IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HARLEY V. FRANCO, Plaintiff, v. AVALON FREIGHT SERVICES LLC and DOUG HOUGHTON, Defendants.	))))))))))	C.A. No. 2020-0608 (MTZ)

PLAINTIFF HARLEY V. FRANCO'S OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

NATURE AND STAGE OF THE PROCEEDING ……...1

STATEMENT OF FACTS ……2

ARGUMENT ……4

I. SUMMARY OF ARGUMENT …… 4

II. SUMMARY JUDGMENT STANDARD ……..5

III. FRANCO IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE AGREEMENT REQUIRES THAT FRANCO AND BOMBARD MUTUALLY AGREE ON THE 5TH DIRECTOR AT ALL TIMES, AND FRANCO NO LONGER CONSENTS TO HOUGHTON'S CONTINUED MEMBERSHIP ON THE BOARD ……5

A. The Purpose of the Agreement and The Context in Which It Was Entered Dictate That Mutual Agreement for the 5th Director Is Required at All Times ……..7

B. The Agreement and the Board Clause Must Be Construed to Require Mutual Agreement for the 5th Director at All Times to Give Meaning to Each Word and Avoid Superfluous Verbiage ……9

C. Reading the Agreement As A Whole And Considering All of Its Parts And Provisions Together, the Absence of Any Provision For the Removal of the 5th Director Reflects The Parties' Intent That Mutual Agreement Is Required At All Times ……10

CONCLUSION……..12

TABLE OF AUTHORITIES

Cases

Aloha Power Co. v. Regenesis Power, LLC,
2017 WL 6550429, (Del. Ch. Dec. 22, 2017) ……5, 6

BLG Hldgs. LLC v. enXco LFG Hldg., LLC,
41 A.3d 410, (Del. 2012) ……..6

City Inv. Co. Liquid. Tr. v. Cont'l Cas. Co.,
624 A.2d 1191 (Del. 1993) …….....6

GMG Capital Invs., LLC v. Athenian Venture P'rs I,
36 A.3d 776, (Del. 2012) ……..…… 6, 7

Heartland Payment Systems, LLC v. In Team Assoc. LLC,
2017 WL 3530242, (Del. 2017) ……..……...7

NAMA Hldgs. V. World Mkt. Ctr. Venture, LLC,
948 A.2d 411, Del. Ch. 2007),
aff'd, 945 A.2d 594 (Del. 2008)……..……6

Martinez v. Regions Financial Corporation,
2009 WL 2413858 (Del. Ch. Aug. 6, 2009) ……..…5

Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.,
616 A.2d 1192 (Del. 1992) ……6

Salamone v. Gorman,
106 A.3d 354 (Del. 2014) ……..6

Statutes and Rules

Chancery Ct. R. 56 ……5

NATURE AND STAGE OF PROCEEDINGS

Plaintiff Harley V. Franco ("Franco") filed a Verified Complaint and Motion for Expedited Proceedings against Defendants Avalon Freight Services, LLC ("AFS") and Doug Houghton ("Houghton") seeking a judicial declaration that, pursuant to the AFS Limited Liability Company Agreement ("Agreement"), Houghton be removed as the fifth member of the AFS Board of Directors ("the 5th Director"). Because this dispute rests entirely on the interpretation of the Agreement, the parties filed a Stipulation and Proposed Order Governing Briefing on Motion to Dismiss and Motion for Summary Judgment, which was approved and entered as an order by the Court. Pursuant to the Stipulation, Franco is submitting this Motion for Summary Judgment and Defendant Houghton is simultaneously filing a Motion to Dismiss to seek an expeditious adjudication of this dispute. The parties agree that no discovery is necessary to resolve this matter.

This is Franco's Opening Brief in Support of Motion for Summary Judgment ("Opening Brief").

STATEMENT OF FACTS

The relevant facts of this case are not in reasonable dispute. Avalon Freight Services, LLC ("AFS') is a limited liability company, governed by the Limited Liability Company Agreement of Avalon Freight Services, LLC ("the Agreement") dated March 25, 2014. See Declaration of Harley V. Franco ("Franco Decl."), ¶ 2. The sole member of AFS is a company called GH Channel Holding LLC ("GH Channel"). See Harley Decl., ¶ 3. GH Channel is also a limited liability company, whose members include Plaintiff Harley V. Franco ("Franco") and Greg Bombard ("Bombard") (and related parties). See Harley Decl., ¶ 4. For all intent and purposes, Franco and Bombard (and their respective related parties) own AFS indirectly through their membership in GH Channel, which serves as a holding company for AFS. See Harley Decl., ¶ 5.

The Agreement sets forth various terms and conditions for the operation and management of AFS as agreed upon by the owners (through their interest in GH Channel), including calling for the management of the company through a board consisting of five directors. See Harley Decl., ¶ 6. Article III, Section 3.1 (the "Board Clause") of the Agreement states in full:

> Subject to the provisions of the Act and any limitations in the Certificate of Formation and this Agreement as to the action required to be authorized or approved by the Member, the business and affairs of the Company shall be managed and all of its powers shall be exercised by or under the direction of the board of directors of the

> Company (the "Board"'). The Board shall have five (5) directors. Two of the directors shall be Greg Bombard ("Bombard") and Harley V. Franco ("Franco"). Bombard shall be entitled to designate and elect one additional Board member, who shall initially be Timothy A. Bombard. Franco shall be entitled to designate and elect one additional Board member, who shall initially be Richard J. Padden. The fifth (5th) director shall be mutually agreed upon and appointed by Bombard and Franco, who shall initially be Doug Houghton. Any vacancy in a Board seat may be filled only by the vote or action of the director entitled to designate and elect such seat.

See Harley Decl., ¶ 7. Thus, pursuant to the Board Clause, the original and current makeup of the board is Franco and his designee, Bombard and his designee, and Houghton, who was mutually agreed upon and appointed by Franco and Bombard to serve as the 5th Director. See Harley Decl., ¶ 8. The Agreement has no provision for the removal of any director, including the 5th Director. See Harley Decl., ¶ 9.

Relevant to this action, Bombard continues to consent to Houghton serving as the 5th Director; however, Franco no longer agrees to Houghton's membership on the board. See Harley Decl., ¶ 10. Following several attempts to remove Houghton voluntarily failed, Franco was forced into this action seeking a judicial declaration that Houghton be removed from the Board and that a new 5th Director must be mutually agreed upon and appointed by Bombard and Franco. See Harley Decl., ¶ 11.

ARGUMENT

I. Summary of Argument

This action is to resolve a disagreement between the directors of AFS regarding the membership of the company's Board of Directors. The Limited Liability Company Agreement ("Agreement") specifically requires that a 5th Director be "mutually agreed upon" by the owners of AFS, Franco, on the one hand and Bombard on the other hand. For reasons unrelated to this action, Franco no longer consents to the continued service of the current 5th Director, Defendant Doug Houghton. Under the plain meaning of the Agreement, as guided by the applicable principles of contract interpretation under Delaware law, once Franco and Bombard no longer "mutually agree" on the 5th Director (in this case, Houghton), he must be removed and replaced with a new 5th Director "mutually agreed upon and appointed" by Franco and Bombard. Any other proposed construction would violate numerous principles of interpretation including those requiring the interpretation to conform to the parties' intentions as reflected in the four corners of the Agreement, to give meaning to each part of the Agreement (and not render certain verbiage superfluous), and interpreting the contract in the context in which the parties entered into an agreement. The only reasonable interpretation of the Agreement that complies with these requirements of Delaware law is the one offered by Franco, *to wit,* that because Franco now objects to Houghton's continued service as the 5th Director, Franco and

Bombard no longer "mutually agree" and Houghton must be replaced by a new 5th Director.

II. Summary Judgment Standard

Court of Chancery Rule 56(c) permits summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Martinez v. Regions Financial Corporation*, 2009 WL 2413858, at *5 (Del. Ch. Aug. 6, 2009). In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that no material question of fact exists. Id. The party opposing summary judgment, however, may not rest upon the mere allegations or denials contained in its pleadings, but must offer, by affidavit or other admissible evidence, specific facts showing that there is a genuine issue for trial. Id.

III. Franco Is Entitled To Summary Judgment Because The Agreement Requires That Franco And Bombard Mutually Agree On The 5th Director At All Times, And Franco No Longer Consents To Houghton's Continued Membership On The Board.

This Motion presents a question of interpretation of the Agreement as a pure question of law, insofar as there are no facts in dispute. When construing and interpreting an LLC agreement, a court applies the same principles that are used when construing and interpreting other contracts. *Aloha Power Co. v. Regenesis*

Power, LLC, 2017 WL 6550429, at *5 n.34 (Del. Ch. Dec. 22, 2017) "The proper construction of any contract is…purely a question of law." *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.,* 616 A.2d 1192, 1195 (Del. 1992). "Delaware adheres to the objective theory of contracts, i.e., a contract's construction should be that which would be understood by an objective, reasonable third party." *Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014). When interpreting a contract, the court "will give priority to the parties' intentions as reflected in the four corners of the agreement," construing the agreement as a whole and giving effect to all its provisions. *GMG Capital Invs., LLC v. Athenian Venture P'rs I*, 36 A.3d 776, 779 (Del. 2012). "If a writing is plain and clear on its face, i.e., its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent." *City Inv. Co. Liquid. Tr. v. Cont'l Cas. Co*., 624 A.2d 1191, 1198 (Del. 1993). A court applying Delaware law will "construe the contract in accordance with that plain meaning and will not resort to extrinsic evidence to determine the parties' intentions." *BLG Hldgs. LLC v. enXco LFG Hldg., LLC*, 41 A.3d 410, 414 (Del. 2012).

Moreover, "Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court." *NAMA Hldgs. V. World Mkt. Ctr. Venture, LLC,* 948 A.2d 411, 419 (Del. Ch. 2007), *aff'd,* 945 A.2d 594 (Del. 2008).

Thus, the contract must be construed as a whole and "The meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflict's with the agreement's overall scheme or plan." *GMG Capital Invs., LLC, supra,* 36 A.3d at 779. Finally, even with unambiguous contracts, when interpreting a particular provision in a contract, the court may "step back" to view the context in which the parties reached their agreement to aid in construction. *Heartland Payment Systems, LLC v. InTeam Assoc. LLC,* 2017 WL 3530242, *10 (Del. 2017).

Here, these guiding principles dictate that the mutuality requirement applies not just to the initial appointment of the 5th Director (Houghton), but also to his continued service as a board member, such that he must now be removed from the board because Franco no longer consents to his continued service as the 5th Director.

A. <u>The Purpose of The Agreement And The Context In Which It Was Entered Dictate That Mutual Agreement For The 5th Director Is Required At All Times</u>.

AFS is owned by its sole member GH Channel, which is in turn owned by Franco and Bombard (and their related parties). The Agreement requires that AFS have a 5 seat board of directors comprised of Franco and his designee, Bombard and his designee, and a 5th "mutually agreed upon and appointed" director. Thus, the structure of the company management is such that Franco and Bombard and their respective designees all serve on the board, with the 5th Director serving as a

mutually agreed upon neutral tie-breaker to prevent one side or the other (Franco or Bombard) unilaterally controlling the company to the detriment of the other. Inherent in that arrangement is the requirement that the 5th Director be mutually agreed upon, not just at the time of appointment but throughout the duration of his or her service. Otherwise, should the 5th Director become unduly aligned with one side (Franco or Bombard) and lose his or her independence, then the other party would suddenly find himself as a minority voice without the opportunity to meaningfully participate in the management of AFS. But by requiring that the mutuality requirement continue past the initial appointment and be maintained throughout the 5th Director's service, both parties (Franco and Bombard) are protected knowing that, in the event the 5th Director does become unduly aligned with the other side, the 5th Director can be removed by withdrawing consent for his or her continued service. Thus, the context and purpose of the Agreement, and of the Board Clause within the Agreement, dictate that the Board Clause must be interpreted as requiring continued consent to the 5th Director at all times to ensure each party (Franco and Bombard) is sufficiently protected from a majority block which would cause them to lose all control over the management of AFS.

B. The Agreement And The Board Clause Must Be Construed To Require Mutual Agreement For The 5th Director At All Times To Give Meaning To Each Word And Avoid Superfluous Verbiage.

Houghton claims the Board Clause requires Franco and Bombard to mutually agree only at the time of his appointment, but that if one party (here, Franco) later withdraws his agreement, that has no impact on Houghton's continued service as the 5th Director. Such an interpretation would violate the rules on contract construction by rendering the "agreed upon and" verbiage superfluous and utterly without meaning. The Board Clause specifically states that the 5th Director must be "mutually agreed upon and appointed" by Bombard and Franco (emphasis added). The conjunctive "and" reflects that the parties intended that the Board Clause requires that Franco and Bombard must mutually agree upon the 5th Director (without limitation as to time and duration) and must mutually agree upon his appointment.

Application of this principle of interpretation (giving meaning to each word and avoiding surplusage) shines a spotlight on the fatal flaw in Houghton's argument: If, as Houghton contends, the mutuality requirement only existed at the time of appointment, then the "agreed upon and" words have no meaning and the Agreement should have simply said that the 5th Director must be "mutually appointed by" Bombard and Franco. The law cannot sanction an interpretation that renders words superfluous in the face of a competing reasonable explanation that

gives meaning to those words. By inclusion of the "agreed upon and" language in the Board Clause, the parties expressed their intent to require mutuality for not just the appointment of the 5th Director, but at all times.

C. <u>Reading The Agreement As A Whole And Considering All Of Its Parts And Provisions Together, The Absence Of Any Provision For The Removal Of The 5th Director Reflects The Parties' Intent That Mutual Agreement Is Required At All Times</u>.

In construing the Board Clause, the Court must also consider the notable absence of a provision, namely any provision for the removal of the 5th Director. The Agreement has no provision of any kind explaining how or when the 5th Director can ever be removed from his or her seat. If the Court were to accept Houghton's proffered interpretation, that mutuality is required only at the time of appointment and is not required thereafter, that would result in Houghton being awarded a perpetual membership on the Board with the company owners (Franco and Bombard, through their interest in GH Channel) powerless to remove him, ever. Put another way, such a construction would render the parties' approval of Houghton as the 5th Director to be irrevocable, despite any indication anywhere in the Agreement that the parties so intended. Conversely, if the Court adopts Franco's interpretation of the Board Clause, then the absence of any specific removal clause makes perfect sense, because the power to remove is inherent in the requirement for continued mutual consent for the 5th Director beyond appointment. Thus, there is no need for a specific provision in the Agreement governing the removal of the 5th Director,

because the power to remove is inherently granted to both Franco and Bombard by simply withdrawing the necessary consent for the 5th Director's continuing seat, which is what Franco has done in this case. As between the two interpretations, Franco's is the more reasonable one because it is the only one that dictates that Franco and Bombard mutually agree on the 5th Director and does not provide that 5th Director, once appointed, a seat on the board in perpetuity.

Thus, the only reasonable interpretation of the Agreement that complies with these principles of contract interpretation under Delaware law is to require that both Franco and Bombard mutually agree on the 5th Director, not just at the time of appointment, but at all times. Accordingly, Franco's withdrawal of his approval for Houghton's continued service as the 5th Director requires Houghton's removal from the post, and Franco is entitled to summary judgment on his claim for a judicial declaration so holding.

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CONCLUSION

For the reasons set forth above, Franco respectfully requests the Court grant his Motion and issue a judicial declaration that Houghton be removed from the AFS Board of Directors and replaced by a new 5th Director mutually agreed upon and appointed by Franco and Bombard.

Dated: September 8, 2020
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