



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

MACQUARIE MARINE SERVICES,  
LLC, derivatively on behalf of HMS  
HOLDINGS 1 LLC US,

Plaintiff,

v.

HARLEY V. FRANCO,

Defendant,

and

HMS HOLDINGS 1 LLC US, a Delaware  
limited liability company,

Nominal Defendant.

C.A. No. \_\_\_\_\_

**VERIFIED DERIVATIVE COMPLAINT FOR  
INJUNCTIVE RELIEF, DECLARATORY RELIEF AND DAMAGES**

Plaintiff, Macquarie Marine Services, LLC (“MMS”), derivatively on behalf of HMS Holdings 1 LLC US (“HMS1”), by and through its undersigned attorneys, brings this Verified Complaint against Defendant, Harley V. Franco (“Franco”), alleging as follows:

**NATURE OF THE PROCEEDING**

1. This action arises out of (a) Franco’s misappropriation of substantial assets and funds of HMS1 and its wholly-owned subsidiary, entities of which he is Chairman, President and Chief Executive Officer; and (b) Franco’s efforts to destroy

damaging evidence, manufacture favorable evidence, and coerce employees to provide false testimony helpful to him. Based on that conduct, this action seeks a declaration that there is good cause to immediately terminate Franco from all of his board and officer positions; a status quo order enjoining Franco from, inter alia, continuing his acts of embezzlement, interfering in the orderly operations of the Company's business, and destroying or falsifying Company records or importuning Company employees to sign or make false statements regarding his conduct at the Company; and awarding the Company compensatory damages it has suffered by virtue of Franco's misconduct.

### **THE PARTIES**

2. Plaintiff, MMS, is a limited liability company organized under the laws of the State of Delaware with its principal place of business located at 125 West 55th Street, 22nd Floor, New York, NY 10019. MMS owns, directly and indirectly, a minority equity interest in HMS1.

3. Nominal Defendant, HMS Holdings 1 LLC US, is a limited liability company organized under the laws of the State of Delaware with its principal place of business located at 125 West 55th Street, New York, NY 10019.

4. Defendant, Harley V. Franco, is a citizen and resident of the State of Washington. Franco owns, directly and indirectly, a majority equity interest in

HMS1. He is also HMS1's President and Chief Executive Officer, and the Chairman of its Board of Managers.

### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over this derivative action pursuant to 6 Del. C. §§ 18-111 and 18-1001.

6. This Court has jurisdiction over Franco as an officer and manager of a Delaware limited liability company pursuant to 6 Del. C. § 18-109.

7. This Court has jurisdiction over HMS1 as a Delaware limited liability company pursuant to 6 Del. C. § 18-105(a).

### **FACTUAL ALLEGATIONS**

8. HMS1 is a holding company that owns 100% of Harley Marine Services, Inc. ("Harley Marine" and, together with HMS1, the "Company"), a corporation organized under the laws of the State of Washington. Harley Marine operates as a marine transportation company providing, *inter alia*, tug and barge services, and petroleum transportation and storage services.

9. Franco, the founder of Harley Marine, serves as its Chief Executive Officer, President and Chairman.

10. In late May 2018, MMS was alerted to the possibility that Franco may have been diverting and misappropriating Company assets and funds for his and his family's personal benefit. As a result, MMS engaged an independent auditing firm

and contacted the Company to request access to its books and records to conduct a forensic accounting in order to ascertain whether Franco had been embezzling money and assets from the Company.

11. As detailed below, that forensic accounting has established that Franco has, in fact, been engaged in a lengthy and wide-ranging course of misconduct designed to divert and misappropriate significant Company funds and other assets. That conduct, which may have been going on for some time, has recently escalated dramatically.

12. After learning that MMS intended to inspect and analyze the Company's books and records for possible misconduct by him, Franco undertook efforts to destroy and/or alter inculpatory documents, to manufacture false positive records, and to tamper with and improperly influence witnesses to provide false statements and testimony favorable to him. When Franco (a) was advised, through counsel, that allegations of his misconduct had been confirmed in a preliminary report prepared by AlixPartners, the firm MMS engaged to conduct a forensic accounting of the Company, and would be substantiated in sworn statements of Harley Marine officers and employees; and (b) was given the opportunity to avoid litigation by relinquishing his Board and Company positions and entering into an agreement not to hypothecate his stock in the Company pending a full investigation of his misconduct, Franco refused, instead doubling down on his efforts to create a

false narrative exonerating him of any wrongdoing. This action for emergent injunctive relief follows.

**A. MMS’s Forensic Accounting Revealed That Franco Had Embezzled And Misappropriated Company Assets And Funds.**

- ***Diverting Harley Marine Tow Winches.***

13. MMS’s forensic accounting and record review revealed that, while the emergency audit of the Company was in process, Franco misappropriated two tow winches owned by Harley Marine worth approximately \$1.2 million by including them in a sales contract between Conrad Industries (“Conrad”) and two Franco-owned entities in which the Company has no financial interest. Specifically, the sales contract, which Franco executed on behalf of his two entities, included the two Harley Marine winches in the section entitled “Owner Furnished Equipment.”

14. Harley Marine had purchased the two winches (along with a third) from Markey Machinery (“Markey”) in 2014 with the intention of installing them on three of its vessels: the Emery Zidell, the Barry Silverton and the Jake Shearer. Harley Marine paid \$523,000 per winch in 2014, but each has a current market value of more than \$612,000 (based on a 4% escalation rate provided by Markey in 2017).

15. One of the winches was initially installed on the Emery Zidell, but was later removed and placed in storage in Seattle. The second winch was never put into use and remained stored at Markey in Seattle.

16. After signing the sale agreement with Conrad, Franco caused Harley Marine to ship the stored winch back to Markey for refurbishment in December 2017/January 2018. Upon completion of the refurbishment, Markey shipped both the refurbished winch and the winch that had never been used to Conrad on or about April 3, 2018.

17. In short, Franco stole two significant Company assets—tow winches with a collective value of **\$1,225,253**—by including them in a sale transaction involving two personal entities.

18. Franco well knew the two winches were Harley Marine's property when he sent them to Conrad. Indeed, by email dated May 16, 2018, Franco was reminded (as he had been made aware in the past) that the two winches appeared on Harley Marine's balance sheet (because they were its property). In response, he acknowledged that the winches belonged to Harley Marine and offered to buy them for a total of \$50,000, approximately 4% of their market value. Harley Marine has never received any payment for the winches.

- ***Unauthorized Salary Increases And Car Allowances/Purchases.***

19. Despite receiving significant compensation from the Company, Franco has unilaterally (and improperly) increased his base salary repeatedly without board input or approval.

20. Specifically, pursuant to § 2.3(a) of his August 15, 2008 employment agreement (the “Employment Agreement”), Franco was entitled to an annual base salary of \$437,750. That salary was subject to annual review and could only be increased by the Board of Directors.

21. But between 2011 and 2014, Franco’s annual base salary increased by \$92,700 (or approximately 21%) without board approval. Specifically, Franco’s base salary increased to \$460,000 in 2011; \$500,000 in 2012; \$515,000 in 2013; and \$530,450 in 2014. A review of the minutes of the meetings of the Company’s Board, however, does not reflect that it even considered, much less approved, any of those salary increases.

22. As a result of those unapproved salary increases, Franco received—between 2011 and 2018—unauthorized salary payments totaling **\$555,725**.

23. Further, MMS’s preliminary forensic review reveals that since at least May 2010, Franco has received a monthly cash payment of approximately \$2,300 for a car allowance. Franco receives that monthly payment through accounts payable rather than via payroll, which is inconsistent with the treatment of every other employee’s car allowance.

24. While Franco’s Employment Agreement does provide for a car allowance (in an unspecified amount), there is no documentation suggesting that Franco obtained authorization for the exorbitant sum of \$2,300/month.

25. Additionally, Harley Marine purchased a Cadillac Escalade in 2015 for **\$100,962** with Company funds. Maintenance charges for that vehicle are covered by the Company's fleet management program. There is, however, no business reason for the vehicle, which Franco keeps at his vacation home in Malibu, California.

26. Finally, Franco's Employment Agreement provided an allowance for his wife's automobile, but only for a period of eight months after the date of the Agreement (*i.e.*, until May 2009). Nonetheless, Mrs. Franco's 2013 Mercedes Benz (which was obviously leased well after her automobile allowance expired in 2009) is currently reflected on the Company's insurance policy and fleet maintenance program. Further, the Company paid off Mrs. Franco's lease on that vehicle in 2017 by making a payment totaling **\$8,096**.

- ***Embezzlement Of Funds Through Fraudulent Expenses.***

27. The Company employs expense and travel management software known as Concur® to manage Company credit cards and employee expense reimbursement. As a result, whenever an employee charges an item to a Company credit card, the charge appears in the Concur® software.

28. For any business charge, the Company's written reimbursement policy requires the employee to submit a receipt (or other backup documentation) and a



description establishing that the expense was reasonable, appropriate and business related.

29. In violation of Company policy, Franco uses Company credit cards to pay for virtually all of his personal expenses and submits for (and receives) reimbursement for those expenses without providing proper documentation or justification. Notably, while every other employee uses Concur® for credit card expense reimbursements (which makes it easier for the Company to track and verify company expenses), Franco uses an excel spreadsheet for his reimbursements.

30. MMS's forensic accounting of Franco's expenses reveals that, during the one-year period from April 4, 2017 through April 4, 2018 (the "Review Period"), he sought reimbursement for 100% of the charges made on his corporate credit cards in 24 of his 28 expense reports. Three of the other four expense reports sought reimbursement for 95-98% of his credit-card charges, while the fourth report sought reimbursement for 89% of his charges.

31. During that one-year Review Period, Franco sought and received expense reimbursements totaling **\$457,111**.

32. In violation of the Company's written reimbursement policy, Franco did not submit proper documentation or justification for any of those expenses. In fact, while Franco's excel expense template included columns for an explanation of the expense, attendees and business purpose, Franco did not provide that information

for any of the expenses (with the exception of a few airfare charges for which he listed his wife and/or children). In short, Franco provided no explanation or documentation suggesting, much less establishing, that any of his expenses were of a business nature.

33. In fact, most of the expenses for which Franco sought reimbursement are, on their face, personal and unrelated to Company business.

34. For example, Franco sought and obtained reimbursement for expenses totaling \$26,266.48 for a trip to London and Spain between April 21, 2017 and May 5, 2017. Franco did not provide any documentation or explanation establishing that those expenses were business related, and his own notes acknowledge that the trip was for his family. Further, many of the expenses were clearly personal in nature, such as personal concierge and cosmetic dentistry charges in England, and touring company expenses in Spain.

35. Similarly, Franco sought and obtained reimbursement for expenses totaling \$18,076.96 for a family trip to Hawaii from October 25, 2017 through November 2, 2017. Once again, Franco submitted no explanation or documentation suggesting that any of the expenses were business related.

36. Likewise, Franco obtained reimbursements totaling \$15,193.11 for trips to San Francisco and Phoenix in October 2017 for which there is no documentation or explanation suggesting a business purpose. Based on the expense

reports and the nature of the expenses, these trips appear to be additional family trips expensed to the Company.

37. In addition to expensing his family's extensive personal travel, Franco also sought and obtained reimbursement for virtually every personal expense he incurred. For example, during the Review Period, Franco received reimbursement for automobile expenses totaling \$12,677.46, personal boating expenses totaling \$6,045.79, event tickets totaling \$20,728.28, and wine purchases totaling \$9,952.51. Franco provided no explanation or documentation establishing that any of these expenses was business related.

38. Franco's Company credit card statements and expense reimbursement requests also contain extensive charitable contributions during the Review Period totaling \$112,891.67; there is no documentation indicating that these contributions, many of which were to charities associated with Franco and his wife, were properly authorized or business related. Other charitable contributions paid by the Company (through means other than a credit card) during the Review Period include \$2,000 to Friendship Circle; \$20,000 to Lewis & Clark Law School (Franco's alma mater); \$10,000 to the University of Washington Foundation – Sephardic Studies; \$20,000 to the Virginia Mason Foundation Tow Boat Invitational; and approximately \$274,000 to the Harley Marine Charity Golf Tournament.

39. Significantly, Franco's wife has and uses her own Company credit cards (despite not being an employee). Mrs. Franco submits expense reports and receives reimbursement for charges on those cards, even though none of her charges are business related.

40. During the Review Period, Mrs. Franco sought and received expense reimbursements totaling **\$12,483.68**.

- ***Improper Use Of Corporate Traveler.***

41. In addition to reimbursing employees for reasonable business-related travel expenses, the Company uses Corporate Traveler, a service through which employees can book travel expenses for direct billing to the Company.

42. During the one-year Review Period, Franco and his wife booked more than 100 travel transactions (including airfare, car rental and hotels) through Corporate Travel.

43. Franco provided no explanation or documentation establishing that those travel expenses were business related. Likewise, checking those charges against Franco's calendar fails to establish a business purpose for most if not all of that travel. In fact, the bookings reveal that many were not for Franco, but for his wife and children.

- ***Improper Per Diem Charges.***

44. Although not provided for by either his Employment Agreement or the Company's Employee Manual, Franco submitted (on a quarterly basis) per diem travel requests for each month during the one-year Review Period.

45. But because the Company reimburses employees for actual business expenses (including travel expenses) pursuant to the above-described procedure, there is no legitimate reason for Franco to receive per-diem amounts. According to the Internal Revenue Service, a per-diem allowance is intended to be "in lieu of paying actual travel expenses." (See [www.irs.gov/pub/irs-regis/perdiemfaq&a.prn.pdf](http://www.irs.gov/pub/irs-regis/perdiemfaq&a.prn.pdf).)

46. Thus, even if the travel at issue were business related (and it was not), it was improper for Franco to seek a per-diem allowance for it because he had already received reimbursement for the specific expenses he incurred during that travel.

47. Moreover, as with the specific expense reimbursements discussed above, much of the travel for which Franco sought a per-diem allowance was personal, not business. For example, Franco sought per-diem allowances totaling \$5,808 for the London and Spain trip he took with his wife and children from April 21, 2017, through May 5, 2017.

48. Ultimately, during the Review Period, Franco improperly requested per-diem allowances totaling \$53,522.50, and has to date been paid **\$18,063** of that amount.

- ***Payment Of Third-Party Vendor Expenses.***

49. MMS's review of the Company's books and records reveals that Franco caused Harley Marine to make significant payments to third-party vendors for services that benefitted him personally and exclusively.

50. These payments, which appear in the Company's general ledger and are not expense report transactions, lack any supporting documentation or explanation suggesting a business purpose or prior Company authorization.

51. Examples of these vendor payments are:

- May 26, 2017 payment of \$2,451.75 to Uyeta Landscape & Maintenance for monthly maintenance at Franco's personal residence (submitted with invoices for office maintenance).
- September 7, 2017 payment of \$12,886.00 to Franco for professional services provided by Bader Martin to Franco regarding planned vessel sales to Harley Marine.
- October 2, 2017 payment of \$75,863.25 to Glendale Country Club.
- November 11, 2017 payment of \$27,076.50 to Covington Cellars for the purchase of wine.
- January 31, 2018 payment of \$16,966.00 to Seattle Mariners for post-season ticket purchases.
- February 21, 2018 payment of \$44,869.36 to Bieser, Greer & Landis LLP for legal fees related to Franco's personal law suit with Great Lakes Towing Company.

- February 28, 2018 payment of \$17,580.00 to Seattle Sounders FC for 2018 season ticket purchases.
- August 2017 and March 2018 payments totaling \$35,020.00 to Jordan Sloan for Seattle Seahawks season ticket purchases.

52. The above improper and an unauthorized vendor payments total **\$232,712.86**.

- ***Use of Harley Marine Employees For Unrelated Franco Businesses And Advances To Those Businesses.***

53. In addition to his interest in Harley Marine, Franco owns two other shipping businesses: Harley Marine Asia (“HMA”) and Catalina Freight (“Catalina”). Even though HMA and Catalina are entirely distinct from and have no relationship with Harley Marine, Franco has caused numerous Harley Marine employees (likely 4-6 individuals) to perform extensive work for those entities (without causing HMA or Catalina to reimburse Harley Marine for any portion of the employees’ salaries).

54. One particularly egregious example is Bo Jun (“Jun”), who is nominally Harley Marine’s Vice President of Business Development (and is paid by that company). At one point, because Franco had burned through \$10 to \$15 million of his personal funds on HMA, he sent Jun to Singapore to run that business.

55. But Harley Marine—which pays 100% of Jun’s **\$163,909** annual salary—has no operations or prospects in Singapore. Harley Marine is thus paying

the entire salary of an individual who devotes a substantial portion of his time to an unrelated entity owned by Franco.

56. Further, Jun's expense reports for April 1, 2017, through April 30, 2018, reflect reimbursements totaling **\$46,674**. Many of those expenses, which were reimbursed by Harley Marine, related to an HMA employee (Mary Park) and/or HMA clients (*e.g.*, Hanwa, Kingsdale, MoL and Gaslog).

57. Another example of Franco's use of Company employees for his personal businesses is Doug Houghton ("Houghton"), a California manager for Harley Marine. Approximately two years ago, Houghton effectively disappeared from Harley Marine because Franco assigned him the task of getting Catalina up and running. Houghton currently works exclusively on Catalina's day-to-day operations, but is still paid by Harley Marine.

58. Moreover, Franco has caused Harley Marine to advance funds to HMA and Catalina without any hope of repayment. In fact, as of March 31, 2017, HMA had an accounts receivable balance with Harley Marine of **\$607,341**, consisting of (a) \$172,017 for HMA operating expenses from July to December 2012; and (b) cumulative vessel insurance premium payments totaling \$453,323 from 2012 to 2019 (the annual vessel premium for 2018-19 is \$66,907). HMA has made no payments to reduce that balance.



59. Additionally, Franco has caused Harley Marine to pay the legal fees incurred by HMA in a \$2 million arbitration brought against it in Singapore, even though Harley Marine is not a party to the matter. Further, several Harley Marine employees have been forced to devote significant time to the matter.

60. Franco has also engaged in improper behavior with respect to Catalina. For example, in or around 2015-2016, Harley Marine incurred a capital expenditure of approximately \$3 million for a tug boat called the Lucy Franco. Franco then caused the Company to sell that boat to Catalina at a considerable discount.

61. Finally, Franco has directed Harley Marine employees to perform personal services for him (at the Company's expense). First, Amy Ryker receives an annual salary of \$108,866 from Harley Marine, but devotes significant time to managing Franco's personal affairs. Second, Maurice Roberts receives an annual salary of \$108,000 from Harley Marine, but devotes significant time to assisting Franco with his personal finances (and to assisting HMA).

- ***Improper Charges Regarding Franco-owned Properties.***

62. Franco owns two commercial properties that he rents to the Company as office space: Channel View Properties LLC in Houston ("Channel View") and Duwamish Properties LLC in Seattle. Although the Company's Board and Franco appear to have engaged in good-faith, arms'-length negotiations with respect to the original lease agreements for these properties, Franco subsequently caused the

Company to engage in several financially damaging transactions with respect to Channel View.

63. Most significantly, Franco caused Harley Marine to pay for significant leasehold improvements to Channel View between August 2013 and April 2016. As a result, a prepaid rent balance of **\$2,171,942** for those expenditures (87 transactions in total) was reflected on Harley Marine's 2017 audited financial statement. Those prepayments were made at a time when the Company required several capital injections to cover its normal operating expenses.

64. There is no evidence that the Company's Board approved (or even considered) that significant rent prepayment. Indeed, while the October 2015 Board minutes makes reference to "[p]roceeding with the build-out of the Harley Marine Gulf dock in Houston, Texas," there is no indication in the corporate records that the Board authorized those dock improvements to be converted to prepaid rent and amortized over the life of the rent agreement.

65. Moreover, from January 2016 to September 2017, Harley Marine began carrying a second receivable balance from Channel View of approximately **\$605,305** for expenses related to security systems and information technology systems. Harley Marine has received no payments from Channel View against that balance.

66. Finally, Franco has improperly caused the Company to increase its rent payment to cover his poor financial decisions with respect to his properties and

businesses. For example, a fifth amendment to the original lease dated February 15, 2017, increased the monthly rent paid by Harley Marine for Channel View from \$69,975 to \$77,337.52.

67. MMS's review of the Company's records revealed no evidence that this increase was properly authorized, as the Company's Board meeting minutes during the relevant time period do not reflect any discussion regarding the increase.

- ***No-Show Jobs For Franco's Relatives.***

68. MMS's forensic review reveals that Franco arranged several "no show" jobs for family members, pursuant to which they received paychecks despite performing no or minimal work.

69. For example, Franco's brother, Jay Franco, holds the title of "IT Manager" at Harley Marine, but has been described by Company personnel as a "no show employee" who has not been seen in the office since May 2018. Jay Franco's current salary is \$74,160/year.

70. Similarly, Franco's daughter, Ahbra Franco, holds the title "Special Projects Coordinator," but has also been described by Company personnel as a "no show employee" who has been studying for the LSAT and has not been present in the office. Her current salary is \$64,960/year.

- ***Summary And Totals Of Franco's Embezzlement And Misappropriation.***

71. MMS's forensic review establishes that Franco uses and, for an extended period, has used the Company as his personal piggy bank to finance every aspect of his and his family's life. During the one-year Review Period (a time when Harley Marine was itself experiencing cash shortfalls), Franco intentionally and improperly diverted significant Company assets to himself, his family, and his businesses.

72. MMS's analysis of the Company's books and records reveals that for that one-year Review Period alone, Franco diverted, misappropriated, and/or embezzled Company assets and funds with a total value in excess of **\$2.6 million**.

73. On information and belief, a more in-depth and extensive review and forensic accounting of earlier time periods will reveal that Franco diverted additional corporate assets to himself and his family.

74. In fact, MMS's analysis has already discovered instances of embezzlement and misappropriation predating the Review Period. Those instances total more than **\$1.4 million** in Company assets.

- ***Franco's Personal Liquidity Issues.***

75. Franco undertook his campaign to dissipate the Company's assets because of his personal financial distress, which includes (a) the extremely precarious position of HMA, in which Franco has invested millions of dollars of his

own funds; (b) a number of outstanding home mortgages; (c) substantial charitable donations; (d) attorneys' fees and fees for other professionals; and (e) substantial outstanding lines of credit.

76. In total, Franco has approximately \$118 million in personal debt with monthly payments of \$789,000. In fact, Maurice Roberts, a senior financial advisor at Harley Marine, believes that Franco had no liquidity as of July 1, 2018.

77. In light of Franco's pattern of misdeeds and liquidity issues, it is likely that, unless enjoined, he will continue to dissipate Harley Marine's funds and other assets to pay for his personal obligations, along with those of his other businesses, as he has done in the past.

**B. After Discovering That MMS Was Investigating His Conduct, Franco Attempted To Destroy Damaging Evidence, Manufacture Favorable Evidence, And Coerce Company Employees To Provide False Statements And Testimony.**

78. Upon learning that Franco might be engaged in misappropriation of Harley Marine's assets and funds, MMS contacted the Company's counsel on or about June 11, 2018, to request the opportunity to review and conduct a forensic analysis of its books and records. MMS made clear that the focus of its analysis would be determining whether Franco was improperly diverting corporate assets to himself, his family, and his personal businesses.

79. After learning from the Company's counsel of MMS's request and intent, Franco immediately began efforts to destroy or alter damaging evidence,

manufacture favorable evidence, and coerce and intimidate Company employees to provide false answers to MMS and its auditors.

80. Indeed, immediately upon learning of MMS's request, Franco began frantically calling and emailing Matthew Godden ("Godden"), Harley Marine's Senior Vice President and Chief Operating Officer. As detailed in Godden's attached Affidavit (Exhibit A), Franco attempted to enlist Godden in his efforts to destroy and manufacture evidence and impede and delay MMS's investigation.

81. Specifically, Franco tried to direct Godden regarding the information he was permitted to give MMS in response to its requests.

82. Franco also demanded that Godden destroy or alter Company records that were damaging to Franco. For example, Franco insisted that Godden (a) falsely represent to MMS that Franco had not been the one to hire Franco's family members; and (b) create counterfeit accounting recordings claiming that the Company owes him substantial sums for accrued vacation time.

83. Further, on numerous occasions, Franco instructed Godden that he needed to "clean up" the Company's records—*i.e.*, destroy or conceal damaging documents and records—to prevent MMS from uncovering Franco's wrongdoing.

84. As Godden attests, Franco also instructed the Company's former Chief Financial Officer, Barry Hachler, to manufacture counterfeit records showing that

Franco intended to repay the sizeable expense reimbursements he had received. Mr. Hachler confirmed as much in his affidavit (Exhibit B).

85. Further, when MMS's auditors were at Harley Marine conducting their forensic accounting, Franco attempted to prevent them from speaking to certain employees, including Jun.

86. During that onsite review, Franco also repeatedly communicated with the employees interacting with MMS's auditors in an attempt to manipulate and control their answers to the auditors' questions.

87. Further, at one point, Franco demanded that Godden call Franco's attorney so he could craft an affidavit for Godden that would falsely support Franco against allegations of misappropriation and embezzlement.

**C. Demand Futility.**

88. Although MMS brings derivative claims on behalf of HMS1, it was not required to first demand that HMS1 file an action asserting those claims because any such demand would have been futile.

89. Section 4.1(a) of the Second Amended and Restated Limited Liability Agreement of HMS1 (the "HMS1 LLC Agreement") provides that the Board of Managers "shall oversee and review the operations" of HMS1.

90. Section 4.1(b) of the HMS1 LLC Agreement provides that the Board shall consist of: (a) two managers appointed by HMS Holdings 2 LLC US

(“HMS2”), defined in the HMS1 LLC Agreement as “Franco Managers;” (b) one manager appointed by MMS (the “MMS Manager”); and (c) one manager jointly selected by HMS2 and MMS (the “Independent Manager”).

91. Currently, the managers of HMS1 are Franco himself (a Franco Manager), Richard Padden (the second Franco Manager), Tobias Bachteler (the MMS Manager), and Godden (the Independent Manager).

92. As the HMS1 LLC Agreement makes clear by defining them as the “Franco Managers,” Franco controls and dominates half the Board by appointing the Franco Managers, both himself and Padden. Indeed, as a threshold matter, Franco would obviously never vote to sue himself for the wrongdoing alleged above. Further, the conduct alleged above makes clear that Franco has ignored corporate governance norms and run roughshod over the Company’s Board and management for years. Certainly, neither Padden nor any Company officer or executive has felt sufficiently empowered to stop Franco from engaging in the blatantly self-interested and damaging conduct described above. Put simply, that Franco has been able, for such an extended period of time, to loot the Company coffers with impunity—and without any effort to conceal his conduct—makes clear that he completely dominates every aspect of the Company, including its Board of Managers. Indeed, in a complaint filed earlier today in the Superior Court of the State of Washington, King County, Franco alleged that he is the majority shareholder and that he controls



two members of the four-member board. Harley V. Franco v. Macquarie Capital (USA) Inc. et al., No. 18-2-16360-9 SEA ¶¶ 16-17.

93. Because §4.1(a) of the HMS1 LLC Agreement requires the vote of a majority of the Managers to take action, the fact that Franco controls half of the Board of Managers allows him to block any action, including the decision to sue him.

94. Thus, while the HMS1 LLC Agreement lists the Board as comprising managers appointed by Members other than Franco, he nevertheless exercises exclusive control over the management and operation of HMS1.

**COUNT ONE**  
**(Breach of Fiduciary Duty)**

95. MMS repeats and realleges the allegations contained in Paragraph 1 through 94 of this Verified Complaint as though fully set forth herein.

96. As Chairman of the Board of Managers, President, and CEO of HMS1, Franco is a fiduciary and owes the fiduciary duties of care and loyalty to HMS1 and MMS, a minority Member of HMS1.

97. Indeed, Franco is the majority and/or controlling Member of HMS1 and exercises complete control of HMS1, through his domination of the Board.

98. Franco breached his fiduciary and other duties to HMS1 and MMS by engaging in the misconduct described above, including but not limited to diverting the Harley Marine tow winches; taking unauthorized salary increases and car

allowances/purchases; embezzling Harley Marine funds through improper expenses; improperly using Corporate Traveler for personal travel; claiming improper per-diem charges; causing Harley Marine to make significant payments to third-party vendors for services that benefitted him, but not Harley Marine; using Harley Marine employees for unrelated businesses; causing Harley Marine to engage in financially damaging transactions with companies owned by him; causing Harley Marine to hire his relatives for “no-show” jobs; and attempting to destroy damaging evidence, manufacture favorable evidence and coerce Harley Marine employees to provide false documentation to conceal his misconduct.

99. As a direct and proximate result of the above-enumerated breaches of fiduciary duties, HMS1 and MMS have suffered and will continue to suffer significant damages.

**COUNT TWO**  
**(Breach of Contract)**

100. MMS repeats and realleges the allegations contained in Paragraph 1 through 99 of this Verified Complaint as though fully set forth herein.

101. The HMS1 LLC Agreement imposes on Franco, by virtue of his officer positions as HMS1’s President and CEO, certain duties and obligations with respect to HMS1 and MMS, a minority Member of HMS1.

102. As a result, Franco owes the duties—which are expressly incorporated into the HMS1 LLC Agreement—to HMS1 and MMS. Specifically, Section 4.9 of the HMS1 LLC Agreement provides as follows:

The officers of the Company shall have such powers and duties in the management of the Company as shall be stated in this Agreement or in a resolution of the Board of Managers which is not inconsistent with this Agreement and, to the extent not so stated, as generally pertain to their respective offices, subject to the control of the Board of Managers.

103. Franco breached Section 4.9 by engaging in the misconduct described above, including but not limited to diverting the Harley Marine tow winches; taking unauthorized salary increases and car allowances/purchases; embezzling Harley Marine funds through improper expenses; improperly using Corporate Traveler for personal travel; claiming improper per-diem charges; causing Harley Marine to make significant payments to third-party vendors for services that benefitted him, but not Harley Marine; using Harley Marine employees for unrelated businesses; causing Harley Marine to engage in financially damaging transactions with companies owned by him; causing Harley Marine to hire his relatives for “no-show” jobs; and attempting to destroy damaging evidence, manufacture favorable evidence and coerce Harley Marine employees to provide false documentation to conceal his misconduct.

104. As a direct and proximate result of the above-enumerated breaches of contract, HMS1 and MMS have suffered and will continue to suffer significant damages.

**COUNT THREE**  
**(Declaratory Judgment)**

105. MMS repeats and realleges the allegations contained in Paragraph 1 through 104 of this Verified Complaint as though fully set forth herein.

106. Franco's Employment Agreement, in § 2.2(a), provides that he would be employed as Harley Marine's President and Chief Executive Officer.

107. Paragraph 6.1(d) of Franco's Employment Agreement governs with-cause terminations, providing as follows:

[Harley Marine] has the right to terminate [Franco's] employment by [Harley Marine] for cause upon written notice to [Franco] following any of (i) the conviction or plead of no contest of [Franco] of a felony or any crime involving fraud, (ii) any other act or omission by [Franco] involving dishonesty or fraud, (iii) the willful or grossly negligent misconduct by [Franco] in the performance of his duties, (iv) [Franco's] repeated and willful failure to follow the reasonable directives of [Franco's] supervisors or to carry out [his] obligations under this Agreement, (v) intentional, grossly negligent or unlawful misconduct by [Franco] which causes material harm or prejudice to any Company Entity or the reputation of any thereof, or (vi) any material violation of the [Harley Marine's] policies, including those relating to sexual harassment and substance abuse.

108. The above described conduct by Franco constitutes (a) acts involving dishonesty or fraud, (b) willful or grossly negligent misconduct in the performance of his duties, (c) repeated and willful failure to carry out his obligations under the Employment Agreement, (d) intentional, grossly negligent or unlawful misconduct that caused material harm or prejudice to the Company, and (e) the material violation of the Company's policies.

109. As a result, there exist numerous grounds on which to terminate Franco's employment for cause.

110. Further, § 4.1(d) of the HMS1 LLC Agreement provides, in pertinent part, that Franco shall be the Chairman of the Board of Managers of HMS1 only if he "has not been terminated by [Harley Marine] 'for cause' under his Employment Agreement."

111. By reason of the foregoing, an actual controversy now exists between the parties with respect to their respective rights, obligations, and liabilities under the Employment Agreement and the HMS1 LLC Agreement, and, in particular, with respect to the Company's entitlement to terminate Franco's employment and remove him from his various positions at HMS1 and Harley Marine.

112. MMS and HMS1 are thus entitled to a declaration that (a) there is good cause to terminate Franco's employment as Harley Marine's President, Chief Executive Officer and Chairman; and (b) he is thus removed from those positions

and from his positions as President, Chief Executive Officer and Chairman of the Board of Managers of HMS1.

### **PRAYER FOR RELIEF**

WHEREFORE, MMS, derivatively on behalf of HMS1, respectfully requests entry of a Judgment and Order:

- (a) declaring that Franco breached his fiduciary and other duties as detailed above, and that he engaged in willful misconduct, acted in bad faith, and derived an improper personal benefit from his misconduct;
- (b) declaring that Franco breached the HMS1 LLC Agreement as detailed above;
- (c) declaring that (i) there is good cause to terminate Franco's employment as Harley Marine's President, Chief Executive Officer and Chairman; and (ii) he is thus removed from those positions and from his positions as President, Chief Executive Officer and Chairman of the Board of Managers of HMS1;
- (d) enjoining Franco from continuing his acts of embezzlement, from interfering in the orderly conduct of the Company's business, from destroying, altering or concealing any Company records; from directing or instructing any employee or agent of the Company to do so; and from firing, discharging or reassigning any Company employees;
- (e) awarding MMS, derivatively on HMSI's behalf, compensatory damages in an amount to be determined at trial, plus pre-judgment interest; and

(f) granting such further relief as the Court deems fair and appropriate.

HEYMAN ENERIO  
GATTUSO & HIRZEL LLP

OF COUNSEL:

Kevin H. Marino  
MARINO, TORTORELLA &  
BOYLE, P.C.  
437 Southern Boulevard  
Chatham, New Jersey 07928  
(973) 824-9300

/s/ Samuel T. Hirzel, II  
Samuel T. Hirzel, II (#4415)  
Melissa N. Donimirski (#4701)  
300 Delaware Avenue, Suite 200  
Wilmington, Delaware 19801  
(302) 472-7300

*Attorneys for Plaintiff  
MMS Marine Services, LLC, derivatively  
on behalf of HMS  
Holdings 1 LLC US*

Dated: July 3, 2018