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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LIMELIGHT NETWORKS, INC., Plaintiff-Below/ Appellant, v. AKAMAI TECHNOLOGIES, INC., Defendant-Below/ Appellee.	No. 138,2017 Court Below: Court of Chancery of the State of Delaware C.A. No. 2017-0035-SG

REPLY IN SUPPORT OF APPELLANT'S OPENING BRIEF

OF COUNSEL:
Asim M. Bhansali
Matthias A. Kamber
Matan Shacham
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111-1809
(415) 391-5400

John W. Shaw (No. 3362)
Karen E. Keller (No. 4489)
David M. Fry (No. 5486)
SHAW KELLER LLP
I.M. Pei Building
1105 North Market Street, 12th Floor
Wilmington, DE 19801
(302) 298-0700
jshaw@shawkeller.com
kkeller@shawkeller.com
dfry@shawkeller.com

Attorneys for Limelight Networks, Inc.
Plaintiff-Below/Appellant

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PRELIMINARY STATEMENT

Akamai's argument rests entirely on accepting a single *fact* that is not pled anywhere in the Complaint: that Akamai and Limelight contracted for direct, personal notice of breach to Akamai's general counsel as a triggering condition to Limelight's right to terminate the Settlement Agreement after Akamai materially breached the Agreement. The Court of Chancery expressly premised its ruling on a finding that the parties intended such notice. Without such a finding, the reasoning behind its decision, and Akamai's arguments for defending the decision, fall apart. Akamai cannot at this stage deny: that it breached the Settlement Agreement entered into just a few months earlier by violating the Non-Use Provision, a critical deal term; that senior outside counsel—including counsel who expressly affirmed that Akamai would comply with the Non-Use provision—received direct notice of breach; and that responsible in-house counsel either did or should have received notice regarding the breach claim. But, of course, the Court of Chancery could not properly make a factual finding regarding the parties' contractual intent regarding notice or any other provision at the motion to dismiss stage.

The Court of Chancery's ruling can stand only if it applied the only reasonable interpretation of unambiguous contract language. It did not. Akamai cannot offer any consistent explanation for how the plain language of the notice

provision, read as a whole, requires direct notice to its general counsel. As Limelight detailed in its Opening Brief, standard rules of English grammar support precisely the opposite conclusion. And Akamai does not identify in its Answering Brief any rule of grammar or any authority to the contrary. Instead, Akamai starts from the *factual assumption* that the parties intended to require direct, personal notice to the general counsel. Language supporting that assumption appears nowhere in the notice provision of the Agreement, or anywhere else. Instead, Akamai tortures its reading out of a single "Attn" line in the address for physical notices to Akamai that the Settlement Agreement includes. Even as to physical notices, Akamai's reading of a direct, personal notice requirement incorporates a factual assumption that does not flow from the Agreement's plain language.

Akamai's argument then goes a step further. That is, Akamai bootstraps the presumptive requirement of direct, personal notice to its general counsel for *physical* notice to extend to *email* notice. There, Akamai's argument falls apart even more: Akamai cannot offer any interpretation of the notice provision that follows standard grammar rules and still gives meaning to all its terms, including the email notice provision, if the *physical* address term (including the "Attn: General Counsel" line) applies to *email* notice.

Furthermore, Akamai fails to address the reasons why Limelight's notice was effective under controlling Massachusetts law, even if, as Akamai contends,

Limelight somehow did not comply with the strict terms of the notice provision. Limelight sent the notice by email to the attorneys representing Akamai in the case where the breach occurred and where the requested cure would have to occur, as well as the lawyers who represented Akamai in negotiating the Settlement Agreement; they had the knowledge and ability to properly and timely respond on Akamai's behalf. Akamai's agents admittedly received, and then responded to, the notice. And Akamai does not deny that these agents could have, and indeed may have, forwarded Limelight's breach notice to the appropriate decision maker at Akamai. Akamai simply chose not to cure in the time allowed by the Settlement Agreement. Akamai's only argument now for why this notice was not effective is that Akamai did not understand from the notice that Limelight intended to terminate the contract. But neither the Settlement Agreement nor Massachusetts law requires that a notice of breach explicitly state an "intent to terminate." In any event, the way in which Akamai understood the notice is a factual question that cannot be resolved on a motion to dismiss.

Akamai tacitly acknowledges the weakness in its lack-of-notice argument by positing an alternative argument that the ruling should be affirmed on the separate issue of materiality, which the Court of Chancery did not reach. But Limelight's Complaint more than adequately pleads a material breach, and materiality is generally a factual issue.

Akamai also repeatedly quotes an order from the judge in the Virginia patent litigation questioning Limelight's motives for bringing this lawsuit. That order has nothing to do with this appeal; Akamai uses it here merely to try to confuse and prejudice this Court. More importantly, Akamai fails to inform this Court that the Virginia court, after receiving submissions from both parties, informed them "that counsel in the Delaware litigation have sufficiently complied with the Order to explain the reasons for filing that case," and directed "the parties to no longer keep the Court informed of correspondence on the matter moving forward."

For the reasons set forth below and in Limelight's Opening Brief, the Court should reverse the Court of Chancery's judgment granting Akamai's motion to dismiss.

ARGUMENT

I. THE COURT OF CHANCERY ERRED WHEN IT INTERPRETED THE SETTLEMENT AGREEMENT'S NOTICE PROVISION AS SATISFIED ONLY BY NOTICE TO AKAMAI'S GENERAL COUNSEL.

For ease of reference, the notice provision in dispute is reproduced below:

> 10.1 Notice: Any notice to be given by one party to another under this Agreement shall be given by electronic mail, or by overnight courier service, such as Federal Express, directed to the following at the address indicated or such other address as may be subsequently provided in accordance with this Section 10.1.
>
> With respect to Akamai:
>
> Akamai Technologies, Inc.
> 150 Broadway
> Cambridge, Massachusetts 02142
> Attn: General Counsel
>
> With respect to Limelight:
>
> Limelight Networks, Inc.
> 222 South Mill Avenue, Suite 800
> Tempe, Arizona 85281
> Attn: Chief Legal Officer and Chief Executive Officer

A030 (SA § 10.1).

A. Akamai Provides No Textual Support For The Court Of Chancery's Link Between The Email Notice Term And The "Directed To" Phrase.

The section in Akamai's brief that purports to address how the Agreement "unambiguously requires notice to Akamai's General Counsel" offers no textual

justification for the key conclusion that underlies the Court of Chancery's entire decision. That is, the Court of Chancery read the words that begin with "directed to" and end with the line "Attn: General Counsel" (for Akamai) as modifying the earlier term in the notice provision that allow notice "given by electronic mail." Akamai just points to the "directed to" phrase and says it supports requiring notice directly to Akamai's general counsel. Akamai's argument thus assumes that the "directed to" phrase modifies the email notice term—*which is precisely the issue in dispute*.

Instead of addressing this disputed issue, Akamai's purported exposition of the notice provision's "unambiguous" language just repeats: (i) an inaccurate general statement of law ("Massachusetts law thus requires strict adherence to notice provisions . . . ."); (ii) the Court of Chancery's *factual* conclusion about the parties' "purpose," for which Court of Chancery did not offer any textual support; and (iii) the Court of Chancery's reliance on "'logic,' 'common sense,' and 'English.'" AB 17-19.[1]

None of these reasons provides an affirmative justification for Akamai's interpretation. ***First***, the principle of strict adherence to notice provisions that Akamai posits begs the question of whether a requirement to directly notify the

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[1] Limelight's Opening Brief and Akamai's Answering Brief are cited herein as "OB" and "AB," respectively.

general counsel exists in the first place for email notice. If the Agreement did not require sending email notice directly to Akamai's general counsel, then a strict-adherence principle would not aid Akamai, even if Massachusetts law operated as Akamai posits. OB 31-35.

Second, as to the Court of Chancery's conclusion about the parties' purpose in the notice provision, Akamai simply repeats the Court of Chancery's conclusion that directly notifying Akamai's general counsel "is *clearly* a negotiated term which has a purpose" and "the purpose *has to be* that the general counsel of the client is directly made aware that its behavior is alleged . . . to be a material breach so that it can cure . . . rather than suffer the forfeiture." AB 19 (quoting A297) (emphasis added). Absent support in the text or pleadings, the Court of Chancery's conclusion can only arise from a finding regarding the parties' intent.

But any reliance on a finding about the parties' intent is reversible error, because "[t]he intent of the parties in negotiating [an agreement] is a factual question that is inappropriate for resolution on a Rule 12(b)(6) motion to dismiss." *Nicholas v. Nat'l Union Fire Ins. Co.*, 83 A.3d 731, 732 (Del. 2013); *accord Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995). *Nicholas* controls what standard the Court of Chancery had to apply on a Rule 12(b)(6) motion, rather than the Massachusetts cases that Akamai cites, which did not involve a motion to dismiss in any event. *Ebenisterie Beaubois LTEE v.*

Deiulis Bros. Constr. Co., 2014 WL 5314825, at *1 (Mass. App. Ct. Oct. 20, 2014); *Cadle Co. v. Vargas*, 771 N.E. 2d 179, 182 (Mass. App. Ct. 2002).

Third, the conclusory statements about "logic," "common sense," and "English" also do not provide the missing textual link between the "directed to" clause and the email notice clause.

In sum, Akamai offers no affirmative textual support for its position. Instead, it relies on a conclusion about strict adherence to notice that begs the question in dispute (and that is incorrect under Massachusetts law regardless), an improper finding regarding the parties' intent, and conclusory statements.

B. Akamai Responds To Limelight's Textual Arguments By Improperly Relying On The Parties' Purported Intent And Making Spurious Waiver Claims.

The Court of Chancery did offer a purported textual reasoning for its decision based on the placement of commas in the notice provision. A267-69, A294. Limelight presented the errors in the Court of Chancery's textual reasoning in its Opening Brief. OB 19-28. Akamai fails to offer any legal or linguistic authority to support the Court of Chancery's reasoning. Instead, Akamai resorts to a spurious waiver argument and then reverts to improper and inaccurate speculation about the parties' purported intent. Akamai's arguments lack merit.

First, Limelight waived no argument here. The Court of Chancery could have, and did, consider the comma placement issue, and cited its conclusion on

that issue as a basis for its ruling. A267-69, 294. Limelight argued in its brief below for the very same reading of the notice provision that it urges here, based on the plain language of the provision. A231-32. Limelight's opposition brief was not framed as explicitly rebutting an argument that the placement of the two commas requires adoption of Akamai's reading, because Akamai never made that argument. The Court of Chancery itself first raised the comma-placement issue at the hearing. Limelight then explicitly addressed the Court of Chancery's question, and the Court of Chancery acknowledged considering Limelight's position. A267-69 (colloquy); A294. Limelight's position on the comma-placement issue was fairly before the Court of Chancery. *See* Del. Supr. Ct. R. 8; *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 382-83 (Del. 2014); *Klauder v. Echo RT Holdings LLC*, 2016 WL 7189917, at *2 n.2 (Del. Dec. 12, 2016); *Lawson v. Preston L. McIlvaine Constr. Co.*, 1988 WL 141168, at *2 (Del. Dec. 7, 1988).

Akamai similarly argues that Limelight's argument is waived because Limelight did not cite the *Chicago Manual of Style* to the Court of Chancery. AB 20. But providing additional authority for an argument raised below does not give rise to waiver. *Robino-Bay Court Plaza, LLC v. West Willow-Bay Court LLC*, 2009 Del. LEXIS 655, at *4-5 & n.6 (Del. Aug. 10, 2009). Moreover, Limelight had no reason or way to cite the *Chicago Manual of Style* in its brief below,

because, again, *Akamai did not make the comma-placement argument*, and the Court of Chancery raised the argument for the first time at the hearing.

Second, Akamai makes one quasi-textual argument based on paragraph breaks, rather than anything in the text itself. Even that argument, however, boils down to speculation about the parties' intent: "Had the parties ***intended*** that the address paragraphs refer back only to 'overnight courier service,' they could have given 'overnight courier service' its own paragraph . . . ." AB 21 (emphasis added); *see also* AB 23 ("That the parties specified that notice must be to Akamai's General Counsel . . . . clearly evinces their ***intent*** that each company's high-ranking lawyer . . . must be directly notified." (emphasis added)). This argument—for which Akamai cites no authority—improperly relies on Akamai's view of what the parties did (or did not) intend when they executed the Agreement.

Ultimately, the notion that comma placement context can be understood to connote only one intended meaning, and thus can justify dismissal at the pleading stage, is incorrect. *See* THE CHICAGO MANUAL OF STYLE R. 6.16, at 311 (16th ed. 2010). But to the extent a firm rule applies, Limelight has supported its argument with clear linguistic authority regarding standard grammar rules. Under those rules, the most plausible reading of the second comma before "such as Federal Express" is that it sets off the appositive providing "such as Federal express" as an example of "overnight courier service." The first comma, before "or," clarifies

that everything after the email service term is a separate portion of the sentence, *i.e.*, that the "directed to" phrase *only* modifies the second clause regarding overnight-courier, *i.e.*, hard-copy service. *Id.* R. 6.23, at 314-15 (commas should be used to set off appositives); *id.* R. 6.18, at 312 (a comma may be used to set off two elements in a series where "the elements are long and delimiters would be helpful"). Akamai never addresses this authority.

Third, Akamai restates the conclusory assertion that Limelight's interpretation would lead to "absurd" results, because email and physical notice would be treated differently. AB 21-22. But Akamai's claim of absurdity does not square with Massachusetts law, which holds that differences in how electronic and physical mail are handled mean that contractual requirements for handling physical notice need not always apply for email notice. *Grimm v. Venezia*, for example, explains that one purpose of notice provisions is to establish a "paper trail to show that notice was given." 2011 WL 7982163, at *2 (Mass. Super. Ct. July 13, 2011); OB 24-25.[2]

In reality, Akamai's view, not Limelight's, leads to facially absurd results. Under Akamai's view, any notice to Limelight under the Agreement would require

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[2] Akamai incorrectly claims that this argument was waived as well. Limelight cited *Grimm* in its papers and made the exact same argument at the hearing, and the Vice Chancellor indicated he had considered and rejected it on the merits. A234, A266-67.

a separate physical notice to both Limelight's Chief Legal Officer *and* its Chief Executive Officer, because Akamai reads the notice provision to require personal notice to each individual named in the "Attn" line. An interpretation that requires Akamai to send two separate notices to the same company at the same address is likely not what the parties intended. And a closer examination reveals that Akamai's position is yet more absurd. That is, given Akamai's view that "strict adherence" to direct, personal notice is required, Limelight's Chief Legal Officer could receive a notice of breach but intentionally disregard it, without consequence, so long as he can confirm that the Chief Executive Officer did not also receive notice. Or, if either the Chief Executive Officer or Chief Legal Officer position were vacant, Akamai simply could not effect notice under the Agreement because it could not adhere strictly to the contractual requirements that, in Akamai's view, require physical notice to both the Chief Legal Officer *and* the Chief Executive Officer. These absurd results follow ineluctably from Akamai's reasoning that the provision of an *address* creates a requirement of direct notice to a particular *person*.

Finally, Akamai takes issue with Limelight's argument that the Court of Chancery's reliance on the notice provision's supposed purpose—providing direct notice to Akamai's General Counsel, rather than notice to Akamai as a party, as the contract provides—constituted an improper factual finding regarding intent.

AB 23-24. But Akamai's response is merely a conclusory assertion that the Court of Chancery's finding was "a legal interpretation of the contract's unambiguous language." *Id.* Akamai does not identify any textual basis for the Court's finding that the notice provision was "clearly a negotiated term" for which "the purpose ha[d] to be" direct notice to the general counsel. A297.

C. Akamai Does Not Show That Its Interpretation Is Consistent With The Language Of The Notice Provision As A Whole.

Massachusetts law bars interpreting a contract provision in such a way as to render another provision a nullity. *E.g.*, *J.A. Sullivan Corp. v. Massachusetts*, 494 N.E.2d 374, 378 (Mass. 1986). Akamai now admits that, under the reading of the contract it persuaded the Court of Chancery to adopt, *there was no way Limelight could have provided email notice at the time it gave notice of breach to Akamai*. Indeed, Akamai's reading would not permit email notice *even if Limelight found the address for Akamai's General Counsel and emailed her directly*, because only a physical notice directly to the General Counsel would be permitted. AB 25-26.

Akamai tries to escape this problem by arguing that although the notice provision as drafted only allowed for a physical address, an email notice address could have been provided later. But under Akamai's own reading of the notice provision—*i.e.*, assuming that the comma before "directed to" would exist even if the appositive "such as Federal Express" were not there—email notice has to be

available at all times, not just if an email address is provided later. Why? If one assumes that the comma before "directed to" would be placed there regardless of the appositive, the notice provision would read as follows without an appositive:

> Any notice to be given by one party to another under this Agreement shall be given by electronic mail, or by overnight courier service [ ], directed to the following at the address indicated or such other address as may be subsequently provided in accordance with this Section 10.1.

Offsetting "or by overnight courier" by commas means that the clause has to read coherently even if it is removed, just as the clause must read coherently when an appositive is removed. *See* THE CHICAGO MANUAL OF STYLE R. 6.17, at 311-12. But read without the "or by overnight courier" phrase, the notice provision recites the impossible scenario of sending email notice to a physical address.

> Any notice to be given by one party to another under this Agreement shall be given by electronic mail directed to the following at the address indicated or such other address as may be subsequently provided in accordance with this Section 10.1.

Indeed, the only interpretation that fits with the structure of the entire clause is one that treats everything after the comma preceding "or" as a single clause, with "such as Federal Express" being an appositive, so that the "directed to" phrase only applies to "overnight courier" notice. All other interpretations lead to an absurd requirement of sending email notice to a physical address.

Furthermore, even if Akamai's explanation for the absence of an email address were plausible, plausibility would not justify choosing Akamai's interpretation over an at-least-equally plausible one *at the motion to dismiss stage*. And Limelight's reading is easily as plausible as Akamai's. Again, Limelight contends that the parties intended the physical address only to apply to notice via overnight courier notice and intended for email notice simply to be effective notice from "***one party to another***." A030 (SA § 10.1).

Akamai's retort—that Limelight posits an interpretation under which Limelight could send an email to any attorney representing Akamai on anything—is a straw man. "Effective notice" is a concept that Massachusetts law recognizes. *See* section II, *infra*; OB 31-35. Limelight contends only that email notice has to be effective notice, not that it could have sent notice to any attorney representing Akamai. An effective notice term would be particularly appropriate in a situation like this one, where the parties (including their counsel) are well known to each other and thus know how to reach each other to give notice.

D. The Court of Chancery Did Not And Could Not Have Found That Akamai Offered The Notice Provision's *Only* Reasonable Interpretation.

On a motion to dismiss, a trial court cannot choose between two differing reasonable interpretations of a contract provision, but rather may grant a motion to dismiss only if the defendant's interpretation is the *only* reasonable construction as

a matter of law. *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003); *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996). Furthermore, at this stage, the trial court must draw all inferences in favor of the plaintiff. *VLIW Tech.*, 840 A.2d at 611; *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952).

The Court of Chancery did not cite this legal standard anywhere in its ruling. It also did not make the necessary finding that, even when it made all inferences in favor of Limelight, Akamai met its burden of showing that its interpretation is the only reasonable interpretation possible. Akamai argues that the Court of Chancery made this finding implicitly when it concluded that Limelight's interpretation did not accord with its "understanding of English" or "common sense." AB 24. But the legally undefined notions of "common sense" or "English" are not the same as the finding required under Delaware law that no reasonable person would have interpreted the Agreement differently from Akamai. Even if Akamai ultimately could prove its interpretation, it did not establish that its interpretation was the *only* reasonable one. At the pleadings stage, that shortcoming should have ended the inquiry in Limelight's favor.

II. THE COURT OF CHANCERY ERRED BECAUSE LIMELIGHT PROVIDED EFFECTIVE NOTICE OF BREACH TO AKAMAI, WHICH IS ALL THAT MASSACHUSETTS LAW REQUIRES.

A. Akamai's Attorneys Received The Notice Of Breach And Should Have Sent It To The Appropriate Decision Maker.

Akamai either concedes or fails to dispute each of the following:

- Limelight explicitly alleged sending "Akamai a written notice of breach on November 11, 2016" that "specifically requested" a cure of the breach. A071 (Compl. ¶ 26).
- Limelight gave express notice of breach that read, in relevant part: "Akamai's reliance in Mr. Meyer's Reply Report on the parties' settlement agreement from the prior litigation is ***a breach*** of the express terms of that settlement agreement." A058 (emphasis added) (judicially noticed without objection). Limelight further asked Akamai to "confirm today that Akamai withdraws Mr. Meyer's references to the settlement of the parties' prior litigation and its terms in his Reply Report and in his deposition." A057-A058 (judicially noticed).
- Limelight sent its breach notice to 26 outside lawyers representing Akamai, many of whom were partners, from several different law firms, including the lawyers who represented Akamai in negotiating the Settlement Agreement, the lawyers who represented Akamai in the

litigation where the breach occurred, and the lawyers who, after this lawsuit was filed, belatedly attempted to cure Akamai's breach. A057-A058.

- Akamai's outside counsel not only received the notice but responded to it. A281-82.
- Under Massachusetts law, Akamai itself is charged with the knowledge of its outside counsel—*i.e.*, knowledge of the written notice and its contents. *E.g.*, *Levin v. Berley*, 728 F.2d 551, 553 (1st Cir. 1984); AB 41.
- Akamai's outside counsel could have forwarded the notice email to his client, and, in fact, admits he would have done so if he had understood it as an "actual" notice. AB 40. Akamai cannot point to any part of the breach notice contemplated by the Settlement Agreement that was absent in Limelight's notice.

Thus, Limelight's notice to Akamai constituted effective notice. For the reasons detailed in Limelight's Opening Brief, Massachusetts law provides that effective notice is sufficient for triggering a contract termination option following breach and failure to cure. OB 31-35.

B. Neither The Settlement Agreement Nor Massachusetts Law Requires A Breach Notice To Express Intent To Terminate.

Akamai nonetheless argues that Limelight's breach notice was ineffective as a matter of law because that notice purportedly failed to put Akamai on notice that Limelight "intended to terminate." AB 29-31, 35. This argument fails because *nothing* in the notice provision or in any other part of the Settlement Agreement requires that a notice of breach state an "intent to terminate." The Settlement Agreement's termination provision requires only "written notice" of breach and explicitly allows for termination if "such breach is not cured within 60 days after receipt of [the] written notice." A029 (SA § 9.3).

Akamai tries to read such a requirement into Massachusetts law from two federal-court decisions, *Jasty v. Wright Medical Technology, Inc.*, 528 F.3d 28 (1st Cir. 2008), and *Seaboard Surety Co. v. Town of Greenfield*, 370 F.3d 215 (1st Cir. 2004). As explained in Limelight's Opening Brief and Opposition in the Court of Chancery, neither case stands for the novel proposition that a party must in all instances provide notice of an "intent to terminate." OB 33-34; A236-37; *see also* A288-89. (Notably, the Court of Chancery did not expressly adopt Akamai's view regarding either *Jasty* or *Seaboard*.)

C. Akamai Offers No Basis For the Court Of Chancery's Improper Factual Finding That Limelight Provided Breach Notice In The Deposition Context And That The Notice Thus Was Ineffective.

The Court of Chancery rejected Limelight's effective notice argument based on a finding that Limelight's notice was just "negotiation over the use of deposition testimony and an expert report" and thus could not have been the form of notice "which puts the general counsel of the company on notice that . . . the equivalent of a forfeiture is liable to occur." A297. Thus, the Court of Chancery's decision was based on a factual determination about the effect of Limelight's notice on Akamai. Making a factual finding of that kind at the motion to dismiss stage was reversible error. *See Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 538 (Del. 2011).

Akamai tries to argue that *Central Mortgage* is distinguishable based on an incorrect claim that the contents of the alleged notice were not in the record there, such that the court had to accept the notice-related allegations in *Central Mortgage* as true. In reality, the disputed issue in *Central Mortgage*, as in this case, was not the content of the alleged notice, but rather the effect the notice had on the breaching party. This Court ruled that it was improper even to reach any dispute about the effect of a non-breaching party's notice in a case decided at the pleading stage, because the complaint in that case—just like the Complaint here—adequately pled notice and an opportunity to cure. *Id.* at 538. Akamai also argues

that *Central Mortgage* does not govern because it applied New York contract interpretation law. AB 38 n.15. But this Court's holding in *Central Mortgage* has nothing to do with interpretation of the specific contract at issue there under New York law; rather, its holding provides the proper scope of the Court of Chancery's determinations under Delaware Court of Chancery Rule 12(b)(6).

Akamai also argues that the Court of Chancery's finding was not a factual determination because it was based only on "the plain reading of Limelight's counsel's email." AB 38-39. But the Court of Chancery was not merely determining what the email said; rather, it was determining how that language was understood by Akamai—*i.e.*, that the recipient could not have understood it as conveying an intent to terminate. A297. That is a factual determination, and, thus, it was improper.

III. LIMELIGHT MORE THAN ADEQUATELY PLED MATERIALITY.

Akamai argues that, even if the Court of Chancery erred on the notice issue, this Court should affirm because Limelight did not adequately plead materiality. The Court of Chancery did not reach this issue (A297), so this Court need not and should not address it. However, if the Court is inclined to address the issue, it should reject Akamai's arguments for two independent reasons.

First, Limelight's Complaint more than adequately pleads that Akamai's breaches were material. The Complaint alleges that these breaches were material because an essential part of the bargain for Limelight in the Settlement Agreement was preventing the Settlement Agreement from being used in any way in the Virginia Litigation or any other litigation between the parties. A067 (Compl. ¶¶ 13-15). The Complaint further alleges that "Akamai's use and reliance on the Settlement Agreement in the Virginia Patent Litigation undercut the very purpose for which the parties had included the Non-Use Provision in the Settlement Agreement." A071-72 (Compl. ¶ 30). Finally, the Complaint alleges that Akamai's breach caused harm to Limelight; that Akamai's future threatened breaches would cause further substantial harm to Limelight; and that this harm cannot be quantified, which is precisely why the parties agreed to bar such conduct. A073 (Compl. ¶ 33). Indeed, Akamai admits in its Answering Brief that the Complaint repeatedly pleads that Akamai's breach was material. AB 45.

These allegations alone are sufficient to foreclose dismissal—especially when all inferences are drawn in favor of Limelight, as they must be.

Second, even if this were a close question based on the allegations (which it is not), materiality is generally a question of fact and therefore not appropriate for resolution on a motion to dismiss. *See, e.g.*, *Lease-It, Inc. v. Mass. Port Auth.*, 600 N.E. 2d 599, 602 (Mass. App. Ct. 1992). The three cases that Akamai relies on—*—EventMonitor, Inc. v. Leness*, 44 N.E. 3d 848 (Mass. 2016); *DiBella v. Fiumara*, 828 N.E. 2d 534 (Mass App. Ct. 2005); and *Zurich Am. Ins. CO. v. Watts Regulator Co.*, 2013 WL 2367855 (D. Mass. Mar. 21, 2013)—say nothing to the contrary. Indeed, *none* of these cases was decided on a motion to dismiss: *EventMonitor* and *DiBella* were decided after bench trials, and *Zurich* was a summary judgment decision. Moreover, the court in *EventMonitor* explicitly recognized that "[w]hether a party has committed a material breach ordinarily is a question of fact." 44 N.E. 3d at 853.[3]

Akamai nonetheless argues that its breaches were "harmless" because it only used the Settlement Agreement in front of the judge in the Virginia Litigation and

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[3] Akamai also cites out of context a statement from Limelight's motion to expedite that materiality may be decided as a matter of law. AB 48. But the fact that materiality might be decided as a matter of law in some circumstances, such as on summary judgment where there is no dispute of material fact, does not mean that materiality is proper for adjudication on a motion to dismiss, before any discovery has been taken. Limelight never argued anything to the contrary.

the Virginia court subsequently ruled that the Settlement Agreement could not be used at trial. AB 46-47. Neither of these assertions was in the Complaint or in any material of which the Court of Chancery took judicial notice, so they cannot properly be the basis for dismissal. In any event, the fact that the breach occurred only in the pretrial context rather than in front of a jury is irrelevant to materiality. The Non-Use Provision is not limited to use or reliance at trial. Instead, it provides that the Settlement Agreement "shall not be used for any reason or otherwise relied upon *in any fashion in any Proceeding* involving the Parties." A029 (SA § 7.2) (emphasis added). Similarly, the fact that court action was required to mitigate the harm Akamai's breach caused establishes the breach's materiality rather than its immateriality.[4]

[4] Akamai's assertion that before the Court of Chancery "Limelight did not dispute that it suffered no harm" (AB 48) is simply not true. Limelight made precisely the arguments it makes here in its papers below. A241-43.

CONCLUSION

The Court of Chancery erred in granting Akamai's motion to dismiss, and Limelight therefore respectfully requests that this Court reverse that ruling.

/s/ David M. Fry

John W. Shaw (No. 3362)
Karen E. Keller (No. 4489)
David M. Fry (No. 5486)
SHAW KELLER LLP
I.M. Pei Building
1105 North Market Street, 12th Floor
Wilmington, DE 19801
(302) 298-0700
jshaw@shawkeller.com
kkeller@shawkeller.com
dfry@shawkeller.com

Attorneys for Limelight Networks, Inc.
Plaintiff-Below/Appellant

OF COUNSEL:
Asim M. Bhansali
Matthias A. Kamber
Matan Shacham
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111-1809
(415) 391-5400

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