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IN THE SUPREME COURT OF THE STATE OF DELAWARE

F.A.M.E. LLC d/b/a Falk Associates Management Enterprises a/k/a FAME, Appellant/ Plaintiff-Below, v. EMTURN LLC and EVAN TURNER, Appellees/ Defendant-Below	Case No. 230, 2025 Appeal from the Superior Court of the State of Delaware C.A. No. N22C-12-003-PAW CCLD **Public Version filed on November 11, 2025**

DEFENDANTS-BELOW/APPELLEES' REPLY BRIEF ON CROSS-APPEAL

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October 27, 2025

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Cases

Other Authorities

INTRODUCTION[1]

Before this Court is FAME's appeal, which argues that the Trial Court erred in holding that its claims against Turner were time-barred. As addressed in Turner's Opening Brief, the Trial Court reached the correct holding on this issue and the Court should affirm that ruling. Should this Court affirm the Trial Court's ruling and dismissal of FAME's claims on statute of limitations grounds, it need not reach the merits of Turner's conditional cross-appeal.

However, to the extent this Court reverses the Trial Court's ruling on that issue, it should also reverse the Trial Court's ruling that the "marketing income" term unambiguously included stock. The FAME Agreement, drafted solely by Falk, provides no definition for the "marketing income" term. It is undisputed that Falk never discussed taking a commission on stock with Turner before or during execution of the FAME Agreement, nor does any of the evidence demonstrate an objective manifestation of intent to do so. Because stock, unlike other forms of compensation, is subject to multiple timing events at which point it may be considered income, the failure to define when and how stock would be commissioned leaves open for interpretation whether stock was intended to be commissioned at all.

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[1] Unless otherwise defined, capitalized terms have the same meaning as in Appellees' Answering Brief on Appeal and Opening Brief on Cross Appeal ("Turner's Opening Brief").

Accordingly, Turner's interpretation that stock was not intended to be subject to a commission as "marketing income" is reasonable, and the Trial Court should have applied the doctrine of *contra proferentem* to rule in Turner's favor on summary judgment.

ARGUMENT

I. THE FAME AGREEMENT DOES NOT UNAMBIGUOUSLY PROVIDE FOR A COMMISSION ON STOCK.

Because the FAME Agreement fails to define "marketing income," a fair reading of the contract as a whole supports Turner's interpretation that stock was not intended to be commissionable or, at best, demonstrates that there are multiple, reasonable interpretations. "Contract language is ambiguous if it is reasonably susceptible of two or more interpretations or may have two or more different meanings." *Twin City Fire Ins. Co. v. Del. Racing Assoc*., 840 A.2d 624, 628 (Del. 2003) (quotation omitted).

FAME's Answering Brief on Cross-Appeal ("FAME Answering Brief") spends a significant amount of time arguing in support of its interpretation of "marketing income" that includes the Li-Ning stock. (FAME Answering Br. at 15-17.) But this misses the issue raised on conditional cross-appeal—the issue is that there is *another* reasonable interpretation of "marketing income" that is better supported by the FAME Agreement's text and any extrinsic evidence, making the term, at best, ambiguous.

As addressed extensively in Turner's Opening Brief, when determining the parties' intent behind a contractual term, "a court must construe the agreement as a whole, giving effect to all provisions therein." *SeaWorld Ent., Inc. v. Andrews*, 2023 WL 3563047, at *5 (Del. Ch. May 19, 2023) (internal quotation marks omitted). FAME's proposed interpretation looks only to the term "marketing income" in

isolation, reasoning that stock falls under the definition of the singular term "income." (FAME Answering Br. at 17.) But consideration of the FAME Agreement as a whole suggests a different interpretation.

Unlike other forms of cash compensation that are subject to only one timing event at which point a commission can be taken, stock is subject to various timing events where it may be considered "income," such as the time it vests. (A225-26, 52:18–53:1.) This is precisely why there are at least three valid methods—as identified by Falk and Cantor—by which an agent may calculate a fee for stock: (1) "by the agency taking their appropriate percentage of the number of shares issued"; (2) by taking a fee "on the amount of cash the player derives when he sells the equity"; and (3) by taking "[c]ash compensation … based on the value … of the equity." (A231, 75:13–76:13; A285, 290:21–291:5; A100, 45:5–14.)

Given the multiple possible methods for commissioning stock, one would reasonably expect that if stock was to be commissioned as "marketing income," the FAME Agreement would have included terms defining the method and timing of the stock commission. Without such a mechanism, the "marketing income" term is *necessarily* subject to various reasonable interpretations as to how stock is commissioned. *See Hongbo Han v. United Continental Holdings, Inc.,* 762 F.3d 598, 601 (7th Cir. 2014) (finding ambiguity in the term "mileage" in a frequent flyer program agreement because the agreement was silent on the method for determining

the number of miles to be credited, which was a matter "naturally within the scope of the contract"); *Vogel v. Boris,* 2023 WL 5471400, at *9 (S.D.N.Y. Aug. 24, 2023) (citing *Langshaw v. Appleby Sys., Inc.,* 2006 WL 3026202, at *2 (Del. Super. Oct. 20, 2006)) ("Delaware courts have recognized 'ambiguity in [a] provision due to the fact that the contract was silent' on another issue."). Further, the absence of such mechanism makes FAME's interpretation of "marketing income" not "commercially reasonable," while supporting Turner's interpretation that stock was not intended to be commissioned at all. *Merck & Co. v. Bayer AG,* 2023 WL 2751590, at *1 (Del. Ch. Apr. 3, 2023), *aff'd*, 308 A.3d 1190 (Del. 2023) (holding that, because an acquisition agreement did not provide a "mechanism" by which liabilities would transfer, seller's interpretation that the parties had intended for buyer to assume liabilities was not "commercially reasonable").

The only responsive argument FAME's Answering Brief asserts against Turner's interpretation of the FAME Agreement is to point out that, at the time of execution, FAME had already negotiated the Li-Ning deal that included stock. (FAME Answering Br. at 17.) But this argument is inapposite for a determination of ambiguity. Although extrinsic evidence can be used to interpret an ambiguous contract term, it cannot be used for an initial *determination* of whether that term is or is not ambiguous. *Vogel,* 2023 WL 5471400, at *9 (quoting *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992)) ("Only when there are ambiguities may a court look to collateral

circumstances."); *id.* (quoting *Allied Cap. Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006) ("Thus, 'only where the contract's language is susceptible of more than one reasonable interpretation may a court look to parol evidence.") Though courts may consider the "commercial context between the parties" when determining whether a contract is ambiguous, "the background facts cannot be used to alter the language chosen by the parties within the four corners of their agreement." *Pearl City Elevator, Inc. v. Gieseke,* 2021 WL 1099230 at *29, (Del. Ch. Mar. 23, 2021) (citation omitted). Thus, the determination of whether "marketing income" is ambiguous must be based on the words used—or not used—in the FAME Agreement.

Even if the existence of the Li-Ning deal at the time FAME and Turner executed the FAME Agreement was considered as "commercial context" or extrinsic evidence, that context or evidence does not render Turner's interpretation of "marketing income" unreasonable. In fact, it supports it. Because stock was included as part of the Li-Ning deal, and operates differently than other types of compensation (such as cash), industry standard and common sense support that if Falk—a veteran, experienced player agent—had intended to commission the stock, he would have, *at any point in time before executing the FAME Agreement*, discussed how and when the stock would be commissioned under his Agreement. But that discussion undisputedly never happened. Falk admits that he "*never* had a conversation with Evan Turner how equity would be commissioned." (A269, 228:5–8.) Cantor confirmed the absence of such discussion

years later. (A806, (stating in a text to Falk: "***David. We never said anything about a fee on the stock. It's not something that was ever part of representation. U can't just go back and say that now***.") (emphasis added).) Without that discussion, Turner had no way to know if or how Falk subjectively believed he was owed a commission on stock, as not even Falk's prior agent experience supports that belief. (A273, 242:18–22 (Falk confirmed he had never, in his decades-long career, received a commission on equity-based compensation obtained by a client, demanding it for the first time from Turner).)

Looking to the undisputed extrinsic evidence, there is simply no fact demonstrating an objective manifestation of intent that stock be commissionable under the FAME Agreement. With the absence of (1) any explicit term in the FAME Agreement providing when and how stock would be commissioned, (2) any discussion by Falk conveying to Turner he intended to commission stock, and (3) any other extrinsic evidence demonstrating an intention for stock to be commissioned, the term "marketing income" is, *at best*, ambiguous.

II. THE DOCTRINE OF *CONTRA PROFERENTEM* APPLIES.

In its Answering Brief, FAME argues that the doctrine of *contra proferentem* "cannot be applied as a matter of law at summary judgment." (FAME Answering Br. at 21.) This is simply not true.

Summary judgment is appropriate for a question of contractual ambiguity when "the moving party's record is not … rebutted so as to create issues of material fact." *GRT, Inc. v. Marathon GTF Tech., Ltd*., 2012 WL 2356489, at *4 (Del. Ch. June 21, 2012). Further, as demonstrated by the precedent cited in Turner's Opening Brief, Delaware courts can and have applied *contra proferentem* to resolve contractual ambiguity on summary judgment. *See Twin City Fire Ins*., 840 A.2d at 630 (on summary judgment, "[h]aving found as a threshold matter an ambiguity in the policy exclusion, the trial court then applied the well-accepted contra proferentem principle of construction"); *Hampton v. Titan Indem. Co.*, 2017 WL 2733760, at *6 (Del. Super. June 23, 2017) (finding on summary judgment that, because language in an insurance contract was ambiguous, the doctrine of *contra proferentem* required it to interpret the contract against the insurer as the drafter of the contract). FAME does not attempt to engage with this precedent in its Answering Brief and relies only on decisions that applied *contra proferentem* after a trial.

FAME instead argues that even if the Trial Court had considered *contra proferentem*, the doctrine should not have applied here because Turner had "significant

bargaining power" in executing the FAME Agreement. (FAME Answering Br. at 22.) But FAME's attempt to recast the parties at the time they executed the FAME Agreement is in *direct conflict* with the sworn testimony of Falk himself.

First, FAME's Answering Brief conflates Turner's "power as a valuable NBA draft pick"[2] (*id.*) with being on even ground in the negotiation of an agency agreement with Falk, an attorney, a "veteran player agent," a "seasoned negotiator" who has "been doing this for 50 years," and by his own account "the most influential player agent in NBA history," who had literally written the book on how to negotiate contracts in the sports world. (A220, 32:18–20; A276, 255:21–256:1; A31, ¶ 8; David Falk, THE BALD TRUTH (2009).) Falk, with his extensive experience and accolades as a sports agent, dispels the notion that Turner was an equal in negotiation, testifying that, at the time of contracting, Turner was "very unsophisticated," "inexperienced," and, relevant to the ultimate issue in this matter, "didn't understand equity." (A244, 125:18–21; A280, 270:7.)

[2] The statement that Turner had some sort of significant leverage as a "valuable NBA player" when entering the FAME Agreement is also refuted by Falk's testimony: "[F]or me, as the market leader and having had more high profile players than anyone else in the biz, I represented 55 players drafted in the top 10 picks, 8 who went number 1 pick in the draft. *Evan was not in any way, shape, or form unique to us, as a special player*." (A232, 80:2–8, (emphasis added)); "I don't think Evan Turner is in the top 75 best players I have represented in my career . . . Maybe not in the top 100." (A257, 180:4–8.)

FAME argues that Turner had "advisors guiding him through the process," but fails to mention that the "advisor" was *Turner's mom*. (FAME Answering Br. At 22; A367, 27:16–18; A369, 36:4–9; A372-73, 49:24–50:17.) And despite FAME's claim that Turner had "retained an attorney with whom Falk had several calls" (FAME Opening Br. at 8), there is no record evidence of this—Turner denies it and FAME offers nothing else into evidence; no name, firm, or even a single document or email indicating an attorney was involved on Turner's behalf, much less any evidence that said unknown attorney did anything to level the wildly imbalanced playing field between Falk and Turner.

FAME argues there was "intense haggling" before executing the FAME Agreement (FAME Answering Br. at 22), yet Falk denies that *any* negotiation occurred. (A244, 128:9–12.) Falk testified that negotiation was beneath him, given his "track record." (*Id.* at 128:13–19.) Though Falk reduced his commission from 20% to 15% for years in which marketing income was less than $2 million, he denied that this was a product of negotiation, stating "[i]t's a really terrible way to start a relationship to feel you have to negotiate with your clients" and that "I didn't negotiate it. I made a concession. . . ." (*Id*.) Moreover, Falk testified that he was the author of the FAME Agreement, stating that "I wrote the agreement. And I have written this same agreement, essentially this same agreement, for 50 years with hundreds of

players." (A243, 123:3–6.) Aside from the single gratuitous concession, Turner "signed off on the contract exactly as it's written." (A270, 229:14–15.)

This case was ready-made for application of *contra proferentem*. Falk and FAME controlled the entire drafting process of the FAME Agreement and should not be rewarded for the blatant failure to make their intentions clearly and objectively understood. *Buckeye Partners, L.P. v. GT USA Wilmington, LLC*, 2022 WL 906521, *10 (Del. Ch. Mar. 29, 2022) ("[A]s the entity in control of the process of articulating the terms of the agreements, it is incumbent on the drafter to make their terms clear." (cleaned up)). To allow Falk to exploit the ambiguity of the "marketing income" term, in a contract he alone drafted for a 19-year-old athlete to sign, to cherry-pick an interpretation of "marketing income" that benefits him a decade after the agreement was entered into, without ever having explained, discussed, mentioned, or objectively manifested any intent to do so prior to execution, would undermine the core principles of contract law.

The material facts here are few and undisputed:

- The FAME Agreement does not explicitly provide for a commission on stock as "marketing income," nor does it provide any mechanism for determining how and when that commission would be calculated;

- Falk never discussed taking a commission on stock with Turner before executing the FAME Agreement, despite the fact that Falk knew stock was part of the Li-Ning deal and that Turner did not understand equity;
- No extrinsic evidence, besides Falk's subjective belief, supports an argument that the parties intended for there to be a commission on stock at the time of executing the FAME Agreement;
- Falk was a sophisticated, experienced sports agent with extensive prior experience while Turner was fresh out of college and unsophisticated in the world of sports marketing; and
- Falk was the sole drafter of the FAME Agreement, had used the same agreement countless times, and refused to negotiate its terms.

At best, the FAME Agreement's "marketing income" term is ambiguous as to whether stock was to be commissioned. Because there is no disputed material fact in the record that supports FAME's interpretation, application of *contra proferentem* and resolution on summary judgment is proper.

CONCLUSION

This Court need not reach the issues raised in this cross-appeal because the Trial Court's ruling in favor of Turner on statute of limitations grounds should be affirmed. However, should the Court find that the Trial Court erred in holding FAME's breach of contract claims were time-barred, Turner respectfully requests that the Court grant Appellees' Cross-Appeal and hold that the FAME Agreement does not entitle FAME to a commission on stock because the FAME Agreement is ambiguous on that point and the ambiguity must be construed against the drafter.

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