the Agreement "never gave the CEO unfettered discretion" to terminate Andrades and Sarma, because the CEO Termination Right was "tempered" by the Efforts Provision. Ex. A at 99-101. This reasoning contains two errors: *First*, it impermissibly reads a limitation into the CEO Termination Right that does not exist. *Second*, it assumes that Alphonso's CEO was the *only* entity with the power to terminate Andrades and Sarma.

The CEO Termination Right empowers the CEO to terminate "non-executive officer employees of [Alphonso]." A3600 (SHA § 10.5(c)). As noted above, when LG and the Key Holders negotiated that term, they agreed to two express limitations on the CEO's power. *Supra* Statement of Facts § III. Neither of those limitations curtailed the CEO's ability to terminate Andrades or Sarma on December 16, 2022. The Trial Court's finding that the Efforts Provision required the CEO "to use reasonable efforts first" before firing Andrades and Sarma, Ex. A at 72, impermissibly reads a limitation into the CEO Termination Right that does not exist.

See Murfey, 236 A.3d at 355 ("[I]t it is axiomatic that courts cannot rewrite contracts or supply omitted provisions."). If the Parties intended to limit the CEO's broad power to terminate Andrades and Sarma, they could have stated that limitation expressly in Section 10.5(c) instead of relying on a boilerplate Efforts Provision.

Even if the CEO Termination Right *was* limited by the Efforts Provision, the same is not true of the Board's right to terminate Alphonso personnel. Ex. A at 82 (explaining that the Board "had no obligation to use reasonable efforts to ensure the Key Holders' enjoyment of the rights" in the Agreement). The Trial Court held that Section 10.5(c) "did not provide the Board with the 'power' to 'fire the non-executive [K]ey [H]olders,'" Ex. A at 56-57, but the Board's power to terminate Andrades and Sarma arises by statute and the Company's bylaws. *See* 8 *Del. C.* § 141(a); A3548 (Bylaws art. 3 § 1 ("The business and affairs of the Corporation shall be managed by the Board of Directors. . . .")); *see also Ogus*, 2020 WL 502996 at *2, *6 (finding that the board's authority to terminate employee "arose from its authority under the [DGCL] and the Company's certificate of incorporation and bylaws."). Although the Agreement delegates the right to terminate non-executive employees to the CEO, that delegation is *not* "exclusive." *See* A3598 (SHA § 10.3(c)). Thus, the Board retained the power to fire Andrades and Sarma. Regardless of how the Efforts Provisions is interpreted, Andrades and Sarma

assumed the risk that they could be terminated "at any time without cause" by the Board. *Lord*, 748 A.2d at 400.

Courts in other jurisdictions have applied the assumption-of-risk exception in cases where, as here, an employee's contract right was conditioned on their continuing employment. For example, in *Doherty v. American Home Products Corp.*, employee plaintiffs alleged that a defendant corporation breached the parties' stock option agreements by limiting their options after their employer, a subsidiary of defendant, was sold. 216 F.3d 1071 (2d Cir. 2000). Applying Delaware law, the Second Circuit held that "the prevention doctrine does not apply" because the at-will employees "assumed the risk . . . that their right to exercise their options would be . . . eliminated by their termination" and that "as at-will employees they assumed the risk that they could be terminated without cause." *Id.* (emphasis added).

Courts applying the laws of other states, which also mirror hornbook law on the prevention doctrine, agree that the assumption-of-risk exception cannot be employed where the condition at issue is at-will employment. *See Meson v. GATX Tech. Servs. Corp.*, 507 F.3d 803, 808 (4th Cir. 2007) (applying Maryland law and holding that the prevention doctrine does not apply because "[i]t flies in the face of the doctrine of at-will employment to suggest that [defendant] was required to maintain her employment"); *Oracle Corp. v. Falotti*, 319 F.3d 1106, 1112 (9th Cir. 2003) (applying California law and holding that the prevention doctrine was

inapplicable because "[the employer] bargained for its right to retain discretion" over plaintiffs' employment); *Leahy v. Comput. Scis. Corp.*, 2015 WL 631353, at *8 (E.D. Va. Feb. 12, 2015) (applying Virginia law and declining to apply the prevention doctrine because "[p]laintiff does not dispute that [his] employment . . . is at will, and Defendant would have been well within its rights to terminate Plaintiff with or without cause"). This Court should adopt the same reasoning.

Because Andrades and Sarma were employed at-will, a status that anticipates that the Designation Condition could fail at any time and for any reason, the Agreement explicitly "allocated the risk of the [Designation Condition's] nonoccurrence" to Andrades and Sarma. *Bobcat*, 2019 WL 1877400 at *6. Accordingly, the Trial Court erred in finding that the assumption-of-risk exception did not apply, and its ruling must be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Trial Court and vacate its order.

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