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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' REPLY BRIEF

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November 8, 2024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

NATURE OF PROCEEDINGS

To sustain the Trial Court's ruling, Plaintiffs throw all but the kitchen sink at Defendants' appeal.[1] They advance legal theories with no support, make speculative assertions of motive and future conduct, and raise peripheral matters that even the Trial Court did not reach, including liquidity rights that have not been impacted. But Plaintiffs avoid the central question: were Defendants permitted to terminate Andrades and Sarma and remove the Common Directors once no employee Key Holders remained? Under the plain terms of the Agreement, the answer is yes. The Trial Court should be reversed.

The essence of the parties' bargain remains undisputed: Plaintiffs sold control of Alphonso for an immediate cash payment of $23 million and the prospect of future liquidity. OB 10; AB 6. It was a bargain Plaintiffs eagerly struck because Alphonso had no other suitors and no profit at the time of the transaction. OB 8. While Plaintiffs could remain employees at Alphonso for as long as they were aligned with Defendants, their employment was terminable at-will. A3820-29. Plaintiffs admitted knowing they could be "fired at any time." OB 41. And while the Agreement granted no employment protections to Plaintiffs (despite their request), it expressly conditioned several rights on their continued employment. The

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[1] All defined terms have the meaning assigned to them in the Opening Brief unless stated otherwise.

Director-Designation Right was one such right that the parties agreed "*shall be null and void if no Key Holder serves as an officer or employee of the Corporation at such time*."[2] OB 33-34; *see also* A3597 (SHA § 10.2(b)). The termination of Andrades and Sarma, and the resulting failure of the Designation Condition was thus "exactly the sort of consequence [Plaintiffs] accepted would occur." *eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 39 (Del. Ch. 2010).

Plaintiffs now ask this Court to rewrite the parties' bargain. In support, Plaintiffs claim that their terminations were made in "bad faith" and thus void. *See* AB 40-46. That is unavailing. The terminations followed an undisputedly acrimonious and difficult relationship that even Plaintiffs concede was filled with "friction." AB 9; *see also* OB 16-18. What is more, because Andrades and Sarma were terminable at-will, the motivations surrounding their termination are irrelevant. *See, e.g.*, *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 437 (Del. 1996) (at-will employment is terminable "without cause and regardless of motive").

There is no reason for this Court to disturb longstanding precedent and indulge Plaintiffs by re-writing the Agreement. "Parties have a right to enter into good and

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

bad contracts, the law enforces both." *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010). This Court should enforce the plain terms of the Agreement and reverse.

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT ALPHONSO BREACHED THE EFFORTS PROVISION.

A. Plaintiffs' Attacks on Defendants' Interpretation of the Efforts Provision Are Meritless.

Plaintiffs proffer no authority supporting the Trial Court's interpretation of the Efforts Provision. That is not surprising as Plaintiffs did not advance this interpretation below. OB 35. Instead, Plaintiffs take a scattershot approach to attacking Defendants' textual arguments in the hopes of preserving the Trial Court's ruling. AB 21-32. Each argument fails.

1. The Trial Court Erroneously Read an Obligation to Satisfy Conditions into the Efforts Provision.

Plaintiffs contort the Trial Court's ruling to argue that it does not require Alphonso to maintain *and satisfy* the Designation Condition. AB 21. The Trial Court's holding says otherwise. In the Trial Court's words, "[g]iven that [Andrades's and Sarma's Director-Designation Right was] conditioned on employment ... Alphonso committed itself to use reasonable efforts in that regard to ensure the rights were effective." Ex A. at 83; *see also id.* at 69-70 n.317 (holding Alphonso "was obligated to use reasonable efforts … to maintain the [Director-Designation Right] in an effective and operative state"). That ruling compels Alphonso to use "reasonable efforts" to ensure that the Designation Condition was satisfied—*i.e.*, that Andrades and Sarma remained employed. But

the word "condition" appears nowhere in the Efforts Provision because the parties did not intend for the Efforts Provision to reach conditions. Read plainly, the Efforts Provision simply requires Alphonso to use reasonable efforts to ensure that rights are "successful in producing a desired or intended result" when exercised by the parties. OB 28-30.

Plaintiffs concede that the Efforts Provision never mentions "conditions" but argue that this omission is "simply consistent with the section's broad scope." AB 23. Nothing supports that reading. Plaintiffs fail to identify a single case where a Delaware court held that an efforts provision devoid of the word "conditions" required a party to satisfy conditions.

Instead, each of Plaintiffs' cited cases illustrates that, when parties intend for an efforts provision to extend to conditions, they deploy express language to do so. *See Williams Cos., Inc. v. Energy Transfer Equity, L.P., Inc.*, 159 A.3d 264, 273 (Del. 2017) (efforts "to ... tak[e] ... all acts necessary to cause the *conditions* to Closing to be satisfied"); *WaveDivision Hldgs., LLC v. Millennium Digit. Media Sys., L.L.C.*, 2010 WL 3706624, at *7 (Del. Ch. Sept. 17, 2010) (efforts "to fulfill as promptly as practicable the *conditions precedent* to their obligations"); *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 749 (Del. Ch. 2008) ("reasonable best efforts to take ... all actions ... to arrange and consummate the

Financing ... including ... reasonable best efforts to ... satisfy on a timely basis all terms, covenants and *conditions* set forth in the Commitment Letter").

"[I]t it is axiomatic that courts cannot rewrite contracts or supply omitted provisions." *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 355 (Del. 2020); *see also* OB 24-26. Alphonso did not agree to use efforts to satisfy conditions to rights in the Efforts Provision. A3602 (SHA § 12.1). The Trial Court erred in holding otherwise.

2. Defendants' Interpretation Is Consistent with the Efforts Provision's Plain Language.

Plaintiffs argue that Defendants' reading of the Efforts Provision is at odds with the plain text. Plaintiffs are wrong.

Plaintiffs contend that Defendants' interpretation "ignore[s] the separate language in Section 12.1 obligating Alphonso to use reasonable efforts to ensure that the parties 'enjoy the benefits of this Agreement.'" AB 25. They argue such language obligates Alphonso to ensure that Andrades and Sarma enjoyed the Director-Designation Right, a conditional benefit granted to them. *Id.* But Plaintiffs ignore that Zenith's control of the Board is also a benefit granted by the Agreement. A3597 (SHA § 10.2). So too is Zenith's ability to cause the Board and CEO to terminate the Key Holders' at-will employment. A3600 (SHA § 10.5(c)). Because Alphonso cannot ensure that Andrades and Sarma enjoy the Director-Designation

Right while also ensuring that Zenith enjoys its control of the Board's and CEO's right to terminate Andrades and Sarma, the Trial Court's interpretation cannot stand.

Plaintiffs argue that Defendants' interpretation of the Efforts Provision "hypocritically" elevates Zenith's rights over the Key Holders'. AB 25. Plaintiffs claim that Zenith's right to elect directors is not a "competing right" to the Director-Designation Right because Zenith's right is "contingent and residual." AB 26. But the Director-Designation Right is likewise contingent; it is contingent on the satisfaction of the Designation Condition.[3] That the Trial Court elevated one contingent right (Plaintiffs' Director-Designation Right) over another (Defendants' right to elect directors in the absence of any Key Holder employees) subverts the Efforts Provision's instruction that Alphonso owes the same duty to both parties. *Bank of N.Y. Mellon v. Commerzbank Cap. Funding Tr. II*, 65 A.3d 539, 555 (Del. 2013) ("An interpretation that conflicts with the plain language of a contract is not reasonable.").

Plaintiffs also posit that Defendants' interpretation—that Alphonso is only required to use reasonable efforts when rights are exercised—does not give the Efforts Provision its plain meaning because it swaps the word "granted" for the word "exercised." AB 24. But Plaintiffs miss the point. The Efforts Provision provides

[3] The Efforts Provision does not distinguish between non-residual and residual rights. A3602 (SHA § 12.1).

that "[Alphonso] agrees to use its reasonable efforts ... to ensure that the rights granted under this Agreement are effective." A3602 (SHA § 12.1). The word that requires an exercise of rights is "effective," not "granted."

The Trial Court consulted several dictionaries to give meaning to the word "effective." Ex. A at 65. Rights granted under the Agreement are "effective" when those rights are "successful in producing a desired or intended result." *Id.* Rights "granted" under the Agreement cannot produce any "result" until they are exercised. OB 29. For instance, the Director-Designation Right can only produce its "desired or intended result" of having the Common Directors elected to the Board after the Employee Key Holder Majority exercises its right to nominate Common Directors.[4] Even Plaintiffs acknowledge the reasonableness of this interpretation. AB 25 n.9.[5]

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[4] The Employee Key Holder Majority is defined as "the Key Holders who are directors, officers or employees of the Corporation at such time … holding a majority of the shares of Capital Stock then held by all Employee Key Holders." A3579 (SHA § 6.2). This definition was intended to ensure that if the Key Holders' interests were no longer aligned with Zenith's, Zenith could cause their termination, resulting in the Director-Designation Right falling away. *See* OB 11-12.

[5] Plaintiffs try to walk back that concession by arguing that some rights in the Agreement "are 'granted' but not necessarily 'exercised.'" AB 24. Plaintiffs point to their right to receive financial statements and Zenith's obligation to make tender offers on a pre-determined schedule. *Id.* But the Efforts Provision has no effect on either provision—Alphonso would be in breach of Section 7.1, not the Efforts Provision, if it failed to deliver financial statements, and Alphonso cannot take any action to cause Zenith to make tender offers.

Plaintiffs also claim that Defendants' interpretation is commercially unreasonable because it "allow[s] LG-controlled Alphonso to eviscerate the Director-Designation Right." AB 26. But that argument ignores the Designation Condition's purpose. As Plaintiffs concede, the Designation Condition, along with several conditions to other rights, required the Key Holders' continued employment. *See, e.g.*, A3582-83, A3585-87, A3603-04 (SHA §§ 7.1-.3, 8.1-.2, 13.1). These conditions were designed to ensure that "everybody's incentives [were] aligned." OB 13 (citing A1065-67 (Hahm Dep. Tr. at 93:14-95:13)); *see also* AB 8. If the Key Holders' incentives diverged from LG's, Zenith retained the right to cause those conditional rights to fall away.

Plaintiffs further argue that Defendants' interpretation of the Efforts Provision is inconsistent with the plain language because it limits Alphonso's obligations to "caus[ing] the nomination and election of the directors," as provided in the Efforts Provision's second sentence. AB 26-27. But Defendants never argued that this is Alphonso's only obligation under the Efforts Provision; rather, Defendants cited it as an example of the kind of obligations Alphonso has under the Efforts Provision. *See* OB 29-30.

Finally, Plaintiffs argue that it was neither "'commercially unreasonable' [n]or 'absurd'" for the Trial Court to find that special employment protections existed for only two Key Holders uninvolved in negotiating the Agreement. AB

31-32. Plaintiffs never explain how Andrades and Sarma, who did not participate in negotiation of the Agreement, could have "bargained for" bespoke protections. Instead, Plaintiffs argue that the Efforts Provision provides a benefit to all minority stockholders by ensuring minority representation on the Board through the Director-Designation Right. *Id.* Plaintiffs are wrong.

Plaintiffs attempted this argument before—when they tried (and failed) to saddle Alphonso's stockholders with their $25 million litigation bill. *See generally* AR0001-44. In denying Plaintiffs' request, the Trial Court held that the Director-Designation Right benefits only "a select group of minority stockholders"—the Key Holders. *See generally* AR0156-58 (order); AR0045-155 (transcript). Plaintiffs have not appealed that (or any) ruling of the Trial Court. And at the bargaining table, Plaintiffs actually stripped the non-Key Holder minority stockholders of designation rights they would otherwise have had by limiting the right to appoint Common Directors to the Employee Key Holder Majority only. A2338. Plaintiffs' argument that the Efforts Provision and the Director-Designation Right were designed to benefit all minority stockholders is baseless and foreclosed by the law of this case.[6]

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[6] Plaintiffs also invite this Court to revisit the Trial Court's ruling that the Board was not subject to the Efforts Provision. *See* AB 18, 32, 37. But that argument is also waived because Plaintiffs failed to cross-appeal. *See, e.g.*, *Haley v. Town of Dewey Beach*, 672 A.2d 55, 58 (Del. 1996). In any case, the Trial (Continued . . .)

To the extent that Plaintiffs argue the Director-Designation Right benefits all minority stockholders because the affirmative vote of a Common Director is required to approve certain transactions that interfere with minority stockholders' liquidity rights, *see* AB 7 n.5, 31-32, Plaintiffs are wrong. Those provisions are unconditional and do not fall away with the Director-Designation Right. *See* A3601-02 (SHA §§ 10.5(d)(ii), (iv), (v)). If no Common Directors remain on the Board, the Board simply cannot take those actions. *Id.* Thus, the non-Key Holder minority stockholders have the same protections regardless of whether the Director-Designation Right remains.

B. The Key Holders' At-Will Employment Undermines the Trial Court's Interpretation.

Next, Plaintiffs try to wave away Defendants' argument that the Trial Court's interpretation of the Efforts Provision fundamentally rewrites the parties' bargain as impermissible "extrinsic evidence." AB 4, 27. But 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). Moreover, the Trial Court found the Key

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Court's determination was compelled by the plain language of the Efforts Provision, which does not bind the Board. Ex. A at 52-53.

Holders' at-will employment relevant to this dispute. *See* Ex. A at 82 ("The context surrounding Andrades and Sarma's employment is also relevant.").

Plaintiffs do not dispute that the Key Holders were employed at-will.[7] Nor can they dispute that Delaware's at-will employment doctrine "permits the dismissal of employees without cause and *regardless of motive*." *Pressman*, 679 A.2d at 437; *see also Shearin v. E.F. Hutton Grp., Inc.*, 652 A.2d 578, 585 (Del. Ch. 1994) (at-will employees are terminable "without demonstrating to anyone else's satisfaction that the reasons for doing so are valid, reasonable or appropriate").[8] Despite Plaintiffs' repeated invocations of Defendants' supposedly bad faith motives, *e.g.*, AB 11-13, Defendants' motives for firing the Key Holders are irrelevant. *See Pressman*, 679 A.2d at 437; *see also Gilliland v. St. Joseph's at Providence Creek*, 2006 WL 258259, at *8 (Del. Super. Ct. Jan. 27, 2006) (an "employer should have the latitude

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[7] Each Key Holder who testified at trial confirmed that 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).

[8] "Delaware courts have refused to adopt policy exceptions to the at-will employment doctrine absent legislative mandate against a certain reason for firing an employee." *Mann v. Dagill Poultry, Inc.*, 1990 WL 91102, at *6 (Del. Super. 1990), *aff'd*, 584 A.2d 1228 (Del. 1990). None of the four "exclusive means" to challenge terminations applies here. *Lord v. Souder*, 748 A.2d 393, 401 (Del. 2000).

to discharge without having a jury 'second guess' the 'correctness' of the employer's decision").

Nevertheless, Plaintiffs argue that (i) at-will employment is irrelevant to this dispute (AB 29-31); and (ii) Defendants' interpretation would render the Agreement "illusory" (AB 28-29). Plaintiffs are wrong.

1. The Agreement Does Not Modify the Key Holders' At-Will Employment.

Plaintiffs take the position that the Agreement modifies the Key Holders' at-will employment because "[n]othing in the Stockholders' Agreement indicates a 'clearly expressed intent' that they could be terminated 'for any reason and at any time.'" AB 30. Plaintiffs have it backwards. Delaware law holds "a heavy presumption that a contract for employment, *unless otherwise expressly stated,* is at-will in nature, with duration indefinite." *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 102 (Del. 1992). Delaware courts reject the notion that post-hoc agreements can implicitly modify at-will employment. *See Chrin v. Ibrix, Inc.*, 2005 WL 2810599, at *10-11 (Del. Ch. Oct. 19, 2005) (refusing to infer implied employment protections into a stock purchase agreement), *aff'd*, 70 A.3d 205 (Del. 2012); *see also Heideck v. Kent Gen. Hosp., Inc.*, 446 A.2d 1095, 1097 (Del. 1982) (affirming judgment that an employee handbook cannot modify employees' at-will status in the absence of "a specific term of employment").

Nothing in the Agreement expressly modifies the Key Holders' at-will employment.[9] *See* A1023-24. The absence of express employment protections in the Agreement means Andrades and Sarma remained employed at-will. The Trial Court erred in finding that the Efforts Provision modified their at-will status.

2. Plaintiffs' Remaining Arguments Do Not Establish That the Agreement Is Illusory and Are Not Ripe.

Plaintiffs further argue that adopting Defendants' interpretation of the Efforts Provision would "render the entire agreement illusory" because it would allow Zenith to unilaterally remove the Common Directors, terminate the Agreement, and "effectively nullify" the liquidity rights the Key Holders received in exchange for giving up control. *See* AB 28-29. Plaintiffs are incorrect. Section 13(b)(iii) does not permit Zenith to unilaterally terminate the Agreement. A3603-04 (SHA § 13.1(b)(iii)). Instead, such termination requires the "execution of a written instrument by" Alphonso and Zenith. *Id.* Plaintiffs' argument requires the Court to assume that Zenith will, at some unknown time in the future, compel the Board to consent to terminating the Agreement. *See* AB 28-29. But as Plaintiffs concede, and the Trial Court acknowledged, neither Zenith nor Alphonso has done so. AB 29 n.12.

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[9] Plaintiffs themselves concede that at *no point* in the parties' negotiations did they *ever* agree the Agreement would modify the Key Holders' at-will employment. AB 31.

That concession speaks volumes. The theoretical, future termination of the Agreement is not ripe for adjudication because those facts are neither "concrete and final" nor "static." *VT S'holder Rep., LLC v. Edwards Lifesciences Corp.*, 2024 WL 3594457, at *1 (Del. July 31, 2024). If "the parade of horribles [Plaintiffs] envision[] occurs in the future, [they] can seek appropriate relief based on claims of breaches of fiduciary duty or other substantive wrongs." *B.F. Rich Co. v. Gray*, 2006 WL 4782419, at *4 (Del. Ch. Nov. 9, 2006). However, Plaintiffs' arguments about speculative future harms are outside the scope of this Section 225 action, and this Court should not consider them in adjudicating this dispute. *Id.* at *3.

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

A. Plaintiffs Fail to Demonstrate That the Trial Court Properly Applied the Prevention Doctrine.

Plaintiffs argue that the Trial Court correctly applied the prevention doctrine. AB 34-35. But Plaintiffs cite no case in support. Defendants are not aware of any court applying the prevention doctrine to excuse a condition and require performance from a non-breaching party. *See* AB 34-35. In every case and treatise cited by Defendants (and by the Trial Court), the court applied the prevention doctrine to the "party [that] wrongfully prevented the performance of th[e] condition precedent," *i.e.*, the breaching party. *BitGo Hldgs., Inc. v. Galaxy Digit. Hldgs., Ltd.*, 319 A.3d 310, 333 (Del. 2024). The Trial Court's unprecedented application of the prevention doctrine should be reversed.

B. The Trial Court Erred in Holding That the Key Holders Did Not Assume the Risk of Termination.

Plaintiffs next contend that the assumption-of-risk exception to the prevention doctrine does not apply. AB 35-38. But by conditioning their Director-Designation Right on their continued at-will employment, Andrades and Sarma "assume[d] the risk that fulfillment of the [Designation Condition would] be prevented" by the CEO or Board. *Mobile Commc'ns Corp. of Am. v. MCI Commc'ns Corp.*, 1985 WL 11574, at *4 (Del. Ch. Aug. 27, 1985). Plaintiffs' arguments compel no different conclusion.

The Agreement provides that the Director-Designation Right "*shall be null and void if no Key Holder serves as an officer or employee of the Corporation at such time*." A3597 (SHA § 10.2(b)). This "conditional language" unambiguously "confirms that there is a risk of the condition's nonoccurrence." *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 2021 WL 4344172, at *13 (Del. Super. Ct. Sept. 23, 2021). The Agreement allocates the risk of the Designation Condition's nonoccurrence to the Key Holders since they were terminable at-will. OB 40-45. Indeed, Andrades and Sarma signed employment contracts stating that they could be terminated for any reason. A3820-29. The Agreement did not modify those terms. *See supra* Argument § I.B.1. In light of these undisputed facts, Plaintiffs cannot contend that the Key Holders did not understand their Director-Designation Right would fall away if their at-will employment was terminated. *See* A1804 (Chordia Tr. at 99:2-100:23).

Plaintiffs do not engage with the Agreement's allocation of risk. Instead, Plaintiffs complain that the Board's termination power is irrelevant to the assumption-of-risk analysis because Zenith subjectively believed they needed the CEO "to fire non-executive [K]ey [H]olders." AB 37 (citing Ex. A at 39, 56, 76). But Delaware follows the objective theory of contracts. *City of Newark v. Donald M. Durkin Contr., Inc.*, 305 A.3d 674, 679 (Del. 2023). In determining whether a

contract allocates risk, Delaware courts looks to the text of the Agreement, not to the subjective beliefs of the parties. *E.g.*, *Humanigen*, 2021 WL 4344172, at *13.

Here, an objective third party would understand that the Board could terminate Andrades's and Sarma's at-will employment. OB 15, 43-44. The Board has the authority to terminate employees pursuant to the DGCL. *See* 8 *Del. C.* § 141(a); *Ogus v. Sportechie, Inc.*, 2020 WL 502996 at *2, *6 (Del. Ch. Jan. 31, 2020). And under the Agreement, the Board's delegation of such power to the CEO for non-executive employees is not "exclusive." A3600 (SHA § 10.5(c)). Accordingly, the Board could also fire Andrades and Sarma "for any reason, with or without cause, at any time." *Lord*, 748 A.2d at 398. The Key Holders assumed the risk of the failure of the Designation Condition. OB 15, 43-44.

Finally, Plaintiffs offer no substantive response to the cases cited by Defendants in which courts rejected a prevention argument when an at-will employee's contract right was conditioned on continuing employment. AB 37. Plaintiffs claim this authority is "irrelevant" because it "did [not] involve reasonable efforts provisions." *Id.* But Plaintiffs cite no authority to suggest that either the prevention doctrine or the assumption-of-risk exception operate differently when a contract also contains an efforts provision.

Plaintiffs also contend that all of Defendants' cited cases involved "good faith" terminations. AB 37. But, consistent with the longstanding at-will doctrine,

no case reached an employer's motives for termination in the assumption-of-risk analysis. Instead, each held that the employee had assumed the risk of the condition's failure, precisely because the employee was employed at-will. OB 44-45.

C. The Trial Court's Equitable Authority to Craft a Remedy under Section 225 Cannot Be Used to Rewrite the Agreement.

Plaintiffs insist that the Trial Court could have crafted the same remedy by "invoking its equitable authority under Section 225" even if the prevention doctrine did not apply. AB 38. Plaintiffs are wrong again.

The Trial Court's remedy rewrote the parties' bargain by granting Andrades and Sarma a continuing right to nominate Common Directors despite the Designation Condition's failure. Plaintiffs argue that the Trial Court was so permitted because "equity will not suffer a wrong without a remedy." AB 38-39. But Delaware law is clear that courts cannot rewrite the agreements of sophisticated parties. *Murfey*, 236 A.3d at 355; *see also Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674, 688-89 (Del. 2024) (Delaware courts "uphold[] the freedom of contract and enforce[] as a matter of fundamental public policy the voluntary agreements of sophisticated parties").

Contrary to Plaintiffs' arguments, the Trial Court's equitable authority under Section 225 does not override this principle. For example, in *Garrett v. Brown*, the

court refused to adopt an interpretation of a right of first offer that would "provide the parties with complete contractual protection against transfers to outsiders" because doing so would amount to "inappropriate judicial reformation of the contract." 1986 WL 6708, at *8 (Del. Ch. June 13, 1986), *aff'd*, 511 A.2d 1044 (Del. 1986). The same principle applies here. *See AECOM v. SCCI Nat'l Hldgs., Inc.*, 2023 WL 6294985, at *5 (Del. Ch. Sept. 27, 2023). Unsurprisingly, Plaintiffs cite no case where a Delaware court rewrote a contract to craft an equitable remedy in a Section 225 action.

Instead, Plaintiffs claim that "Delaware courts routinely tailor Section 225(a) remedies to prevent defendants from benefitting from their wrongdoing." AB 38. But Section 225(a) cannot abide a contractual rewrite. For support, Plaintiffs invoke *Agranoff v. Miller*, but that case merely reaffirms that Delaware courts hold parties to the plain terms of their agreements. 1999 WL 219650, at *14 (Del. Ch. Apr. 12, 1999). Plaintiffs' reliance on *Portnoy v. Cryo-cell* and *Flaa v. Montano* fares no better. In those cases, the court did not rewrite the parties' agreement—they required new board elections be held. *See Flaa*, 2014 WL 2212019, at *12 (Del Ch. May 29, 2014); *Portnoy*, 940 A.2d 43, 47 (Del. Ch. 2008). But new board elections are expressly authorized by Section 225(a), whereas judicial rewriting of an agreement is not. 8 *Del. C.* § 225(a).

III. THIS COURT SHOULD NOT AFFIRM ON ALTERNATIVE GROUNDS.

In a last-ditch effort to seek affirmance, Plaintiffs ask this Court to revisit the Trial Court's analysis that Plaintiffs' arguments were "insufficient to find a breach of the implied covenant" and that their *Schnell* arguments were likely "unavailing."[10] Ex. A at 88-94. Here, the Trial Court got it right.[11]

A. The Implied Covenant Has No Role Here.

Plaintiffs repeat the flawed implied covenant arguments that they made to the Trial Court below. AB 40-44. That doctrine is inapplicable: there is no gap to fill or "discretion" exercised by Defendants limited by the implied covenant.

1. There Is No Gap in the Agreement.

According to Plaintiffs, there is a gap in the Agreement because it is supposedly silent as to whether Zenith could fire "Sarma and Andrades (along with

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[10] Contrary to Plaintiffs' assertion, AB 16, the Trial Court's holding that the executive-officer Key Holders failed to demonstrate a breach of the implied covenant was not dicta. Ex. A at 88-93. The Trial Court held that the Agreement contains no gap and that the Board did not abuse its discretion in terminating the executive-officer Key Holders. *Id.* at 92-93. Because the executive-officer Key Holders did not cross-appeal, Plaintiffs' arguments are waived. *Haley*, 672 A.2d at 58.

[11] Plaintiffs seek to selectively avoid some of the Trial Court's factual findings by labeling them "dicta." AB 44 n.14. Defendants do not challenge the Trial Court's finding of facts in this appeal, which are entitled to "a high level of deference." *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005).

the other Key Holders) for the purpose of eliminating [their contractual] rights." AB 41-42. But there is no gap. The Agreement is not silent as to whether Zenith could terminate Andrades and Sarma. They were terminated pursuant to Section 10.5(c), which grants the CEO the power to terminate non-executive employees subject to human resources policies. A3600 (SHA § 10.5(c)). Because the Agreement "already provides for a specific process by which a[n] [employee] may be removed," "[t]here [was] no gap to fill, and an implied term would limit and alter that express [removal] process." *DG BF, LLC v. Ray*, 2021 WL 776742, at *16 (Del. Ch. Mar. 1, 2021).[12]

Even if the Agreement was silent as to the circumstances for termination, the implied covenant cannot be invoked. As the Trial Court explained, a contract can be "silent as to a term, but only because the parties negotiated over the matter and determined to reject the relevant term or otherwise not address the matter in the agreement." Ex. A at 90.

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[12] Additionally, Andrades and Sarma knew that they could be fired for any reason and that upon their termination, the Director-Designation Right would fall away. *See supra* Argument § II.B. The implied covenant cannot apply. *Nemec*, 991 A.2d at 1126 (implied covenant "only applies to developments that could not be anticipated" at formation).

That is what happened here. Andrades's and Sarma's employment contracts stated that they could be terminated for any reason. *See* A3820-29. In light of this, the Key Holders sought but failed to obtain employment protections during negotiations over the Agreement. A2104-05; *compare* A2340-41, *with* A2580-81; *see also* Ex. A at 91-92. The Agreement's intentional silence on employment protections is confirmation that the Key Holders were at-will employees who could be terminated for "*any reason*, with or without cause, at any time." *Lord*, 748 A.2d at 398.

2. The Implied Covenant Does Not Limit Alphonso's Discretion to Fire At-Will Employees.

Plaintiffs also argue that "parties never accept the risk that their counterparties will exercise their contractual discretion in bad faith." AB 43 (cleaned up). But whether a party acts in bad faith in exercising contractual discretion "depends on the parties' original contractual expectations, not a 'free-floating duty' applied at the time of the wrong." *Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 419 (Del. 2013). The implied covenant cannot be invoked "to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal." *Nemec*, 991 A.2d at 1126.

The Agreement gives Alphonso (and Zenith, by extension) an express contractual right to terminate the Key Holders' at-will employment at Alphonso's discretion. A3600 (SHA § 10.5(c)). The Key Holders knew that LG had rejected

their requests for employment protections in the Agreement, and confirmed their understanding of the scope of Alphonso's discretion when they testified that they were at-will employees. 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). Accordingly, their original contractual expectations were that Alphonso could terminate them "without cause and regardless of motive." *Pressman*, 679 A.2d at 437. The Key Holders cannot now invoke the implied covenant to seek after-the-fact employment protections that were previously rejected.

Plaintiffs' cited authority does not support a different result. Plaintiffs rely on *Amirsaleh* and *Chamison* for the general proposition that acting arbitrarily or unreasonably "'to deny the other side the fruits of the parties' bargain' ... is quintessential bad faith." AB 43. But "[w]hen determining the parties' reasonable expectations, the court analyzes whether the parties would have bargained for a contractual term proscribing the conduct … had they foreseen the circumstances under which the conduct arose." Ex. A at 93. Neither of Plaintiffs' cases stand for the proposition that the implied covenant can supply protections that the parties raised but did not secure at the bargaining table.

B. *Schnell*'s Twice-Tested Rule Cannot Override the Parties' Bargain.

Finally, Plaintiffs argue that this Court should invoke its equitable powers under *Schnell* to grant the Key Holders employment protections that they failed to secure at the bargaining table. AB 44-46. This Court should decline to do so.

While "*Schnell* embodies the fundamental power of equity," its "power should not be invoked lightly." *Sternlicht v. Hernandez*, 2023 WL 3991642, at *14 (Del. Ch. June 14, 2023). Plaintiffs fail to cite a single case where *Schnell* has been invoked to rewrite the unambiguous terms of a stockholders' agreement involving sophisticated parties. That is because "equity respects the freedom to contract." *Martin Marietta Mat'ls, Inc. v. Vulcan Mat'ls Co.*, 56 A.3d 1072,1145 n.283 (Del. 2012). The Trial Court correctly stated that *Schnell* is "unavailing" in the present dispute, given the "healthy inclination on the part of the judiciary to employ the *Schnell* principle of legal but equitable only sparingly." Ex. A at 94. Plaintiffs' request would represent an unprecedented and unwarranted expansion of *Schnell*.

Plaintiffs' arguments fail for the independent reason that *Schnell* applies "in the limited scenario wherein the directors have no good faith basis for approving the disenfranchising action." *Coster v. UIP Cos., Inc.*, 2022 WL 1299127, at *9 (Del. Ch. May 2, 2022), *aff'd*, 300 A.3d 656 (Del. 2023). The Common Directors spearheaded Alphonso's unauthorized use of LG's trademark, circumvented Board authority to hire officers, blocked LG's attempts to audit Alphonso's data privacy

practices, depleted the employee stock option pool, and instigated persistent conflict in the boardroom. Ex. A at 14-27. These actions threatened Alphonso's long-term development, and Alphonso and the LG Directors acted in good faith to restore order to the Board.

In any event, Defendants' conduct "cannot be inequitable because [the Key Holders' terminations] were exactly the sort of consequence [they] accepted would occur" when they conditioned their Director-Designation Right on their continuing employment, which was subject to the discretion of the Board and CEO. *eBay*, 16 A.3d at 39. This Court should reject Plaintiffs' invocation of *Schnell*.

CONCLUSION

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

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