STATE OF WISCONSIN CIRCUIT COURT BRANCH 15 DANE COUNTY

In the Matter of the Liquidation of:

Wisconsin Reinsurance Corporation and 1st Auto & Casualty Insurance Company

Case No.: 2023CV1310

Case Code: 30701

FOGG'S REPLY TO LIQUIDATOR'S RESPONSE TO OBJECTION TO LIQUIDATOR'S DENIAL OF CLAIM

Jason A. Fogg ("**Fogg**"), by his counsel, Richman & Richman LLC, by Michael P. Richman, for his reply to the Liquidator's Response to Objection to Liquidator's Denial of Claim ("**Liq. Resp.**") [Doc 55], states as follows:

1. Fogg's Objection to Liquidator's Denial of Claim [Doc 50] ("**Fogg Objection**") showed that the termination of his employment (and the Liquidator's request of this Court for subsequent denial of Fogg's claim for severance and other benefits) pursuant to this Court's Order Terminating Rehabilitation and Order for Liquidation With Finding of Insolvency [Doc 22] ("**Liquidation Order**" entered January 2, 2024) was not a "for cause" termination by OCI under his Executive

Employment Agreement (the "**Agreement**").[1] Section 5(C)(f) ("**5(C)(f)**") of the Agreement, on which the Liquidator relies, requires official agency allegations of misconduct, due process, and findings by OCI, an intention evident from the context of the entirety of section 5(C) ("**5(C)**," entitled "Termination by the Company for Cause".

2. *The Liquidator's Response leads to exactly the same result.* The Liquidator relies on plain meaning, arguing that 5(C)(f) is unambiguous and should not be reformed or otherwise made subject to an interpretation that it requires due process. By such plain meaning, however, Fogg's termination was required to be an official action of the OCI, as "*the regulatory agency having supervisory responsibility over WRC*" (emphasis supplied). It was not. It was indisputably an action of this Court's Liquidation Order. In the implementation of the statutory requirements for an insurance company liquidation under Wisconsin law, OCI and the Liquidator only requested that the Court enter a Liquidation Order, which included *as required by law* the suspension of all managers and officers. Thus, ironically, while asserting that Fogg impermissibly seeks to reform the Agreement, the Liquidator requires impermissible reformation of the Agreement in order to prevail. The mere request of a supervisory agency for suspension of the executive is not the same is if the agency had acted to suspend the executive, as the Agreement required.[2]

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[1] Capitalized terms used herein have the meanings ascribed herein or in the Fogg Objection.
[2] Furthermore, it appears that OCI, the "supervisory agency" in 5(C)(f), could have acted directly to effectuate a suspension. *See, e.g.*, Wisc. Admin. Code and OCI's website linked thereunder, and especially Chapter Ins 5 ("administrative actions; rules of procedures for contested cases"), which provides exactly the kinds of due process, including allegations and findings, that Fogg contends was a necessary part of any termination purporting to comply with 5(C)(f).

3. This anti-reformation line of argument urged by the Liquidator obscures a significant and material difference between Fogg and the Liquidator. Fogg argues not for reformation, but for interpretation based on context, on the fact that the entirety of 5(C) (except 5(C)(f)) expressly requires allegations of misconduct or other wrongdoing. The Liquidator so concedes. Liq. Resp. 5. But the reformation urged by the Liquidator has no contextual support in the Agreement whatsoever. The Liquidator wants the Court to amend 5(C)(f) so that it provides that a Court's entry of a liquidation order on petition of OCI is the same as OCI's direct termination of Fogg. It is not the same. The direct action required by the plain meaning of the Agreement would have provided Fogg with the due process rights that he should have received for any "for cause" termination within the meaning of his Agreement. *See* n. 2 above.

4. If OCI wanted to invoke the "for cause" provision of his Agreement, then they should have filed an administrative complaint to suspend him. But no one has ever suggested that Fogg engaged in any misconduct, and therefore an administrative proceeding to suspend him would likely have failed. Fogg was removed by this Court's Liquidation Order, paragraph 7, in implementation of the law. The Order provided that "[t]he existing boards of directors of WRC and 1st Auto are terminated and the Liquidator is granted all the powers of the board, *as well as the officers and managers, whose authority shall be suspended*" (emphasis supplied), exactly as OCI requested in paragraph 42 of its Notice of Verified Petition and Verified Petition to Terminate

Rehabilitation and for Order for Liquidation of Wisconsin Reinsurance Corporation and 1st Auto & Casualty Insurance Company [Doc 17].

5. If plain meaning controls, as the Liquidator contends, then the indisputable fact is that Fogg was not terminated by OCI, the "*regulatory agency having supervisory responsibility over WRC*," which is the plain meaning required by the Agreement. OCI and the Liquidator merely took actions which led to his termination, and then notified him that he was to be terminated as a consequence of this Court's Liquidation Order.[3]

6. The Liquidator also argues that Fogg's suspension by the Liquidation Order should be interpreted to be the same as if OCI had done so directly, because OCI had authority to re-engage Fogg, and by declining to do so terminated him in effect. Liq. Resp. 3. Again, this would require (according to the Liquidator, a prohibited) reformation of the Agreement. OCI's decision not to re-engage following a statutory suspension effectuated by the Court means only that they chose not to undo what the Liquidation Order accomplished. *That they desired that outcome does not make his termination their official act.* If plain meaning controls, then the Court should reject the Liquidator's argument that its request for a Court order of suspension was the same as if OCI had directly terminated Fogg. As a matter of plain meaning, the only question is whether under 5(C)(f), Fogg's termination was an action

[3] By letter dated December 28, 2023 (Fogg Dec., exh. B), OCI purported notified Fogg that it would regard his employment as terminated as of "the effective date of the WRC Liquidation Order, which we expect to be January 1, 2024," making clear that they were not acting directly but rather informing Fogg of the consequence of the expected order. Further, in the third paragraph, OCI stated that Fogg's suspension will be "[p]ursuant to the liquidation order and applicable law," not pursuant to official agency action.

of the agency having supervisory responsibility over WRC. It was not. It was an action of this Court.

7. Fogg should prevail either way. If the plain meaning urged by the Liquidator is not dispositive for Fogg, then as Fogg argued in his Objection, the meaning of 5(C)(f) to require due process allegations and findings of misconduct by the agency with supervisory authority should be able to be discerned from the context of section 5(C) and every other of the "for cause" grounds contained therein. The Liquidator contends that the Court may not use the surrounding context unless 5(C)(f) is itself ambiguous on a standalone basis, but that is not true. Even an unambiguous provision should not be applied where such application would lead to an absurd or inequitable result. *See e.g., Chapman v. B.C. Ziegler & Co.*, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425 ("we analyze contract clauses in context, as they are reasonably understood…critically, we must interpret contracts to avoid absurd results."); *State ex rel. Kalal v. Circuit Court for Dane Cty.* (*In re Criminal Complaint*), 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results."); *Diamond Assets LLC v. Godina*, 404 Wis. 2d 404, 417, 979 N.W.2d 586, 593 (Ct. App. 2022) (holding that, "subject to [the] rules of contract interpretation," restrictive covenants in employment contracts are read as a whole and interpreted reasonably so as to avoid absurd results.); *Citation Partners, LLC v. DOR*, 400 Wis. 2d 260, ¶16, 968 N.W.2d 734 (Ct. App. 2021). *See also Folkman*

v. Quamme, 2003 WI 116, 264 Wis. 2d 617, 665 N.W.2d 857, cited by the Liquidator, which holds that a contract provision that is clear on its face when viewed in isolation, may still be ambiguous when the entire contract is viewed as a whole, taking context into consideration.

8. The court in *Folkman* stated that "[o]ccasionally a clear and unambiguous provision may be found ambiguous in the context of the entire policy…[T]he opposite principle--that courts must mechanically apply a clear provision regardless of the ambiguity created by the organization, labeling, explanation, inconsistency, omission, and text of the other provisions in the policy--is not acceptable." *Folkman*, 2003 WI 116, ¶19. *See also, Id.* at ¶24 ("[t]he principle of contextual ambiguity is established precedent. As a general matter, it has long been a rule of contract construction in Wisconsin that the meaning of particular provisions in the contract is to be ascertained with reference to the contract as a whole") (internal quotations omitted); *Jackman v. WMAC Inv. Corp.*, 809 F.2d 377, 382 (7th Cir. 1987) (citing *Carey v. Rathman, 55 Wis. 2d 732, 200 N.W.2d 591, 594 (1972)*, "we next determine whether the specific language . . . becomes ambiguous when considered with reference to the underlying purposes of the contract"); *Kernz v. J. L. French Corp.*, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751 (quoting *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis. 2d 105, 116, 479 N.W.2d 557 (Ct. App. 1991), "[t]he ultimate aim of all contract interpretation is to ascertain the intent of the parties.")

9. The Liquidator concedes that "Fogg is correct that each of the other definitions [of "cause" in 5(C)] includes an express reference to immoral or wrongful conduct, or to poor performance." Liq. Resp. 5. He criticizes Fogg for seeking to import the due process context of those provisions to 5(C)(f). But he then applies his own interpretation to explain the differences as a deliberate choice that suspension by the agency with supervision does not have to rely upon "cause," or allegations of wrongful conduct. As shown above, even if that were true (which Fogg and OCI's own procedures (n.2 above) refutes), the Liquidator's argument is moot because the agency did not act to suspend him as required by 5(C)(f).

10. The Liquidator says that "Mr. Fogg and WRC knew how to limit and qualify the circumstances justifying for-cause termination." Liq. Resp. 5. If so, then the decision to limit termination under 5(C)(f) to official agency action should also be regarded as deliberate, and requiring removal by the agency, not by Court Order on the agency's request. The former would have required due process allegations and findings, as does every other part of 5(C). The latter does not. It implements the law. Fogg's understanding of the proper application of the Agreement places 5(C)(f) in contextual harmony with the rest of 5(C).[4] The construction urged by the Liquidator is not supported by any evidence of intention or context of 5(C).

11. As the Liquidator notes, in citing *Carey,* a "'reasonable, fair, and just' interpretation will be preferred over an 'unusual or extraordinary' interpretation only

[4] By the Liquidator's argument, it is equally valid to find that had the parties so intended for the Agreement to provide what the Liquidator desires, it would have been a simple matter for 5(C)(f) to have provided that his benefits would be denied in the event an order of liquidation were entered against WRC.

'if equally consistent with the language used'." This is exactly what Fogg has shown here. Interpreting the Agreement in a manner which would allow this Court's Liquidation Order to substitute for OCI's official action, and thereby deprive Fogg of the important benefits of the Agreement on which he relied in first accepting the CEO position and in continuing to perform as CEO during the Rehabilitation, would be an "unusual or extraordinary" interpretation creating a highly inequitable result.

CONCLUSION

For the reasons stated, Fogg respectfully requests that the Court enter an order granting Fogg payment of the severance benefits to which he is entitled under the Agreement and granting such further relief as is just and appropriate in the circumstances.

Dated: December 4, 2024.

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