

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEMATIC CORP.,	:	
	:	No. 180, 2023
Appellant/Cross-Appellee,	:	
	:	Court Below:
vs.	:	Superior Court
	:	of the State of Delaware
FORTIS ADVISORS, LLC,	:	C.A. No. N18C-12-104 AML CCLD
	:	
Appellee/Cross-Appellant.	:	
	:	

**APPELLEE'S ANSWERING BRIEF ON APPEAL
AND OPENING BRIEF ON CROSS-APPEAL**

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NATURE OF PROCEEDINGS

This appeal involves an “earn-out” dispute arising from a merger between Dematic Corp. (“Dematic”) and Reddwerks Corporation (“Reddwerks”)¹. Post-merger, the interests of the Reddwerks former securityholders (“Company Holders”) were represented by Fortis Advisors, LLC (“Fortis”) acting solely in its capacity as the Shareholder Representative.²

From the inception of this case, Fortis sought documents related to the integration of Reddwerks Company Products software into Dematic products and services.³ Fortis sought this information because Dematic had a contractual obligation during the Earn-Out Period (i) to integrate Company Products into Dematic products and services and (ii) to incentivize its sales force to sell Company Products. Nevertheless, at the conclusion of the Earn-Out Period Dematic reported that it had sold \$0 of Reddwerks Company Products.⁴ The requested discovery sought information essential to determining whether Dematic had breached its

¹ As a result of the merger, Reddwerks was renamed Dematic Reddwerks Corporation. Fortis refers herein to both the pre- and post-merger entity as “Reddwerks”.

² A130 §3.5.

³ A1482-A1490, Item 5.

⁴ A1235; *See also* A124, §3.1(h)(i).

contract obligations and (as a consequence) failed to properly account for and pay the Contingent Consideration.⁵

Throughout the case, Dematic resisted this discovery. Fortis filed multiple motions to compel and for sanctions resulting in multiple agreements and orders.⁶ Each consequent wave of discovery was analyzed by Fortis (and the court) and determined to lack the specific information Dematic had agreed or been ordered to produce.

In response to Dematic's disregard of multiple orders, the Superior Court imposed sanctions in the form of a conditional evidentiary presumption. This sanction was tailored to the basis for Dematic's resistance and to the specific prejudice sustained by Fortis. The court held that, if it adopted Fortis's interpretation of the term "Company Products," (*i.e.* that Company Products source code was a form of "Company Products") then it would presume that Reddwerks had achieved the Order Intake targets and fully performed under the terms of the Earn-Out; but if it adopted Dematic's interpretation (*i.e.*, that source code was not "Company Product" and, therefore, not responsive to the discovery requests) then no evidentiary presumption would be imposed.

⁵ See *e.g.* *Wal-Mart Stores, Inc. v. Cuker Interactive, LLC*, 2017 WL 11681860, at *4 (W.D.Ark. Jan. 19, 2017); *Finjan, Inc. v. Cisco Sys.*, 2020 WL 13180005, at *10 (N.D.Cal. Apr. 21, 2020). See also A123 §3.1(g).

⁶ *Post-Trial Mem. Op.* (Exhibit A hereto), p. 21-28; A1506-A1513; B266-B309.

After a five-day trial and extensive post-trial briefing, the Superior Court found that (i) “source code” was a form of Company Products; (ii) the evidentiary presumptions applied; (iii) Reddwerks had fulfilled its contractual obligations regarding Order Intake and Earn-Out Period EBITDA; and (iv) Fortis was entitled to recover the full amount of Contingent Consideration.⁷ The Superior Court rejected Dematic’s product defect counterclaim but granted Dematic indemnity for legal fees and settlement consideration paid to resolve a shareholder rights suit. This appeal followed.

⁷ Note: the *Post-Trial Memorandum Opinion* submitted by Dematic at A2750 is not in its original form (e.g. at A2767). Fortis has attached a copy of the *Opinion* in its original form hereto at Ex. A.

SUMMARY OF THE ARGUMENT

1. Denied. The Superior Court correctly concluded (i) that the definition of “Company Products” is ambiguous and (ii) that “Company Products” included source code. A reasonable person cannot define “Company Products” without looking outside the Merger Agreement. Source code is not *a component* of Company Products, it is *a form* of Company Products. The evidence supports finding that source code is “Company Products” and that source code was offered to customers.

2. Denied. The Superior Court did not abuse its discretion when it imposed conditional evidentiary presumptions as sanctions for Dematic’s repeated violations of discovery orders. The sanctions were factually based, supported by the record, the result of a logical and orderly reasoning process, and appropriately tailored to remedy the prejudice caused.

3. Denied. The Superior Court did not err in finding that Dematic had waived or was estopped to argue that its calculations were “conclusive and binding”. The existence of manifest error and Fortis’s delivery of a notice of objection prevented the calculation from becoming “conclusive and binding”. The Review Firm process was not competent to address the manifest error. Dematic did not invoke the Review Firm process and waived its right to such process by participating

in litigation. The Undisputed Amount Notice was delivered pursuant to an agreed reservation of rights.

4. Denied. The Superior Court did not err in rejecting Dematic's counterclaim. Dematic failed to prove any breach of warranty by Fortis. Dematic waived and failed to preserve its arguments (i) that the alleged defect was obvious and (ii) that Reddwerks had failed to make reasonable inquiry. These arguments fail because the court did not find the existence of defects; did not find that the alleged defects were obvious; did not find that Reddwerks had warranty-based liability to any customer; and did not find that the costs of retrofit were reasonable, necessary, or related to an allegedly obvious defect.

Fortis's Cross-Appeal

5. The Superior Court erred when it granted a set off to indemnify Dematic for Losses incurred by it in connection with the *D'Angela* shareholder appraisal suit. The court erroneously placed the burden of proof on Fortis (to prove that the set off was "unreasonable") instead of on Dematic (to prove that the set off was "reasonable"). There is no evidence to support a finding that the legal fees awarded were reasonable within the meaning of Delaware Rule of Professional Conduct 1.5(a)(1).

STATEMENT OF FACTS

Reddwerks was a Delaware corporation in the business of manufacturing, installing, and servicing “pick-to-light” (“PTL”) hardware and software solutions to support supply chain logistics. Dematic is a large multinational provider of engineering and supply-chain solutions.

A. The Merger

The parties executed an Agreement and Plan of Merger (the “Agreement”) on November 18, 2015.⁸ Dematic agreed to pay approximately \$45 million in up-front consideration,⁹ with the potential to pay an additional \$13 million in earn-out consideration (“Contingent Consideration”)¹⁰. The Contingent Consideration was determined based upon the “Order Intake Amount” and “Earn-Out Period EBITDA” achieved during the fourteen-month period beginning November 1, 2015 and ending December 31, 2016 (the “Earn-Out Period”).¹¹ Order Intake Amount was based on the dollar value of “Company Products” sold by Dematic or Reddwerks pursuant to

⁸ A98.

⁹ A110 §1.1(uu).

¹⁰ A107 §1.1(bb).

¹¹ A123 §3.1(g).

contracts entered into during the Earn-Out Period.¹² Earn-Out Period EBITDA was calculated based on Reddwerks' financial performance as a standalone entity.¹³

“Company Products” was defined by incorporating a list of Reddwerks' software functions, identified using one or two word names.¹⁴ Dematic affirmed that Company Products were intangible “functionalities” and each functionality was a result of source code that “a computer reads to provide the functionality.”¹⁵ The nature of Company Products, and the fact that they derive from source code, was known to Dematic and Reddwerks during the negotiation process.¹⁶ Accordingly, the parties elected to refer to the Company Products by their short-hand names rather than supplying more technical definitions.¹⁷

During the Earn-Out Period, Dematic entered into contracts with customers that called for the sale of Company Products which had been integrated into Dematic software.¹⁸ However, Dematic did not consider Company Products source code integrated into Dematic products to be Company Products for purposes of Order

¹² A112 §1.1(jjj).

¹³ A107 §1.1(gg).

¹⁴ A301.

¹⁵ *See Trial Transcript* (hereinafter “*Tr.*”) III (*Gill*) 52-53 (B508).

¹⁶ *Post-Trial Mem. Op.* p. 8.

¹⁷ *Ibid.*

¹⁸ *E.g.* A890-A1234.

Intake Amount .¹⁹ As a result, Dematic did not include contracts for the sale of such integrated Company Products in its calculation of Earn-Out Consideration. As a consequence, material contracts containing Company Products source code were omitted from the calculations entirely.²⁰

B. The Conclusion of the Earn-Out

On March 10th, 2017, Dematic provided Fortis with its calculations of the Order Intake Amount and Earnout-Period EBITDA. According to these calculations, Reddwerks earned approximately \$1.5 million in Contingent Consideration and failed to achieve the minimum EBITDA target.²¹ However, Dematic's notice was opaque and lacked essential information.²² Accordingly, on April 7th, 2017, Fortis objected to Dematic's calculations and to its claim to the escrow funds, setting forth its good faith basis for doing so.²³ On April 20th, 2017, Dematic declared Fortis's objection notice deficient and asserted that its calculations were conclusive and binding.²⁴ Neither party hired a "Review Firm" (as

¹⁹ *Post-Trial Mem. Op.* p. 12-13; *Tr. V (Carlson)* 225-28 (B690-B691).

²⁰ B690 *Tr. V (Carlson)* 226 (B690); *see also Tr. III (Gill)* 89 (B517); *Tr. IV (Khodl)* 151:21-152:2 (B598-B599).

²¹ A1235.

²² *Post-Trial Mem. Op.* p. 16; B122-B128; *Tr. I (Fink)* 114-15, 117-18 (B398-B399); *Tr. II (Rogers)* 90-99 (B449-B451).

²³ *Post-Trial Mem. Op.* p. 40; B122-B128.

²⁴ B139-B140.

contemplated by the Agreement) or pursued enforcement of alternative dispute resolution processes.²⁵

Neither Fortis nor the Company Holders ever received any Contingent Consideration from Dematic. Dematic asserted that it was entitled to set off the entire Contingent Consideration earned by Reddwerks “to cover its Losses which are subject to indemnification under the Merger Agreement.”²⁶ Furthermore, because Dematic’s calculation of Earn-Out Period EBITDA was less than the \$6.3 million threshold, on June 27th, 2017, Dematic made demand for payment from the escrow account in the amount of \$3 million (*i.e.*, 100% of the “Escrow Amount”).²⁷

On June 27th, 2017, Fortis objected to Dematic’s escrow demand on the bases previously asserted regarding Dematic’s calculations.²⁸ Neither party had any right to receive the Escrow Amount until their disputes had been resolved.²⁹ After protracted negotiations, Dematic and Fortis reached an interim resolution to their dispute regarding the escrow: Fortis would agree to the release of the full Escrow Amount to Dematic, and Dematic would agree to Fortis’s reservation of rights to

²⁵ *Post-Trial Mem. Op.* p. 17, 42.

²⁶ A1235.

²⁷ A1266-A1267.

²⁸ A1265.

²⁹ A199 §1.4(b), (d).

challenge Dematic’s calculations at a future date.³⁰ Accordingly, on July 17th, 2017, Fortis and Dematic jointly issued the required “Undisputed Amount Notice” to the escrow agent in order to effect the terms of their agreement.³¹

C. Dematic’s Claims for Indemnity

Dematic set off the Contingent Consideration and demanded the Escrow Amount pursuant to two claims for indemnity: for the costs and fees incurred in settling an appraisal rights suit and for Dematic’s expected (but not yet incurred) costs to remediate what it alleged were safety defects in the PTL system.

On April 8th, 2016, a group of dissenting former Reddwerks shareholders initiated a shareholder appraisal suit (the “*D’Angela* Litigation”).³² Dematic assumed the defense³³ and ultimately settled with the dissenting shareholders.³⁴ On August 21st, 2017, Dematic notified Fortis about its resolution of the shareholder appraisal suit and its demand for indemnity for \$1,561,277.92 (*i.e.*, settlement

³⁰ A1274-A1279.

³¹ A1272.

³² B151-B152.

³³ B62.

³⁴ B153-B190.

consideration of \$1,276,590.72 and legal fees of \$236,217.40).³⁵ Dematic offset this amount from the Contingent Consideration earned by Reddwerks.³⁶

In February 2016, Dematic purportedly discovered a defect in wiring for the PTL System. That same month, Dematic engaged third-party testing laboratory Safety Engineering Labs (“SEL”) to confirm its allegations. SEL performed destructive testing of an incomplete PTL System and identified cables provided by Dematic as being out of specifications. SEL did not conclude that the PTL system was defective or that it posed an unreasonable safety hazard; however, SEL recommended that Dematic examine each customer site to ensure that the types of misuse and abuse of the PTL system applied in SEL’s testing were not present in the field. Dematic did not perform any recommended site inspections.

In the summer of 2016, Dematic decided that every then-existing installation of the PTL system was required to be retrofitted.³⁷ Over the next two years, Dematic attempted to design “enhancements” to the PTL system which were unsuccessful and resulted in damaged components.³⁸ As a result, as of January 1, 2020, Dematic

³⁵ B151-B152.

³⁶ A163 §7.1(a); A126 §3.1(j).

³⁷ B85.

³⁸ A1255.

had completed only four retrofits. At trial, Dematic witness Melissa Vanderwiel testified that the retrofitting process remained ongoing.³⁹

D. Dematic's Discovery Misconduct

In December 2018, Fortis filed suit against Dematic alleging two alternative theories: (1) that Dematic had failed to incentivize its sales force and/or to comply with its obligation to integrate Reddwerks' products into Dematic products; or (2) that Dematic had integrated Company Products into Dematic products, but failed to properly credit the sale thereof when calculating the Order Intake Amount or Earn-Out Period EBITDA.⁴⁰ From the beginning of discovery, Dematic repeatedly failed to adhere to discovery protocols.⁴¹ Dematic failed to produce evidence of its integration of Company Products and of the contracts entered into during the Earn-Out Period to sell such integrated products.⁴² Dematic's failure to make discovery caused significant delay, required numerous motions to compel, resulted in several orders compelling discovery, and (ultimately) led to sanctions.⁴³

³⁹ A2619; A2645 at 78:22-79:3.

⁴⁰ A1310-A1316.

⁴¹ *Post-Trial Mem. Op.* p. 22.

⁴² *Id.* p. 23.

⁴³ See *Fortis Advisors, LLC v. Dematic Corp.*, 2020 WL 6784129, at *1 (Del. Super. Nov. 18, 2020) (internal quotations and citations omitted).

In March 2021, the extent of Dematic’s failure to produce clearly relevant and responsive evidence was shockingly revealed. In the deposition of Dematic witness Andrew Gill (taken less than three months before trial) it was discovered that Dematic had knowingly and intentionally failed to produce evidence of Company Products integration and was using that evidence to develop its own case.⁴⁴ As a result Fortis filed its third motion for sanctions.⁴⁵ Following extensive briefing and an oral hearing, the trial court issued conditional evidentiary presumptions conditioned upon whether the trial court ultimately concluded that “source code” was “Company Products” within the meaning of the Agreement.⁴⁶

Following trial on the merits, the Superior Court held that source code was “Company Product” and, therefore, the evidentiary presumptions would be applied. Accordingly, the court presumed that (i) Reddwerks had fulfilled its contractual obligations regarding Order Intake and Earn-Out Period EBITDA; and (ii) Fortis was entitled to recover the full amount of Contingent Consideration.

⁴⁴ *Post-Trial Mem. Op.* p. 25-27.

⁴⁵ *Id.* p. 27-28.

⁴⁶ *Ibid.*

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT THE DEFINITION OF “COMPANY PRODUCTS” IS AMBIGUOUS AND THE TERM “COMPANY PRODUCTS” INCLUDES SOURCE CODE

A. Questions Presented

Did the trial court err when it concluded that the term “Company Products” was ambiguous and when it construed that term to include source code?

B. Scope of Review

Questions of contract interpretation are reviewed on a *de novo* basis. *Cox v. Commc’ns, Inc. v T-Mobile US, Inc.*, 273 A.3d 752, 760 (Del. 2022). Questions of fact are reviewed for clear error. *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

C. Merits of the Argument

The Superior Court correctly concluded that the definition of “Company Products” is ambiguous. The specific forms, variations, expressions, and translations of the listed modules and products cannot be understood by a reasonable person without reference to external sources. The extrinsic evidence adduced at trial overwhelmingly supports the finding that Reddwerks’ software source code is a form of Company Products.

1. The Definition of Company Products Is Ambiguous

Delaware courts interpret clear and unambiguous contractual terms according to their ordinary meaning.⁴⁷ If the language of the contract establishes a common meaning so that a reasonable person would have no expectations inconsistent with the contractual language, those terms control and Delaware courts will not consider extrinsic evidence.⁴⁸ Ambiguity does not arise from mere disagreements among the parties, but rather when “the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings.”⁴⁹

The term “Company Products” is defined in the Agreement in §4.12(h):⁵⁰

(h) Part 1 of Section 4.12(h) of the Disclosure Schedules sets forth a list of all products currently distributed or offered to third parties by the Company or any Subsidiary thereof, which for purposes hereof includes third party products sold by the Company (collectively, the “Company Products”).

The Agreement incorporates by reference the Disclosure Schedules (“Disclosure”) described in §4.12(h), including the list of Company Products at issue herein.⁵¹ The Superior Court found that Part 1 of Disclosure 4.12(h) “describes Reddwerks’

⁴⁷ See *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009) (internal citations omitted).

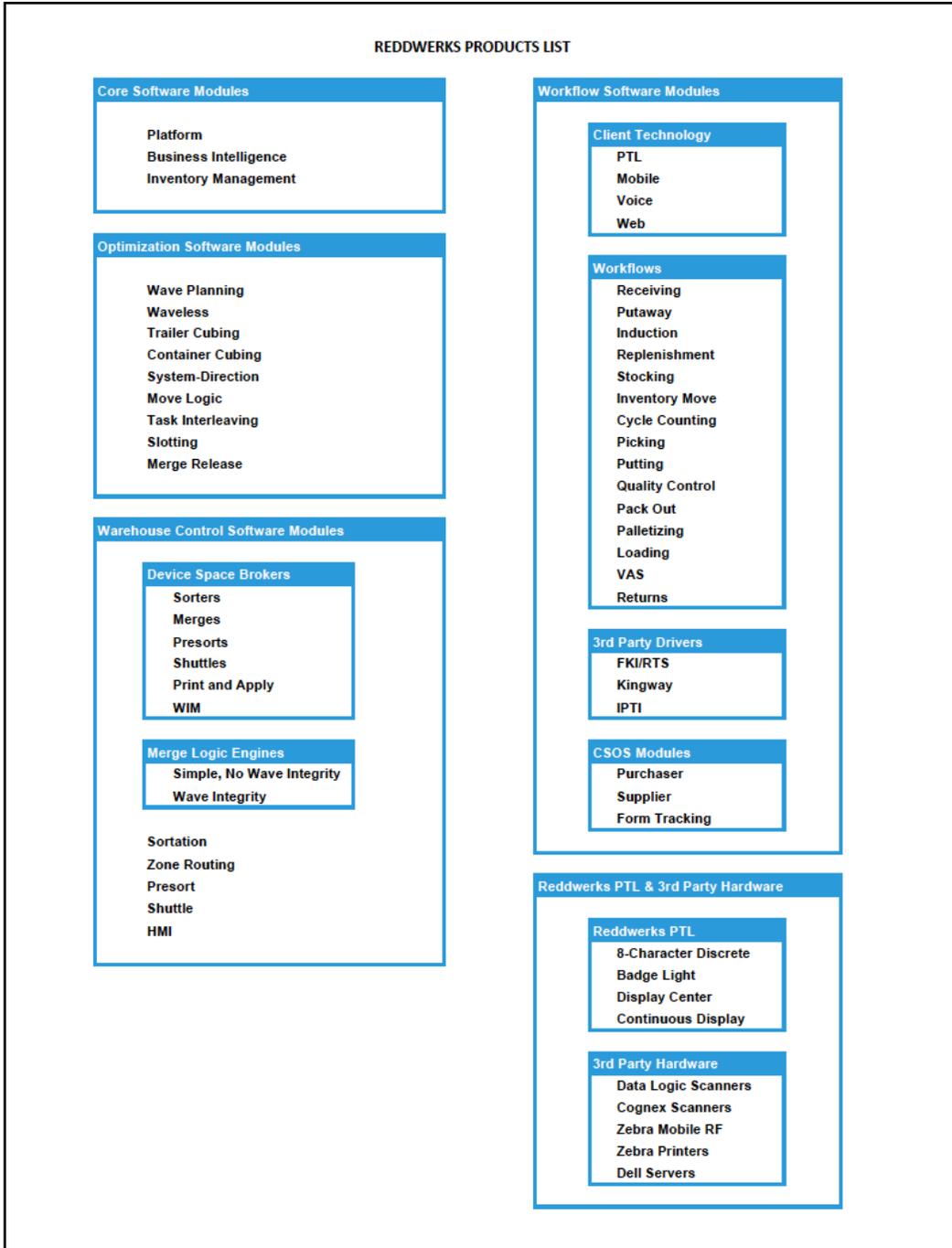
⁴⁸ See *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

⁴⁹ See *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992); See also *Eagle Indus.*, 702 A.2d at 1232.

⁵⁰ A145 §4.12(h) (emphasis added).

⁵¹ A301.

products in extremely general terms, typically limited to one or two words with no definitions provided.”⁵² That Disclosure Schedule provides *in its entirety*:



⁵² *Post-Trial Mem. Op.* p. 43.

The Superior Court correctly recognized the existence of ambiguity in Disclosure 4.12(h).⁵³ Prior to the merger, both Reddwerks and Dematic understood that every Reddwerks Company Product was bespoke, requiring customization for each customer site.⁵⁴ Rather than explicitly listing every customized version of software or hardware Company Products then in existence, Reddwerks and Dematic referred to Company Products generally by the names used to market those Company Products to customers. In order for a reasonable person to understand and appreciate the fundamental character or scope of a named product, they would need access to extrinsic information. For example, a highly complex hardware system containing multiple discrete physical components and installation options was listed simply as “PTL”.⁵⁵ Accordingly, the Superior Court correctly recognized that the vague descriptions of Company Products in Disclosure 4.12(h) prevent the precise meaning thereof from being discerned without going outside the four corners of the Agreement.⁵⁶

⁵³ *Id.* p. 46.

⁵⁴ B18; *See also Tr. II (Rogers)* 33:22-35:23 (B435).

⁵⁵ A145.

⁵⁶ *Post-Trial Mem. Op.* p. 46-47.

2. The Record Supports Finding That Company Products, As Used in the Merger Agreement, Includes Reddwerks Source Code.

In light of the ambiguity inherent in the §4.12(h) definition of Company Products and the term's susceptibility to multiple reasonable interpretations, the Superior Court did not err in examining extrinsic evidence to determine the meaning of the term "Company Products."

a. Dematic's Arguments Rely Entirely Upon the False Premise that "Source Code" is a "Component" of Company Products.

Dematic asserts that source code is not Company Products within the meaning of §4.12(h) because (i) source code is "a component of software underlying Reddwerks' product, and not the product itself"; (ii) the Company Products List contained in Part 1 of Disclosure 4.12(h) "does not expressly list 'source code'"; and (iii) "Reddwerks did not distribute or offer source code to its customers."⁵⁷ On the bases of these arguments, Dematic contends that the trial court erred in concluding that documents relevant to its integration of source code were responsive to orders compelling it to produce documents relevant to its integration of Company Products.

Dematic offered no evidence to establish that Company Product source code is a component but not a product and the trial court made no such finding.⁵⁸ In lieu

⁵⁷ Dematic Brief, p. 21.

⁵⁸ *Post-Trial Mem. Op.* p. 47, 49. The Superior Court did not (as Dematic suggests) find that source code is a component of software. Rather, the Superior Court found that "source code" was a component of the "functionalities" provided to customers

of such evidence or finding, Dematic offers only rhetoric: “Just as flour is not bread, tomatoes are not ketchup, and words are not a book – source code is not a product.”⁵⁹ But this argument begs the central question of the dispute by presupposing that (like flour, tomatoes, and words) Company Product source code is a constituent component of a multi-component product (like bread, ketchup, and a book). This is wrong. Company Product source code is not a component of Company Product, it is a form of Company Product.

b. The Plain Language of the Merger Agreement Supports the Court’s Findings.

According to the Agreement, source code for Company Product is Company Product in source code form. *See* §§ 4.12(h) and (j) of the Agreement, which provide:

None of the Company Products use, incorporate or are distributed with any Open Source Software, or any modification or derivative thereof, in a manner that, pursuant to the applicable Open Source Software license terms, would subject any Company Product as a whole to the requirements of the Open Source Software license terms that would require the Company Product be made generally available in source code form.

(j) Except confidential disclosure to employees and contractors involved in the creation and development of Company Products or any technology of the Company or any Subsidiary thereof, neither the Company nor any Subsidiary thereof has disclosed, delivered or licensed, or has a Liability, duty or obligation (whether present, contingent, or otherwise) to disclose, deliver or license, any Company Products to any third party in source code form.

by Reddwerks software.

⁵⁹ *Ibid.*

(Emphasis added.) Thus, the relationship between source code and Company Product is not analogous to the relationship between flour and bread (*i.e.*, a component and a product). Rather, it is analogous to the relationship between water and the various forms that water can take (*i.e.*, a single thing presented in different states of being). Water can be a liquid, a solid, or a gas – but it is always water. Similarly, Company Product can be functionality, software, or source code – but it is always Company Product.⁶⁰

If Dematic’s assertion regarding the definition of Company Products were deemed true, it would fundamentally change how the Agreement operates by rendering material provisions of the contract meaningless or illusory. For example, the Agreement required Dematic to integrate Company Products into its own products and services.⁶¹ Dematic witness Andrew Gill testified that in order to satisfy this obligation, Dematic integrated Company Product source code into Dematic products, creating a Dematic software product that was “functionality equivalent” of

⁶⁰ Liquid water is analogous to Company Product in the form of functionality; *that is*, the product in motion as it is utilized by the customer. Ice is analogous to Company Product in the form of compiled software; *that is*, the static product in tangible form as it is delivered to the customer. And steam is analogous to Company Product in the form of source code; *that is*, the atomized product in its most transparent form.

⁶¹ A124 §3.1(h)(i).

Reddwerks' software.⁶² This testimony reflects Dematic's pre-merger expectation that "[r]euse of the existing [Reddwerks] code is highly desirable" during the integration process.⁶³ The Superior Court correctly recognized that Dematic's promise to integrate Company Products was not an illusory commitment, but a material provision of the contract that was fulfilled by Dematic's integration of Company Products source code into Dematic software.⁶⁴

c. The Superior Court Did Not Enlarge the Definition of "Company Products".

Dematic contends that, by defining the term "Company Products" to include source code, the Superior Court impermissibly enlarged the scope of the term "Company Products". According to Dematic, "The parties knew how to refer to source code" and, since they did not do so in Disclosure 4.12(h), they manifested an intention to exclude source code from the definition of Company Products.⁶⁵ The fallacy of this Dematic contention is (once again) exposed by Dematic itself.

According to Dematic, the Company Products identified in Disclosure 4.12(h) "were unambiguously defined with reference to functionalities."⁶⁶ In his 30(b)(6)

⁶² *Post-Trial Mem. Op.* p. 54. *See also Tr. III (Gill)* 80 (B515).

⁶³ B26.

⁶⁴ *Ibid.*

⁶⁵ Dematic Brief at 24.

⁶⁶ Dematic Brief at 18.

deposition on behalf of the company, Dematic Senior Director Andrew Gill testified, “[T]he list of Company Products, with the exception of Device Space and their lights, was nothing tangible. It was functionality.”⁶⁷ Thus, Dematic proposes to delimit the character and scope of the listed Company Products on the basis of their functionality.

But defining Company Products to include “functionality” requires the same allegedly improper enlargement as defining Company Products to include “source code”. The parties knew how to refer to both terms; however, neither term appears in Disclosure 4.12(h). Unlike the term “source code”, the term “functionality” is not defined and does not appear in the Agreement at all. Dematic’s invocation of “functionality” to define what *was* and *was not* Company Products is explicit acknowledgement that the term “Company Products” is ambiguous and cannot be defined absent extrinsic evidence. Once this determination of ambiguity is made, the Superior Court is not *expanding* the definition, it is *deciding* the definition.

d. The Definition of “Source Code” in the Disclosure Schedule and in the Industry Aligns with the Superior Court’s Findings.

Source code is defined in the Disclosure Schedule as “software written in programming languages in a human readable form intelligible to trained programmers and capable of being translated into Object Code for operation on computer

⁶⁷ See 30(b)(6) Deposition of Dematic (Andrew Gill) 188:21-190:5 (B248-B249). See also Tr. III (Gill) 43:22-44:2 (B505-B506); 52:8-52:17 (B508).

equipment.”⁶⁸ This definition (found outside the operative language but incorporated into the Agreement) comports with the software industry’s understanding of the forms in which software exists; *to wit*, “Software is expressed in two variations of code: source code (the original written program) and object code (the compiled or end-user version).”⁶⁹ The relationship between source code and object code is analogous to the relationship between the phrases “Out of many, one” and “E pluribus unam.” Each phrase is a translation of the other and both are an expression of our national motto. Similarly, source code and object code are each a translation of the other and both are Company Product. Thus, according to both the definition in the Disclosure Schedule and the industry understanding, source code is not (as Dematic contends) a component of software; rather, it is a form, variation, expression, or translation of software.

e. Reddwerks Source Code Was Offered or Distributed to Customers.

Dematic asserts that Reddwerks source code was not Company Product because it was not “distributed or offered” to its customers as of the date of Closing. This is demonstrably false. First, as demonstrated above (i) software was Company Product within the meaning of Agreement §4.12(h); and (ii) source code is Company Product in source code form. Accordingly, by delivering Company Product software

⁶⁸ A324.

⁶⁹ A2822.

to clients, Reddwerks fully satisfied the “distributed or offered” requirement of §4.12(h) with respect to source code.⁷⁰ Second, Reddwerks “distributed or offered” to customers escrowed copies of as-delivered software in source code form – a fact known to Dematic and bargained for by it in the Agreement. Section 4.11(a)(xi) of the agreement required that Reddwerks identify “any agreement relating to the escrow of any software in source code of the Company.”⁷¹ In fulfillment of this obligation, Reddwerks identified 23 separate source code escrow agreements it had executed in favor of customers.⁷² Thus, there is no credible basis for Dematic’s claim that, as of the Closing Date, Reddwerks did not “distribute or offer” software in source code form or that Dematic did not know this fact.

3. Dematic’s Own Statements and Actions Support Finding the Definition of “Company Products” Includes “Source Code”.

The evidence establishing the fact that source code was Company Product is overwhelming, undisputed, and mostly provided by Dematic.⁷³

⁷⁰ *Post-Trial Mem. Op.* p. 53.

⁷¹ A141.

⁷² A294-A295. Dematic’s own software license agreement includes an offer to escrow as-delivered software in source code form. *See* A940.

⁷³ *But see* A2625 at 30:6-30:8, A2632 at 204:9-206:10; *Tr. III (Easson)* 107:13-107:16 (B521).

a. Dematic’s Answers to Interrogatories Are in Direct Conflict With Its Current Position.

Throughout discovery and at trial Dematic repeatedly affirmed that it had satisfied its §3.1(h)(i) obligation to integrate Reddwerks Company Products into Dematic products and services by integrating Reddwerks source code into Dematic software.⁷⁴ In response to an interrogatory directing that Dematic describe every instance in which it “integrated Company Product into Dematic’s products and services,” Dematic averred, “After the Merger Agreement was signed, substantial efforts were made to integrate Reddwerks functionality into Dematic iQ.”

Andrew Gill, Dematic’s Senior Director and Project Manager for Worldwide Integration and Engineering, testified at trial that:

- The integrated functionalities are a product of software and software is a function of source code.⁷⁵
- An engineer writes source code, that source code is compiled into software, and that software causes functionalities.⁷⁶
- Source code is inherent in all software functionalities and one cannot sell software functionalities without source code.⁷⁷

⁷⁴ See, e.g., B191-B200.

⁷⁵ Tr. III (Gill) 53:3-53:9 (B508).

⁷⁶ Tr. III (Gill) 53:16-53:23 (B508). See also Tr. III (Gill) 62:11-62:14 (B510).

⁷⁷ Tr. III (Gill) 54:6-54:9 (B508). See also Deposition of Ottoniel “Alex” Ramirez

- The Dematic Due Diligence Team recommended integration of Reddwerks source code into Dematic platforms so that Dematic could sell Reddwerks functionalities to its customers.⁷⁸
- Integration of Reddwerks software functionalities (e.g., Warehouse Execution System) into Dematic software platforms (e.g., DC Director) required the importation and integration of source code.⁷⁹
- Integration of WES into DCD involved copying “functions and objects” that were composed almost entirely of source code.⁸⁰
- The copied WES “functions and objects” were stitched to the DCD platform – in some instances at the source code level.⁸¹
- The goal of this integration process was to create Dematic products with functionalities equivalent to the Reddwerks products and this goal was achieved by integrating source code.⁸²

Vol. I at 56:23-57:11 (B325).

⁷⁸ *Tr. III (Gill)* 73:17-74:5 (B513). *See also* B6.

⁷⁹ *Tr. III (Gill)* 60:17-63:12 (B510).

⁸⁰ *Tr. III (Gill)* 69:8-69:23 (B512).

⁸¹ *Tr. III (Gill)* 71:23-72:3 (B512-B513).

⁸² *Tr. III (Gill)* 79:18-80:17 (B514-B515).

- Some of the functionalities that were delivered by Dematic pursuant to the Under Armour contract were “derived directly or indirectly from Reddwerks source code.”⁸³

Thus, Dematic acknowledges that the Company Products identified in Disclosure Schedule 4.12(h) are *inter alia* Reddwerks functionalities derived from Reddwerks source code; that Reddwerks source code is inherent in all Reddwerks functionalities and that Dematic could not sell or integrate any Reddwerks functionalities without Reddwerks source code; and that, when it integrated Reddwerks functionalities pursuant to the Under Armour contract, Dematic did so by integrating Reddwerks source code.⁸⁴ And Dematic reveals that, whenever it deems it necessary or convenient, it is willing to swear that source code is Company Product.⁸⁵

This evidence exposes the absurdity of Dematic’s attempt to distinguish between Reddwerks functionalities (which it admits are Company Products) and Reddwerks source code (which it denies is Company Product). They are the same thing: One cannot have functionalities without source code. Accordingly, source

⁸³ *Tr. III (Gill)* 89:8-89:13 (B517). *See also 30(b)(6) Deposition of Dematic (Andrew Gill)* at 212:19-216:3 (B254-B255).

⁸⁴ *See n. 78-82 supra.*

⁸⁵ B191-B199.

code is and always was a Company Product within the meaning of the Agreement and Fortis is entitled to the presumptions granted by the Superior Court.

b. Dematic Agreed to Deliver Company Products to Customers and Utilized Reddwerks Source Code to Satisfy Its Obligations.

Dematic integrated Reddwerks source code into Dematic software platforms in order to deliver Reddwerks functionalities contracted for by a Dematic customer during the Earn Out Period.⁸⁶ The Under Armour contract obligated Dematic to deliver a staggering number of software Company Products by name, including “WES” (defined as Dematic Reddwerks Warehouse Execution Software), “Waveless”, “Move Logic”, “Task Interleaving”, “Slotting”, “Sortation”, “Zone Routing”, “PTL”, “Mobile”, “Web”, “Voice”, “Picking”, “Putaway”, “Induction”, “Putting”, “VAS”, “Cycle Counting”, “Returns”, “Inventory Move”, “Print and Apply”, and “Quality Control”.⁸⁷ Andrew Gill testified that some of these deliverable functionalities were “derived directly or indirectly from Reddwerks source code.”⁸⁸ Notwithstanding the overwhelming number of Reddwerks Company Products identified by name in the Under Armour contract, Dematic

⁸⁶ Dematic entered a contract with Under Armour on December 21, 2016. *See* A931-A932; *See also* A123 §3.1(g): The Earn-Out Period concluded on December 31, 2016.

⁸⁷ A968-A1025. Compare A301.

⁸⁸ *Tr. III (Gill)* 89 (B517).

allocated \$0 in Order Intake credit arising from the contract.⁸⁹ When this failure to credit was discovered, Dematic argued – not that source code or functionality were not Company Product – but that Reddwerks source code and functionality had lost their Company Product nature when they were incorporated into the Dematic software platform.⁹⁰

c. The Parties Agreed at the Time of Merger to a Method for Apportioning Value of Company Products, Inclusive of Company Products Integrated into Dematic Products and Services.

Dematic asserts that the Agreement does not specify a method for apportioning the value of the sales of Company Products integrated within Dematic products and services and that this failure is dispositive.⁹¹ This is wrong. The Agreement did *in fact* supply a method for calculating Order Intake Amount attributable to the sale of *any* Company Products. Agreement §1.1(jjj) defines Order Intake Amount as follows:

(jjj) “Order Intake Amount” shall mean the aggregate dollar amount to be paid to the Company or Parent for all Company Products to be sold under binding written agreements between the Company or Parent and customers of the Business which are first entered into during the Earn-Out Period and which (i) provide commitments for the purchase of Company Products and (ii) are not cancelled during the Earn-Out Period.

⁸⁹ B112-B114; A1243 (*Native file - See Dematic flash drive*).

⁹⁰ *Post-Trial Mem. Op.* p. 24-25; *Tr. V (Carlson)* 179:6-179:12 (B678).

⁹¹ Dematic Brief at 30.

Simply stated, the Order Intake Amount attributable to Company Products sold by Dematic pursuant to contracts first entered into during the Earn Out Period was the amount to be paid by the customer for such Company Products. Pursuant to the terms of the Agreement, Dematic agreed to account in its own accounting system for its sales of “all Company Products”.⁹² Thus, the onus to account for such sales – whether of integrated source code or PTL hardware – was placed upon and accepted by Dematic.⁹³

This mandatory accounting for the sale of Company Products did not require guesswork. Reddwerks sold its software on an “a-la-carte” basis; that is, pricing each discrete Company Product individually. Indeed, at Dematic’s request, the Reddwerks sales staff produced software pricing worksheets to assist Dematic in negotiating its sale of Company Products to Under Armour.⁹⁴ Thus, Dematic did not fail to give Order Intake Credit associated with the Under Armour contract because it *could not*. It failed to give credit because it *would not*.

⁹² See A127 §3.1(k)(1).

⁹³ B48.

⁹⁴ B109 (*Native file – See included flash drive*).

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT IMPOSED CONDITIONAL EVIDENTIARY PRESUMPTIONS AS SANCTIONS FOR DEMATIC'S REPEATED AND INTENTIONAL VIOLATIONS OF DISCOVERY ORDERS

A. Question Presented

Whether the Superior Court's imposition of discovery sanctions in the form of conditional evidentiary presumptions was an abuse of its discretion.

B. Scope of Review

Discovery sanctions orders are reviewed for abuse of discretion. *In re Rinehardt*, 575 A.2d 1079, 1081-1082 (Del. 1990).⁹⁵

C. Merits of the Argument

The Superior Court's imposition of evidentiary presumptions as discovery sanctions was not an abuse of discretion. The sanctions were factually based, supported by the record, the result of an orderly and logical reasoning process, and appropriately tailored to remedy the prejudice caused by Dematic's discovery misconduct. Neither the Superior Court's process nor its tailored sanctions is clearly erroneous.⁹⁶ Accordingly, the imposition of such discovery sanctions should be upheld.⁹⁷

⁹⁵ See also *Genger v. TR Invs.*, 26 A.3d 180, 190 (Del. 2011).

⁹⁶ *Post-Trial Mem. Op.* p. 43-55.

⁹⁷ See *Lehman Capital v. Lofland*, 906 A.2d 121, 131 (Del. 2006).

1. The Discovery Sanctions are Factually Based, Supported by the Record, and the Result of an Orderly and Logical Reasoning Process.

Delaware courts have long held that trial courts have broad discretion when deciding to impose discovery sanctions.⁹⁸ Discovery sanctions are generally intended to fulfill one or more purposes; namely punishment, deterrence, or coercion.⁹⁹ The trial court is charged with the duty to tailor discovery sanctions to the specific violation and its prompt cure.¹⁰⁰ In determining whether a trial court has abused its discretion in imposing severe sanctions, Delaware courts have found it instructive to apply a factor analysis which calls for examining the extent of the offending party's personal responsibility, the prejudice to the aggrieved party, the history of dilatoriness, whether the offending party acted in bad faith, the effectiveness of sanctions other than dismissal, and the merits of the claims and defense.¹⁰¹

Fortis's breach of contract claim was based on two alternative theories that were known to the parties from the earliest stages of the litigation: first, that Dematic had failed to incentivize its sales force and to comply with its §3.1(h)(i) obligation to integrate Company Products into Dematic products and services; and second, that Dematic had integrated and sold Company Products but failed to give proper credit

⁹⁸ See *Genger v. TR Invs.*, 26 A.3d at 190.

⁹⁹ See *In re: Rinehardt*, 575 A.2d at 1082.

¹⁰⁰ See *Ibid.*

¹⁰¹ See *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 718 (Del. 2008).

when calculating Order Intake Amount or Earn-Out Period EBITDA.¹⁰² The discovery dispute that gave rise to the evidentiary presumptions at issue herein arose from Fortis’s years-long attempt to discover whether and how Dematic integrated Company Products source code into Dematic products and/or services.¹⁰³

The *Post-Trial Memorandum Opinion* provides a detailed narrative of Dematic’s stubborn refusal to make reasonable discovery.¹⁰⁴ It is a fact-based account of a frustrating and wasteful process. Between October 2019 and November 2020, the court issued three separate orders instructing Dematic to answer interrogatories and produce documents relevant to its integration of Company Products into Dematic products and services. Each successive order was necessitated by Dematic’s mulish refusal to fully comply with the prior orders.

In March 2021 – less than three months before trial – the intentionality and scope of Dematic’s astonishing disobedience was exposed. During the deposition of Dematic 30(b)(6) witness Andrew Gill, Fortis learned for the first time that Dematic had used project management software (“Confluence”) and task management software (“Jira”) to document and supervise its integration of Company Products source code into the Dematic iQ source code (“DiQ”). In addition, Mr. Gill revealed

¹⁰² *Post-Trial Mem. Op.* p. 21-22.

¹⁰³ *Id.* p. 22-23.

¹⁰⁴ *Id.* p. 21-29.

that Dematic had performed a line-by-line comparison of Company Products source code to the source code in the Under Armour version of DiQ. Mr. Gill testified that this analysis identified (i) exactly what Company Products source code had been integrated into the Under Armour DiQ source code and (ii) the precise percentage of Company Products source code in the Under Armour DiQ. Finally, Mr. Gill acknowledged that neither the Confluence documents, the Jira documents, the comparative analysis, nor the Under Armour DiQ source code had been produced in response to the court orders.

Based on these facts, the Superior Court found: (i) that the Confluence, Jira, and DiQ materials were directly responsive to Fortis’s discovery requests and to the court’s May 2020 order;¹⁰⁵ (ii) Dematic’s failure to produce these responsive materials was intentional;¹⁰⁶ (iii) Dematic had severely prejudiced Fortis by making it impossible for Fortis to satisfy its burden of proof;¹⁰⁷ and (iv) Dematic’s failure to produce these responsive materials was done in bad faith and as part of a greater scheme to delay trial and frustrate the development of Fortis’s case.¹⁰⁸

¹⁰⁵ See *Order Denying Defendant’s Application for Certification of Interlocutory Appeal and Motion to Stay* (“*Order Denying Certification*”) at 8 (B362).

¹⁰⁶ *Post-Trial Mem. Op.* p. 26-27; See also *Id.* p. 24-25.

¹⁰⁷ See *Order Denying Certification* at 8 (B362).

¹⁰⁸ *Id.* at B362, B365. The delays occasioned by Dematic’s failure to make discovery required the court to postpone trial from July 2020 to June 2021. *Post-Trial Mem. Op.* p. 25. In April 2021, the parties advised the court that ongoing discovery delays

As sanctions for Dematic’s repeated discovery failures, the court (i) awarded fees and expenses; and (ii) precluded Dematic from introducing any testimony or exhibits derived from the Confluence or Jira systems. In addition, the court issued evidentiary presumptions conditioned on whether Company Products source code was “Company Products” within the meaning of §4.12(h). If, following trial on the merits, the court determined that source code was Company Products, then the court would presume that (i) the Order Intake Amount achieved by Reddwerks Dematic and/or Dematic during the Earn-Out Period was greater than or equal to \$48 million; and (ii) the Earn-Out Period EBITDA for Reddwerks Dematic was greater than or equal to \$9.3 million. Alternatively, if the court determined that source code was not Company Products, then the court would not indulge any evidentiary presumptions.

2. The Sanctions Were Appropriately Tailored to the Prejudice Caused by Dematic’s Discovery Misconduct.

The sanctions imposed by the Superior Court were artfully tailored to remedy the specific prejudice caused to Fortis by Dematic’s discovery misconduct. The award of fees and the exclusion of testimony or exhibits derived from the Confluence or Jira systems are a modulated response to Dematic’s wrongdoing: Dematic is required to

had caused them to miss several pre-trial deadlines. Dematic moved to continue the June 2021 trial, but the court denied that motion. *Ibid.* Dematic subsequently moved (unsuccessfully) to continue or stay the case three more times. *See Order Denying Certification* at n. 35 (B365).

pay Fortis the costs incurred by it to enforce the orders and Dematic is prevented from obtaining strategic advantage from evidence it did not produce.

The third element of the sanction was a precisely calibrated conditional evidentiary presumption.¹⁰⁹ The court found *as a matter of fact* that Dematic’s misconduct had severely prejudiced Fortis by making it impossible for Fortis to satisfy its burden of proof regarding the Order Income credit due from the sale of any Company Products source code that had been integrated into Dematic products and services.¹¹⁰ However, by making the sanction conditional, the court acknowledged that prejudice to Fortis would only accrue if Company Products source code was ultimately deemed to be “Company Product” within the meaning of §4.12(h).¹¹¹ Only then would proceeds from a sale of integrated source code have been factored into Earn-Out Consideration and EBITDA Adjustment.¹¹² If the court ultimately

¹⁰⁹ Dematic argues that the sanction is an adverse inference and, therefore, “cannot amount to substantive proof or substitute for actual proof of a fact necessary to the benefitted party’s case.” Dematic Brief at 39 (citation omitted). The Superior Court explicitly rejected this mischaracterization of its order. *Post-Trial Mem. Op.* p. 61 n. 178. The sanction was an evidentiary presumption, not an adverse inference.

¹¹⁰ *See, e.g.*, the B351-B354. *See also* A112 §1.1(jjj).

¹¹¹ *See M & G Polymers USA, LLC v. Carestream Health, Inc.*, 2010 WL 1611042, at *56-60 (Del. Super. April 21, 2010).

¹¹² Dematic instructed that “If this Court reverses the judgment on the grounds in Argument I, it need not consider the alternative Arguments II and III...” Dematic Brief, n. 6. Presumably, if this Court has reached Argument II, it has done so because it concluded in Argument I that Company Product source code is “Company Product” within the meaning of §4.12(h). Fortis will, therefore, not burden the Court

concluded that Company Products source code was not Company Products, then Dematic would have committed no discovery abuse by failing to produce evidence of integrated source code and Fortis would not have been prejudiced by not having it.

Additionally, the sanction did not extend beyond the bounds of the perceived prejudice. The evidentiary presumption did not adjudicate any of Dematic's affirmative defenses.¹¹³ Thus, irrespective of the amount of Earn-Out Consideration or EBITDA Adjustment presumed to have accrued in favor of Fortis, Dematic could have escaped liability if it had successfully proven that the court lacked subject matter jurisdiction because the Merger Agreement required the parties to retain an independent accountant and engage in an alternative dispute resolution process.¹¹⁴

Similarly, the sanction did not extend beyond the bounds of Fortis's affirmative claim for damages. The evidentiary presumption was fashioned so that it had no impact on Dematic's set-off or on its counterclaim.

Thus, in response to Dematic's discovery misconduct, the Superior Court fashioned a sanction that deprived Dematic of any tactical or evidentiary benefit from the Confluence records, the Jira records, and the source code comparative analysis; remediated Fortis's inability to meet its burden of proof *but only if* the court ultimately

with a reiteration of the arguments made in response to Argument I.

¹¹³ *Post-Trial Mem. Op.* p. 38-43.

¹¹⁴ *Id.* p. 40-42.

found that the evidence in question should have been produced by Dematic in response to discovery regarding Company Product; and left Dematic's affirmative defenses untouched and its set-off and counterclaim unaffected.

This is master tailoring.

III. THE SUPERIOR COURT DID NOT ERR IN FINDING THAT DEMATIC HAD WAIVED OR WAS ESTOPPED TO ARGUE THAT ITS CALCULATIONS WERE “CONCLUSIVE AND BINDING”

A. Question Presented

Whether Dematic’s calculation of Order Intake Amount and Earn-Out Period EBITDA was “conclusive and binding” or subject to challenge by Fortis.

B. Scope of Review

Questions of contract interpretation are reviewed on a *de novo* basis. *Cox v. Commc’ns, Inc. v T-Mobile US, Inc.*, 273 A.3d at 760. Findings of fact are reviewed for clear error. *Levitt v. Bouvier*, 287 A.2d at 673.

C. Merits of the Argument

Dematic argues that Fortis cannot challenge Dematic’s calculations of Order Intake Amount and Earn-Out Period EBITDA because those calculations are “conclusive and binding” under the Agreement. Dematic is wrong. Pursuant to the terms of the Agreement, the existence of manifest error and the delivery of a notice objecting to the calculations prevented them from becoming “conclusive and binding.”

Dematic argues that the Court erred in permitting Fortis to challenge Dematic’s calculation of Order Intake Amount because the Agreement required the parties to retain an independent accountant and engage in alternative dispute resolution. Dematic is wrong. First, the Review Firm process did not apply because the dispute

between Fortis and Dematic was one of contract interpretation. Second, the Review Firm process imposed equal responsibility on both parties, and Dematic never performed any of its process-related responsibilities. Third, Dematic waived its argument regarding the Review Firm process by participating in the litigation and failing to raise the issue until shortly before trial.

Dematic argues that, by signing and submitting the Undisputed Amount Notice, Fortis waived its right to challenge Dematic’s calculation of and claim to the EBITDA Adjustment. Dematic is wrong. In consideration of Fortis’s agreement to execute the Undisputed Amount Notice, Dematic agreed to a reservation of rights in favor of Fortis.¹¹⁵

1. Dematic’s Calculations of Order Intake Amount and EBITDA are Not “Binding and Conclusive”.

Dematic contends that its calculations of Order Intake Amount and Earn-Out Period EBITDA are “conclusive and binding” pursuant to Agreement §3.1(h)(ii). That subsection provides in relevant part:

The Parent’s calculation of the Order Intake Amount and Earn-Out Period EBITDA shall be conclusive and binding on the parties absent manifest error unless the Seller Representative delivers a notice as specified below objecting to such calculation.

See A124, §3.1(h)(ii). Similarly, the Escrow Agreement provides that Fortis could submit a “reasonably detailed description and supporting documentation” outlining

¹¹⁵ A1274.

Fortis’s good faith basis for objecting to Dematic’s claim against the Escrow.¹¹⁶ Thus, the contract provides two circumstances in which the calculations do not become “binding and conclusive” – the presence of “manifest error” and the timely delivery of the specified notice.

a. The Existence of Manifest Error Prevented the Calculations from Becoming Conclusive and Binding.

The Superior Court found that “Dematic’s calculations were a product of ‘manifest error,’ namely Dematic’s erroneous interpretation of the Merger Agreement and the meaning of Company Products.”¹¹⁷ Dematic took the position that contracts for the sale of integrated product – whether at the source code level or at the “functionality” level – were not included in Order Intake Amount or Earn-Out Period EBITDA. As we now know, this was a fundamental error and resulted in Dematic failing to identify, quantify, and account for the sale of Company Products source code integrated into Dematic products and services.¹¹⁸ This manifest error is precisely the kind of calculation error that should be exempt from a contractual “binding and conclusive” presumption: A fundamental mistake of interpretation and application of the contract terms governing calculation that results in both opacity and a windfall to

¹¹⁶ A199 §1.4(b).

¹¹⁷ *Post-Trial Mem. Op.* p. 39. *See n.*

¹¹⁸ *See fn. 112 supra.*

the party who made the mistake. As a result of this manifest error, the calculation never became conclusive and binding.

b. Fortis’s Notice of Objection Prevented the Calculations from Becoming Conclusive and Binding.

Fortis objected to Dematic’s calculation of both the Order Intake Amount and the Earn-Out Period EBITDA in the form required by § 3.1(h)(ii).¹¹⁹ This objection letter – delivered within twenty Business Days of Fortis’s receipt of the Earn-Out Notice – stated:

We are in receipt of your letter dated March 9, 2017 (actually received by us on March 10, 2017) notifying us of various matters and enclosing the notice required to be delivered to us pursuant to Section 3.1(h)(ii) of the Merger Agreement (the “Earn-Out Notice”), a copy of which is attached hereto. By this letter, we are formally objecting to and disagreeing with the calculations and information in the Earn-Out Notice pursuant to Section 3.1(h)(ii) of the Merger Agreement on the basis that we have not yet been provided reasonable access to the books, records, working papers and other supporting information to verify the calculations of the Order Intake Amount and Earn-Out Period EBITDA and Parent’s compliance with its obligations under Section 3.1(h)(i) of the Merger Agreement. We hope to work with you over the next several weeks to obtain the information necessary for such verification.

See B122-B128. *See also* B129-B138. The Superior Court found that this written notice was timely and that it set forth in reasonable detail the good faith bases for Fortis’s disagreements with the calculations.¹²⁰ As the court noted, Dematic had not (and to this day has not) provided access to any “books, records, working papers and

¹¹⁹ A125, §3.1(h)(ii).

¹²⁰ *Post-Trial Mem. Op.* p. 39.

other supporting information” that would permit Fortis to verify the \$0 in Order Intake Amount claimed by Dematic.¹²¹ The court concluded that, in light of Dematic’s failure to be forthcoming, the notice explained Fortis’s objection “in as much detail as possible, given the information Dematic had and had not provided.”¹²² As a result of timely and proper notice, the calculation never became conclusive and binding.

c. The Parties’ Failure to Invoke the Review Process Did Not Cause the Calculation to Become Conclusive and Binding.

Dematic asserts that, notwithstanding the existence of manifest error and Fortis’s delivery of a timely notice of objection, the calculation nevertheless became conclusive and binding because Fortis did not retain an independent accounting firm to review the calculation. The foundation of Dematic’s argument is Agreement §3.1(h)(ii), which provides in relevant part:

If the parties are unable to agree upon the calculation they shall retain a nationally or regionally recognized independent accounting firm mutually agreeable to Parent and the Seller Representative (the “Review Firm”) to review the calculation.

A124, §3.1(h)(ii) (emphasis added). Although its logic is obscure, Dematic appears to contend that this provision is jurisdictional and prevents any party who did not

¹²¹ *Post-Trial Mem. Op.* p. 40.

¹²² *Ibid.*

engage a Review Firm from ever challenging in court the calculation of Order Intake Amount or Earn-Out Period EBITDA.

The Superior Court held that the Review Firm dispute resolution process only applied if the parties “are unable to agree upon the calculation.”¹²³ The court found that the dispute between Fortis and Dematic was not a dispute about the calculation but a dispute about contract interpretation.¹²⁴ “Because the dispute was not about a ‘calculation’ that an accounting firm would be equipped to resolve, the Merger Agreement did not require an independent accounting firm to resolve it.”¹²⁵

Nevertheless, Dematic argues that the Superior Court erroneously failed to find as a matter of fact that Fortis had contemporaneously admitted that it did have a calculation dispute.¹²⁶ In so doing, Dematic asks this Court to substitute its factual judgment for that of the trial court based on a single phrase in a single email. The trial court is the finder of fact and its conclusions will not be disturbed absent a finding of clear error.¹²⁷ Dematic’s citation of a single ambiguous phrase does not establish clear error.

¹²³ *Post-Trial Mem. Op.* p. 41.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Dematic Brief at 45.

¹²⁷ *See Genger v. TR Invs.*, 26 A.3d at 190 (citing *Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999)).

In addition, the Superior Court held that §3.1(h)(ii) charged both parties with responsibility to retain a Review Firm and that, to the extent the contract claim fell within that dispute resolution process, Dematic was “equally at fault for the parties’ failure to retain an accounting firm.”¹²⁸ On appeal, Dematic complains that “the court provided no legal basis to relieve Fortis of its contractual obligation to resolve disputes through an accountant merely because Dematic also failed to appoint one.”¹²⁹ Implicit in this argument is the assumption that Dematic can refuse to participate in the Review Firm process and thereby deprive Fortis of the right to mount a judicial challenge to Dematic’s calculation of Order Intake Amount or Earn-Out Period EBITDA. Thus, according to Dematic, the Review Firm provision not only trumps the “manifest error” and “notice of objection” exceptions stated in §3.1(h)(ii), it is also an unstated condition precedent to judicial review that Dematic can thwart simply by refusing to participate. There is nothing in the Agreement to support this “Heads I Win, Tails You Lose” logic.

Finally, the Superior Court held that Dematic waived its arguments regarding the Review Firm provision “by participating in this litigation at every turn until a few months before trial.”¹³⁰ On appeal, Dematic protests that the court misunderstood its

¹²⁸ *Post-Trial Mem. Op.* p. 41.

¹²⁹ Dematic Brief at 46.

¹³⁰ *Post-Trial Mem. Op.* p. 41-42.

argument, that it “is not asking that Fortis be compelled to resolve the dispute with an accountant rather than in court.”¹³¹ But this is precisely what the court found to be the import of Dematic’s ill-fated eleventh hour application to amend its counterclaim; *to wit*, “to include a claim that Fortis breached the Merger Agreement dispute resolution procedure and therefore must pay Dematic’s fees and expenses in defending this litigation.”¹³² According to Dematic, it has sustained breach of contract damages because Fortis sued it for claims that involve, directly or indirectly, its calculation of Order Intake Amount and Earn-Out Period EBITDA.¹³³ This necessarily implies the existence of a contract right for Dematic not to have to answer in court for any such claims. If the contract bestowed such a right on Dematic, then Dematic waived that right by participating fully in the litigation and failing to raise the issue until shortly before trial.¹³⁴

¹³¹ Dematic Brief at 46.

¹³² *Post-Trial Mem. Op.* p. 42.

¹³³ A2742-A2743.

¹³⁴ *Post-Trial Mem. Op.* p. 42. See *Specialty DX Holdings, LLC v. Laboratory Corp. of America Holdings*, 2020 WL 4581007, at *3 (Del. Super. July 27, 2020); *Russykevicz v. State Farm Mut. Ins. Co.*, 1994 WL 369519, at *4 (Del. Ch. June 29, 1994); *Cities Service Co. v. Gardinier, Inc.*, 344 A.2d 254, 259 (Del. Super. 1975).

2. Fortis Did Not Concede Liability When It Agreed to the Premature Release of the Escrow Funds to Dematic.

The Superior Court found that, in consideration of Fortis’s agreement to execute the Undisputed Amount Notice, Dematic agreed to a reservation of rights in favor of Fortis “to challenge the amount of the Contingent Consideration.”¹³⁵ Dematic rejects this finding as “clearly erroneous” and invites this Court to re-adjudicate the fact findings made by the trial court, including (necessarily) the credibility of witnesses.

Dematic claims that, by executing and delivering the “Undisputed Amount Notice” pursuant to §1.4 of the Escrow Agreement, Fortis conceded any claim it may have ever had to the escrow funds.¹³⁶ Dematic further claims that the rights reserved by Fortis were illusory and therefore incapable of being reserved.¹³⁷ Dematic is wrong.

The Escrow Agreement, incorporated into the Agreement as Exhibit B, governs the conditions precedent to the release of the escrow funds.¹³⁸ Section 1.4(b) of that Escrow Agreement states that, if Fortis objects to claims against the escrow account made by Dematic, then it must inform the Escrow Agent in writing using the

¹³⁵ *Post-Trial Mem. Op.* p. 17, 42.

¹³⁶ Dematic Brief at 42-43.

¹³⁷ Dematic Brief at 43-44.

¹³⁸ A198.

incorporated forms attached thereto.¹³⁹ It is undisputed that Fortis did so.¹⁴⁰ The Escrow Agreement is clear that neither party was entitled to receive the escrow funds until disputes regarding such funds had been resolved either by agreement or legal action.¹⁴¹ Once the parties had resolved their dispute (whether by agreement or as the result of a “Final Order” from “any court or agency of competent jurisdiction”), §1.4(d) requires the parties to submit the “Undisputed Amount Notice” to the Escrow Agent in order “to effect such resolution”.

Fully aware of its right to make an agreement to resolve disputes regarding the escrow funds, Fortis responded to Dematic’s demands for their release by offering a compromise: Fortis would agree to release the entire escrow to Dematic if Dematic would agree that the release of such funds (including execution of the Undisputed Amount Notice) was subject to Fortis’s reservation of right to challenge (i) Dematic’s calculation of Order Intake Amount or Earn-Out Period EBITDA; and (ii) Dematic’s right to receive and retain the EBITDA Adjustment.¹⁴² Dematic agreed to this offer and to the reservation of rights in favor of Fortis.¹⁴³

¹³⁹ *Ibid.*

¹⁴⁰ B129-B138.

¹⁴¹ A199-A200 §1.4(d).

¹⁴² A1274-A1279.

¹⁴³ *Post-Trial Mem. Op.* p. 17, 42.

Fortis delivered the executed Undisputed Amount Notice to Dematic based on the explicit understanding that the parties were permitting the Escrow Agent to release the escrow funds to Dematic while reserving the parties' rights to challenge *inter alia* the calculations of Order Intake Amount and Earn-Out Period EBITDA.¹⁴⁴ Although Dematic now claims that Fortis's reservation of rights was illusory, Dematic was also attempting to reserve rights at the same time as a part of the same agreement. In the email correspondence that evidences Fortis's reservation of rights, Dematic Deputy General Counsel Amy Gibbs said, "Dematic expressly reserves any and all rights on other issues, including the indemnification claims which are subject to Dematic's notice dated June 9, 2017."¹⁴⁵

Fortis and Dematic issued the Undisputed Amount Notice to the Escrow Agent using the form specified in the Escrow Agreement for the benefit and protection of the Escrow Agent. Dematic now claims that the language in this form somehow supersedes the agreement that induced Fortis to sign the form. Dematic is wrong.

The relevant language of the Undisputed Amount Notice states:

¹⁴⁴ A1274-A1279. *See also* *Tr. I (Fink)* 148:20-151:14 (B407); *Tr. IV (Attebury)* 28:17-29:6 (B568).

¹⁴⁵ A1274-A1279.

The undersigned, pursuant to Section 1.4(c) of the Escrow Agreement, dated as of December 11, 2015, by and among Dematic Corp., a Delaware corporation (the “Parent”), Fortis Advisors LLC, solely in its capacity as the Seller Representative (the “Seller Representative”), and Wells Fargo Bank, National Association, as escrow agent (“Escrow Agent”) (the “Escrow Agreement”) (terms defined in the Escrow Agreement have the same meanings when used herein), hereby jointly:

- (a) certify that the amount of \$3,000,000.00 (the “Claimed Amount”), which is the subject of a Claims Notice based solely on the Parent’s calculation of the Earn-Out Period EBITDA (the “Undisputed Amount”) is owed in full to Parent; and

See A1272. The statements in the Undisputed Amount Notice were true at the time it was signed, but there is nothing in the quoted provision that supports Dematic’s argument. It was undeniably true that the \$3 million escrow was “subject to a Claims Notice” and that this Claims Notice was “based solely on [Dematic’s] calculation of Earn-Out Period EBITDA”. However, there is nothing in this statement that constitutes an admission by Fortis that the Claims Notice calculation is accurate or that escrow funds were being paid pursuant to that Claims Notice. As the court found, there was an intervening agreement between Fortis and Dematic to pay the entire escrow fund to Dematic in exchange for a reservation of rights in favor of Fortis. In light of that agreement, it was undeniably true that the \$3 million escrow was “owed in full to Dematic” – albeit not pursuant to the Claims Notice.

Dematic’s tortured exegesis of multiple interlocking documents appears calculated to obscure the fact that the Superior Court’s finding regarding the existence of a reservation of rights agreement between the parties was a factual finding. Fortis CEO Rick Fink testified that Dematic had agreed to the reservation of rights in favor of Fortis, and the Superior Court cited this testimony with approval in support of its

finding.¹⁴⁶ Dematic offered no testimony regarding Fortis's claim of reservation of rights. Thus, the trial court was well within its rights to accept as true the unrebutted testimony of a credible witness. There is no clear error.

¹⁴⁶ *Post-Trial Mem. Op.* p. 17; *Tr. I (Fink)* 148:20-151:14 (B407). *See also Tr. IV (Attebury)* 28:17-29:6 (B568).

IV. THE SUPERIOR COURT DID NOT ERR IN REJECTING DEMATIC'S COUNTERCLAIM

A. Question Presented

Whether Dematic preserved its appellate point and, if so, whether the Superior Court erred in failing to find that Reddwerks had knowledge of the alleged defect.

B. Scope of Review

Questions of contract interpretation are reviewed on a *de novo* basis. *Cox v. Commc'ns, Inc. v T-Mobile US, Inc.*, 273 A.3d at 760. Findings of fact are reviewed for clear error. *Levitt v. Bouvier*, 287 A.2d at 673.

C. Merits of the Argument

The Superior Court held that Dematic had failed to prove that Reddwerks was aware of the alleged safety defect at the time the representations were made.¹⁴⁷ In its appeal Dematic argues for the first time that the alleged safety defects in the PTL System were so obvious that Reddwerks' failure to discover them proves as a matter of law that the officers listed in Disclosure 1.1(xx)(i) did not make the "reasonable inquiry" represented in Agreement §1.1(xx).¹⁴⁸ According to Dematic:

¹⁴⁷ *Post-Trial Mem. Op.* p. 66.

¹⁴⁸ Dematic Brief 47-48.

- (i) the remedy for this alleged failure to make “reasonable inquiry” is an evidentiary presumption; *to wit*, to impute actual knowledge of the alleged safety defects to Reddwerks;¹⁴⁹
- (ii) the consequence of this imputed actual knowledge is an established breach of Agreement §4.28; *to wit*, the representation by the officers listed in Disclosure 1.1(xx)(i) that, to their actual knowledge after reasonable inquiry, “there is no basis for any present or future action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand” against Reddwerks;¹⁵⁰ and
- (iii) the effect of this established breach of §4.28 is judgment for Dematic in the full amount of its retrofit costs.¹⁵¹

There are so many problems with this argument that it is hard to know where to begin. First, Dematic failed to preserve this argument in the court below. According to the Superior Court:

Dematic does not even try to establish any breach or inaccuracy of any representation or warranty, and therefore necessarily fails to prove its claim.

The only time Dematic even mentions any specific warranties or representations is when Dematic notes that its general counsel sent Fortis a letter on June 9, 2017 (“the June 9 Letter”) that “listed the

¹⁴⁹ Dematic Brief 48.

¹⁵⁰ *Ibid.*

¹⁵¹ Dematic Brief 48-49.

numerous representations and warranties breached as a result of Reddwerks’ selling this defectively designed product to Dematic.” This factual recitation offers little help to Dematic because Dematic’s post-trial briefing fails to explain how any of those representations and warranties were breached.

...

Dematic has not argued or established that the PTL Solution was not in conformity with any contract or that Reddwerks had any knowledge of liability relating the PTL Solution before executing the Merger Agreement or at the time of closing.

...

To re-cap, Dematic’s post-trial briefs did not expressly identify which representations and warranties were allegedly breached. To the extent Dematic alluded to particular representations and warranties in its factual recitations, Dematic failed to describe how any of them were breached. Accordingly, Dematic failed to carry its burden of proof with respect to its counterclaim.

See Post-Trial Mem. Op. p. 67, 70 (emphasis added). Supreme Court Rule 8 provides that “only questions fairly presented to the trial court may be presented for review.¹⁵² This issue was not fairly presented to the Superior Court and therefore is not appropriately presented for review by this Court.

Second, the Superior Court did not find that there were safety defects in the PTL System.¹⁵³ This issue was rendered moot “for the simple but fundamental reason that Dematic failed to establish how the discovery of defects in that system

¹⁵² Del. Sup. Ct. R. 8. *See also Protech Minerals, Inc. v. Dugout Team, LLC*, 284 A.3d 369, 377-378 (Del. 2022).

¹⁵³ *Post-Trial Mem. Op.* p. 65, 71. *See also Id.* p. 68.

after the merger breached any representation in the Merger Agreement.”¹⁵⁴ This is the bedrock of Dematic’s illogical house of cards and, without it, everything comes tumbling down.

Third, there is no evidence (and the Superior Court did not find) that the alleged safety defect was “obvious” or that the alleged safety defect could be discovered upon reasonable inquiry. What little evidence that is available contradicts Dematic’s assertions of obviousness and discoverability; *to wit*, Dematic negotiated for and received prior to Closing both (i) access to premises, facilities, books and records, and all other documents pertaining to Reddwerks and its business; and (ii) permission to visit and inspect any of Reddwerks properties.¹⁵⁵ Reddwerks Board Chairman Dyke Rogers testified that, pursuant to this grant of access, the Dematic Due Diligence Team looked at the PTL lights, examined the PTL test racks, reviewed the PTL schematics, visited PTL installations in several locations and ultimately declared that “our [Reddwerks] lights were so far superior to their lights, they’d be selling ours.”¹⁵⁶ If the alleged safety defects were as obvious as Dematic claims, then presumably the Dematic Due Diligence Team would have found them as a result of their investigative efforts – but they didn’t.

¹⁵⁴ *Post-Trial Mem. Op.* p. 64-65, 71.

¹⁵⁵ A160, §6.5.

¹⁵⁶ *See Tr. II (Rogers)* 66:1-69:1 (B443-B444).

Fourth, the Superior Court found that Dematic had failed to prove that, as of the date of closing, Reddwerks had “any material Liability or material obligation for replacement or repair” of the PTL System.¹⁵⁷ According to the court:

Nor has Dematic established that Reddwerks had “any material Liability or material obligation for replacement or repair” of the PTL Solution, as the alleged defect in the PTL Solution had never caused a fire and Reddwerks’ customers had never complained about the alleged defect at the time of closing, which was the effective date of the representation.

See Post-Trial Mem. Op. p. 68. Dematic merely assumes that any defect – even one which has never caused a product failure or client inconvenience – is a basis for and will result in a “future action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand” against Reddwerks. There is no evidence to support this assumption and without it the §4.28 representation is not false.

Fifth, the trial court did not find that the costs of the Dematic retrofit were reasonable and necessary to remediate the allegedly obvious safety defects. Dematic merely assumes that if there was a breach of the §4.28 warranty then, *ipse dixit*, Dematic is entitled to indemnification.¹⁵⁸ There is no evidence of a nexus between the specific defects that were allegedly discoverable upon reasonable inquiry and the

¹⁵⁷ *Post-Trial Mem. Op.* p. 65, 71.

¹⁵⁸ *See Post-Trial Mem. Op.* p. 66 (“Dematic instead argues that the PTL Solution was defective and concludes, *ipse dixit*, that Dematic is entitled to indemnification.”).

specific defects that were remediated in the Dematic retrofit. In the absence of this evidence, there is no causation of indemnification damages.

V. THE SUPERIOR COURT ERRED WHEN IT GRANTED A SET OFF TO INDEMNIFY DEMATIC FOR LOSSES INCURRED BY IT IN CONNECTION WITH THE SHAREHOLDER APPRAISAL SUIT

A. Question Presented

Did the trial court err when it awarded a set off to indemnify Dematic for the consideration and legal fees incurred by it in connection with the shareholder appraisal suit? This issue was preserved in Fortis's *Opening Brief in Support of its Case-in-Chief* at A2685.

B. Scope of Review

Questions of law and of contract interpretation are reviewed on a *de novo* basis. *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 40 (Del. 1991); *Cox v. Commc'ns, Inc. v T-Mobile US, Inc.*, 273 A.3d at 760. Findings of fact are reviewed for clear error. *Levitt v. Bouvier*, 287 A.2d at 673.

C. Merits of the Argument

The Superior Court committed clear error when it erroneously placed the burden on Fortis to prove that the legal fees and settlement consideration were unreasonable. There is no evidence of reasonableness sufficient to support the award of legal fees.

1. The Superior Court Misplaced the Burden of Proof

The Agreement stipulates that, in order to be subject to indemnification, any alleged "Loss" must be reasonable. *See* A163, §7.1(a) (emphasis added):

against any loss, claim, Action, Liability, fine, penalty, assessment, deficiency, damage or expense (including reasonable legal, accounting, and professional services expenses and costs incurred in the investigation, defense or settlement thereof or the enforcement of any rights hereunder) (each a “Loss” or collectively, “Losses”) that any Parent Indemnitee incurs, sustains, accrues or becomes subject to as a result of:

Dematic effected the offset against Earn Out Merger Consideration for legal fees and settlement consideration to indemnify itself for Losses related to legal fees and settlement consideration paid in connection with the *D’Angela* shareholder rights suit.¹⁵⁹ Had Dematic made the offset against the escrow funds, then Fortis would have been precluded from challenging the offset. *See* Escrow Agreement §1.4(b):

Seller Representative acknowledges and agrees that it has no right to and shall not dispute any Claim that is covered by Section 7.1(a)(iii) of the Purchase Agreement.

However, because Dematic offset the alleged Losses against Earn-Out Merger Consideration and not against escrow funds, it cannot claim the benefit of §1.4(b) preclusion.¹⁶⁰

In response to Fortis’s claim for breach of contract, Dematic filed a counterclaim for indemnity and an affirmative defense of set off – both of which were related to the *D’Angela* Losses.¹⁶¹ Following trial on the merits, the Superior

¹⁵⁹ *Tr. II (Rogers)* 196:5-196:9 (B476); *Tr. III (Easson)* 126:5-126:11 (B526), 215:15-217:10 (B548-B549).

¹⁶⁰ It is undisputed that the offset for Losses associated with the *D’Angela* appraisal rights case was made against Earn Out Consideration. *See* A1235-A1236, B151-B152.

¹⁶¹ *Post-Trial Mem. Op.* p. 63 n. 181.

Court held that, “Fortis has not proved by a preponderance of the evidence that the settlement amount was unreasonable.”¹⁶²

By placing the burden of proof on Fortis (to prove that the set off was “unreasonable”) instead of on Dematic (to prove that the set off was “reasonable”), the Superior Court committed clear error. *See, e.g., Zeisloft v. Mergenthaler*, 2015 WL 3609914 fn 20 (Del. Com. Pl. June 8, 2015) *citing Claringbold v. Newark Garage & Electric Co.*, 97 A. 386, 387 (Del. Super. 1915) (“In a case where a defendant invokes the defense of recoupment, otherwise known as set off, he carries the burden of proof to show his damages.”). *See also Johnson v. Eric’s Chop Shop, Inc.*, 2003 WL 21673959 *4 (Del. Super. July 14, 2003) (The defendant bears the burden to prove any set off to which he may be entitled); *Kent County Levy Court v. International Underwriters, Inc.*, 1985 WL 149635 *6 (Del. Ch. July 31, 1985) (The party claiming a set off has the burden of proving that it has sustained financial harm by reason of the plaintiff’s conduct); *RPPG Holdings, LLC v. Freedom Mortgage Corp.*, 2021 WL 3136045 (Del. Ch. July 26, 2021) (A defendant is under the same burden of proof as any litigant if it elects to pursue an affirmative claim).

¹⁶² *Post-Trial Mem. Op.* p. 63. *See also Id.* n. 181 (“Dematic’s claim for indemnification for the D’Angela Litigation is alternatively pleaded as an affirmative defense for setoff and as part of Dematic’s indemnification counterclaim. The Court cannot identify any reason to resolve the issue as a counterclaim as opposed to a setoff, and the parties have not argued otherwise.”).

2. There is No Evidence to Support the Award of Legal Fees

In order to recover a judgment for Losses associated with legal fees paid in connection with the *D'Angela* shareholder rights suit, Dematic had to prove that the amounts paid were reasonable.¹⁶³ Under Delaware law, any determination regarding the reasonableness of attorneys' fees is based on the factors set forth in Delaware Rule of Professional Conduct 1.5(a)(1). *See Mahani v. Edix Media Group, Inc.*, 935 A.2d 242, 247-48 (Del. 2007):

To assess the reasonableness of EDIX's award for attorneys' fees and other expenses, we consider the factors "identified in Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct and [relevant] case law." DLRPC Rule 1.5(a)(1) states that a court shall consider "the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly." DLRPC Rule 1.5(a)(4) states that a court shall consider "the amount involved and the results obtained." Finally, a court also should consider whether the number of hours devoted to litigation was "excessive, redundant, duplicative or otherwise unnecessary."

The only evidence offered by Dematic in support of the set off for legal fees was the billing statements¹⁶⁴ and a stipulation regarding the payment (but not reasonableness) of those fees.¹⁶⁵

- In argument to the court, counsel for Dematic alluded to an analysis of potential exposure and expense related to the *D'Angela* shareholder

¹⁶³ A163, §7.1(a).

¹⁶⁴ B63-B81, B89-B108, B110-B111, B115-B121, B141-B150.

¹⁶⁵ *See Tr. V (Pullara)* 17:22-18:4 (B638).

appraisal suit.¹⁶⁶ However, Dematic chose not to offer or produce that analysis.

- Dematic was represented in the *D'Angela* shareholder appraisal suit by Mr. John D. Hendershot of Richards Layton & Finger. However, Dematic chose not to call Mr. Hendershot to testify.

In short, Dematic offered no evidence whatsoever regarding (i) the time, labor, and skill *required* to perform the legal services properly;¹⁶⁷ (ii) the novelty and difficulty of the questions involved in the litigation; (iii) the amount in controversy and the result obtained; or (iv) whether the hours devoted to the litigation were excessive, redundant, duplicative, or otherwise unnecessary.

Fortis made clear that it was challenging the reasonableness of fees and consideration paid by Dematic in connection with the *D'Angela* shareholder appraisal suit. *See, e.g., Tr. V (Haviland and Pullara) 17:7-18:4 (B368):*

¹⁶⁶ *Tr. I (Haviland) 51:19-52:8 (B382-B383).*

¹⁶⁷ The billing statements offer vague descriptions of the work that was done, but do not speak to the issue of whether the case itself was novel and challenging or whether the work actually performed was reasonable, necessary, excessive, redundant, or duplicative. *See n. 164 supra.*

7 MR. HAVILAND: One is with respect to --
8 with respect to the so-called D'Angela appraisal
9 litigation, I brought up before the idea that there
10 could be a possible stipulation between the
11 parties, the amount and the reasonableness of the
12 settlement and the fees. It's become quite obvious
13 that the other side has not stipulated to the
14 reasonableness of the amount and the fees; however,
15 they did say that they would stipulate to the
16 amount. So if they can confirm that, then I won't
17 have to burden the Court with submitting evidence
18 of legal bills or other documentation of the
19 amount. So is that still a stipulation by the
20 other side?

21 THE COURT: Mr. Pullara.

22 MR. PULLARA: Your Honor, we have stipulated
23 and communicated I believe to Mr. Mangan directly

1 that we do not contest the amount of the D'Angela
2 settlement or the amount of the fees, and we gave
3 notice well in advance of trial that we contest the
4 reasonableness of those two amounts.

In light of these facts, Dematic's failure to offer evidence of reasonableness can only be explained as conscious, tactical and intentional. Accordingly, Dematic has had its day in court and has wholly failed to meet its burden of proof regarding the reasonableness of legal fees paid in connection with the *D'Angela* shareholder appraisal suit.

CONCLUSION

For the reasons stated, Fortis respectfully requests that this Court (i) sustain the Superior Court's judgment for Fortis and against Dematic in the principal amount of \$13,000,000 (together with pre-judgment interest, post-judgment interest, and costs of court); (ii) reverse the Superior Court's judgment for Dematic and against Fortis in the amount of \$1,512,808.10, and, with regard to such, (a) render a Take Nothing judgment regarding Dematic's claim against Fortis seeking indemnity for or set off of legal fees paid in defending the *D'Angela* shareholder appraisal case (*i.e.*, \$236,217.40)¹⁶⁸ and (b) remand to the Superior Court Dematic's claim against Fortis seeking indemnity for or set off of consideration paid to settle the *D'Angela* appraisal case (*i.e.*, \$1,276,590.72)¹⁶⁹; and (iii) sustain the Superior Court's Take Nothing judgment regarding Dematic's counterclaim against Fortis.

Dated: September 14, 2023

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¹⁶⁸ *Post-Trial Mem. Op.* p. 15.

¹⁶⁹ *Ibid.*