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THE SUPREME COURT OF THE STATE OF DELAWARE

Delphi Petroleum, Inc. Appellant, Cross-Appellee, v. Magellan Terminal Holdings, L.P. Appellee, Cross-Appellant.	No. 261, 2020 On appeal from the Superior Court for New Castle County C.A. No. N12C-02-302 FWW C.A. No. N19C-05-015 FWW

APPELLANT'S REPLY BRIEF ON APPEAL AND CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL

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SUMMARY OF ARGUMENT

Magellan's Arguments on Cross-Appeal and Delphi's Denials with Specificity

1. Denied. The trial court properly awarded interest to Delphi for the period between December 21, 2018 (when the trial court found, over Delphi's objection, that a binding agreement was reached) and May 28, 2019 (when Magellan paid $1,050,000 to Delphi). The agreement did not provide for a specific payment date so the trial court used a "reasonable time" standard. Since Magellan waited more than five months after the purported binding settlement agreement to pay Delphi, the trial court determined that Magellan had not paid in a reasonable time. In awarding interest, the trial court necessarily found that Magellan's late payment was a breach.

Magellan told the trial court that "the parties were still exchanging drafts of a document that detailed how and when payment should be made up to the time of the Supreme Court's opinion." A760. In fact, the last draft exchanged was on January 17, 2019, three months before this Court's opinion. A 370. There was no excuse for Magellan's untimely payment.

2. Denied. Delphi contended in the trial court that no binding settlement agreement was reached on December 21, 2018. The trial court disagreed, held that a binding agreement was reached on December 21, 2018, and directed Magellan to submit an order consistent with its opinion. The trial court rejected Magellan's

proposed order. The trial court allowed Delphi to submit a competing order, which it accepted as accurate. Delphi's order called for the payment of interest. The trial court agreed.

In the trial court, Delphi's position was, as it is in this appeal, that the December exchange was not a binding agreement. Only when the trial court decided, erroneously, Delphi maintains, that the December Exchange was binding, did Delphi ask for interest. Interest was due because Magellan did not pay what it claimed it owed Delphi, because of Delphi's December 21, 2018 acceptance of Magellan's December 20, 2018 final non-negotiable offer until May 28, 2019, unreasonably late.

Had Magellan wanted to allow itself to pay as late as May 28, 2019, or wanted the broader release it later insisted upon, it could have added those clauses to its final non-negotiable offer drafted by its attorneys. It did not.

STATEMENT OF FACTS ON CROSS-APPEAL

By Decision dated April 23, 2020, the trial court ruled that a settlement was reached on December 21, 2018. A141. The trial court in its Opinion directed Magellan to submit "a form of release consistent with this Order", with Delphi having the opportunity to object. A3. On May 21, 2020, Magellan submitted its proposed order. B3, 25-27. On June 5, 2020 Delphi submitted its objections to Magellan's proposed order, without prejudice to its position that there had been no enforceable agreement. B30. On July 15, 2020, the trial court rejected Magellan's proposed order and ruled that "Delphi's proposed order accurately reflects the terms of the settlement agreement the parties reached on December 21, 2018." A166-168. The trial court thus rejected the new and broader release Magellan demanded Delphi agree to before Magellan would execute a written settlement agreement and pay Delphi. *Id.* Having found that the parties made a binding agreement on December 21, 2018, the trial court ordered Magellan to pay interest on the settlement sum from December 21, 2018 to May 28, 2019, a term contained in Delphi's proposed order. *Id.*

ARGUMENT ON CROSS-APPEAL

I. The Trial Court's Interest Ruling Means that It Found Magellan Breached the Settlement Agreement By Late Payment of the Settlement Proceeds, and the Award of Interest Was Proper

A. Question Presented

Where the trial court found that Magellan paid Delphi the settlement proceeds five months after the date of the alleged settlement agreement, was the trial court correct in finding that the payment was late and Delphi was due interest? A166-168; B37.

B. Scope of Review

The scope of this Court's review is *de novo*. *See Stonewall Ins. Co. v. E.I. DuPont de Nemours & Co.*, 996 A.2d 1254, 1261 (Del. 2010).

C. Merits of the Argument

The trial court ruled that a settlement was reached on December 21, 2018. The trial court directed Magellan to submit "a form of release consistent with this Order", and gave Delphi the opportunity to object. A165. The trial court rejected Magellan's proposed order and ruled that "Delphi's proposed order accurately reflects the terms of the settlement agreement the parties reached on December 21, 2018." A.165. The trial court also ordered Magellan to pay interest on the settlement sum from December 21, 2018 to May 28, 2019. *Id.*

Generally, prejudgment interest accumulates from the date payment was due a party, or alternatively, 'when the plaintiff first suffered a loss at the hands of the defendant.'" *Delphi Petroleum, Inc. v. Magellan Terminal Hldgs, L.P.*, 177 A.3d 610, 2017 Del. LEXIS 511, at *5 (Del. 2017) (citing *Moskowitz v. Wilmington*, 391 A.2d 209, 210 (Del. 1978) and *TransSched Sys. Ltd. v Versyss Transit Sols., LLC*, 2012 WL 1415466 at *5 (Del. Super. Mar. 29, 2012)). The purpose of interest is to fairly compensate plaintiffs for their inability to use the money during the period in question. *Tannetic, Inc. v. A.J. Indus.*, 1980 Del. Ch. LEXIS 626, at *5 (Del. Ch. 1980) *accord Estate of Carpenter v. Dinneen*, 2008 Del. Ch. LEXIS 40 (Del. Ch. 2008); *Felder v. Anderson, Clayton & Co.*, 159 A.2d 278 (Del. Ch. 1960).

Delphi's argument that Magellan breached the settlement, found by the trial court, by its refusal to pay unless Delphi accepted new terms and by making untimely payment is not undercut by its position that there was no binding settlement. It is argument raised in the alternative, which has firm support in the trial court's award of interest. A165. In other words, even if it is assumed a settlement was reached, Magellan breached and cannot enforce it. If this Court agrees that no binding settlement was reached by the December Exchange, the argument is moot. The relevant papers are before the Court and Magellan has offered argument on the issue of breach. There is inconsistency in the trial court's decision requiring review because the trial court found that Delphi was bound to

honor a settlement agreement that Magellan breached. This is not a valid conclusion under Delaware law, where Magellan refused to perform unless Delphi agreed to new and onerous release language and waited five months after the alleged settlement to pay. The Court can examine the question if necessary under the plain error standard. Plain error "is error that is apparent on the face of the record and is so fundamental and serious that it affected the outcome of the trial." *Taylor v. State*, 149 A.3d 241 (Del. 2016).

The trial court ordered Magellan to pay interest on the settlement sum from December 21, 2018 to May 28, 2019. A165. The trial court thus properly found that Magellan's payment on May 28, 2019 was not made in a reasonable time and was therefore late. Magellan characterizes as a "false premise" the proposition that the trial court found Magellan breached the purported settlement agreement by late payment. The Court's interest award makes clear that it did find that Magellan breached. "A breach occurs when a party abandons their duties under the contract or fails to complete the contract in a reasonable time." *Greenfield v. Foley*, 2020 Del. C.P. LEXIS 2, at *11 (Del. Com. Pl. Feb. 10, 2020). There is no other basis to support an award of interest. Interest compensates for money not paid when due.

It was clear by January 17, 2019 that the parties had reached an impasse and stopped negotiating. Delphi had said just that on January 16, 2019. A362. After that, neither party proposed any new drafts of the settlement agreement even

though the parties had proposed no fewer than nine drafts between December 26, 2018 and January 17, 2019. If Magellan believed that the December Exchange created a binding settlement, it would have moved to enforce promptly thereafter. It did not. Nor did Delphi, even though Delphi had fully performed its only obligation on December 21, 2018 by giving Magellan the release it demanded. More than four months passed after the end of negotiations before Magellan paid the settlement proceeds, and then only so it could file its Motion to Enforce. The December Exchange specified no payment date. Magellan Brief at 11. Magellan admits it could have made payment within five business days, not five months. Magellan Brief at 40, 43. The trial court chose December 21, 2018 as the date payment was due, so Magellan tendered the settlement proceeds five months late.

Delphi has argued that the delay reflects Magellan's position that there was no binding agreement on December 21, 2018—a position Magellan took either because it belatedly wanted a broader release than it demanded on December 20, 2018, or because it did not intend to be bound absent an executed settlement agreement. The trial court disagreed, and found that there was a binding agreement on December 21, 2018 and Magellan failed to pay in a reasonable time.

The trial court recognized that Delphi deserved prompt payment if the trial court was to accept Magellan's argument that it had entered into a final and binding agreement with Delphi on December 21, 2018. Magellan also refused to

perform unless Delphi agreed to an expanded release. The trial court did not recognize, however, that under Delaware law, Magellan's breach of the alleged agreement by its refusal to timely pay the settlement amount precluded Magellan from enforcing the alleged agreement. See Delphi Opening Brief at 38-42. This was plain error.

Magellan heavily relies on *Lamourine v. Mazda Motor of Am., Inc.*, 2009 Del. LEXIS 449 (Del. Aug. 28, 2009), a case that addresses an issue totally irrelevant to the case at bar. In *Lamourine*, the litigants came to a settlement agreement in connection with the sale of a defective automobile. *Id.* at *1. The plaintiffs reserved the right to seek *pre-judgment* interest from the date of the sale of the automobile; the trial court rejected this bid. *Id.* at *11-12. The trial court reasoned that interest only begins accruing on the date an obligation to pay isincurred, and that when a settlement agreement is entered into, the obligation to pay is incurred *on the day of the settlement*. *Id*. *Lamourine* at most stands for the proposition that, where an obligation to pay stems from a settlement agreement, interest begins accruing on the day of the settlement agreement—which is exactly what the Superior Court found. The question here, unlike in *Lamourine*, is not whether Delphi can seek prejudgment interest on its underlying claim; rather, it is whether the Superior Court was correct in finding that Delphi is entitled to interest *on the alleged settlement agreement*, due to Magellan's bad faith failure to pay

under that alleged settlement agreement. Accordingly, to the degree *Lamourine* has any applicability to this case, it clearly supports Delphi's position, not Magellan's.

REPLY ARGUMENTS IN SUPPORT OF DELPHI'S APPEAL

From as early as November 2018, the parties each viewed execution of a signed settlement agreement as necessary to create a binding settlement. Magellan demanded it and Delphi agreed. No agreement was executed because Magellan demanded a new and expanded scope of release while the parties tried for a month after the December Exchange to draft an agreement. On multiple occasions, Magellan repudiated the agreement it now relies upon by explicitly telling Delphi that Magellan would not pay Delphi unless Delphi signed a settlement agreement satisfactory to Magellan with the new release and indemnity, and that never occurred.

The settlement never became binding as a result.

Delphi respectfully requests this Court make Magellan's interest counter-appeal moot by reversing the trial court's decision to enforce the December Exchange. The December Exchange was unenforceable by Magellan because (1) it did not contain all the essential terms of settlement; (2) the parties agreed that the settlement was not final until the parties executed a settlement agreement, which never occurred; and (3) if this Court finds that the December Exchange was a final and binding agreement, Magellan cannot enforce that agreement because it breached the agreement by refusing to perform under its release term and failing to pay Delphi in a reasonable time.

I. The Scope of Appeal is *de novo*.

Magellan argues incorrectly that this Court reviews the trial court's ruling on an abuse of discretion basis. In making this argument, it relies principally on a case that could not be more procedurally distinct from this case. *Cole v. State* involved appellate review of the denial of a motion to suppress in a capital case. 922 A.2d 354, 355 (Del. 2005). In that case, defendant-appellant claimed, pursuant to an alleged agreement with prosecutors, that statements he had made to police implicating a co-accomplice could not be used against him at trial. *Id.* The trial court denied the motion to suppress, finding that no agreement existed between the state and the defendant-appellant. On review, this Court applied an abuse of discretion standard *not* because, as Magellan argues, that standard somehow attaches to all decisions involving the existence of contracts, but rather because a "motion to suppress evidence" is ordinarily reviewed "under an abuse of discretion standard." *Id.* at 358. *Cole* simply has nothing to do with this case, in which the trial court's decision on a motion to enforce settlement is reviewed. Similarly, this Court's decision in *Wheeler v. Clerkin* is not instructive, because it also had nothing to do with a motion to enforce settlement—rather, it was an appeal of the

Superior Court's affirmation of the Court of Common Pleas' judgment after a bench trial. 2005 Del. LEXIS 149, at *4-5 (Del. Apr. 13, 2005).[1]

A motion to enforce settlement is decided on a summary judgment standard when the trial court reviews a paper record. *Sterling Prop. Holdings v. New Castle County*, 2013 Del. Ch. LEXIS 107, at *33 n. 109 (Del. Ch. Apr. 23, 2013); *see also Trexler v. Billingsley*, 2017 Del. LEXIS 254, at *7 (Del. Jun. 21, 2017) ("We review the Superior Court's determination of whether a valid settlement agreement exists *de novo*."). On appeal of a summary judgment motion, this Court must "undertake an independent review of the record and applicable legal principles to determine whether, after viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that no material issues of fact are in dispute and it is entitled to judgment as a matter of law." *McCaffrey v. Wilmington*, 133 A.3d 536, 545 (Del. 2016). The reviewing court's *de novo* review thus reaches both questions of law and questions of fact. Accordingly, the scope of review here is clearly *de novo*.

The sole case involving a motion to enforce settlement that Magellan cites, *Alston v. Pritchett*, is readily factually distinguishable. 2015 Del. LEXIS 99, at *5-

[1] Magellan also cites *Philips Bros. Elec. Contrs., Inc v. Great Am. Ins. Co.*, 133 Fed. Appx 815 (3d Cir. 2005). But *Philips* was not decided under Delaware law, and involved the appeal of a judgment after a bench trial, not a motion to enforce judgment. *Id.* at 815-16.

6 (Del. Feb. 26, 2015). *Alston* involved a *pro se* appeal of a settlement agreement, in which, without evidence, the *pro se* litigant argued that he had been prevented from withdrawing from a settlement agreement via fraud and racial bias on the part of his counsel, the trial court judge, and opposing counsel. *Id.* No similar allegations are involved in this case. Further, insofar as *Alston* applies an abuse of discretion standard to is inconsistent with *Trexler*, the most recent Supreme Court case on point on the issue. 2017 Del. LEXIS 254.

II. The Settlement Was Contingent on a Signed Agreement

The written negotiation history leaves no doubt that Magellan demanded a signed agreement before it would pay Delphi the settlement amount. Delaware law makes clear that, when parties' statements and objective actions evince an intention only to be bound to a contract after a signed writing has been executed, only that signed writing will consummate that contract. Further, in its Answering Brief, Magellan essentially admits that, according to its own internal corporate processes and protocols (not produced to the trial court or Delphi), a signed writing was a necessary pre-condition to the fulfillment of its obligations under the settlement agreement. Magellan Brief at 42.

A settlement agreement is binding under Delaware law only when the parties "agree to all material terms and intend to be bound by the contract . . . ." *Schwartz v. Chase*, 2010 Del. Ch. LEXIS 235, at *13 (Del. Ch. Jun. 29, 2010). Even if the parties agree to all the essential terms of a settlement agreement, it is not enforceable where the parties agree that the settlement is not final until a written agreement is executed. *Loppert v. WindsorTech, Inc.*, 865 A.2d 1282, 1286 (Del. Ch. 2004). In all the negotiations between October, 2018 and January, 2019, Magellan insisted on a signed agreement as a condition to Delphi's release and Magellan's payment of the settlement amount, and Delphi agreed.

In *Schwartz*, 2010 Del. Ch. LEXIS 235, the court wrote:

> It is not essential, however, that both parties require execution before a binding contract arises. In at least one case, *Transamerican S.S. Corp. v. Murphy*, 1989 WL 12181, at *1 (Del. Ch. Feb. 14, 1989), this Court has held that, if 'one of the contracting parties states that he will not be bound until' he signs the document, explicitly making that signing a condition precedent, then an agreement to settle will not be binding until that condition is met.'

Id. at 31.

The *Schwartz* court further stated: "If one of the parties expressly states that no contract will exist until both parties have signed the settlement agreement, then that party clearly does not intend to be bound until the document is fully executed." *Id.*, n. 69. Here it is Magellan that made such demands and it is Magellan seeking to enforce the agreement even though no document was ever executed.

In the face of these authorities, Magellan makes the false claim that "Delphi cites no case law suggesting that one party can unilaterally make an executed agreement a condition of settlement without acquiescence or agreement by the other party." Magellan Brief at 37. Delphi cited *Schwartz* on this very point at the trial court. A229. Here, we not only have Magellan insisting on a signed agreement as early as November 14, 2018[2] as essential to a settlement, but Delphi agreed.

[2] See A307-310.

Magellan argues that Delphi did not counteroffer or qualify its acceptance, saying that it supports the conclusion that Magellan's offer contained all the material terms of a settlement. Not so. Magellan's offer clearly said it was Magellan's "final" and "non-negotiable" settlement offer. Magellan made this offer on a take it or leave it basis, demanding that Delphi waive any ability to counter.

Furthermore, parties who spend significant effort negotiating the precise terms of a settlement agreement, exchanging multiple drafts over several months, demonstrate an intent to be bound only by a written executed agreement. *See Clark v. Gotham Lasik, PLLC*, 2012 U.S. Dist. LEXIS 40290 at *3 (E.D.N.Y. Mar. 2, 2012) (citing *Abel v. Town Sports Int'l Holdings, Inc.*, 2010 U.S. Dist. LEXIS 136888, at *5 (S.D.N.Y. Dec. 23, 2010) (stating that negotiations regarding the terms of the agreement "approach an express reservation of the right not to be bound until a written agreement was executed")). Additionally, "[w]here one of the contracting parties states that he will not be bound until an event such as the signing of a memorandum that might not otherwise be required occurs, he will not be bound before that condition is satisfied, even though an agreement on all the material terms of the contract have been reached." *Transamerican Steamship Corp v. Murphy*, 1989 Del. Ch. LEXIS 13, at *3 (citing 1 Williston on Contracts); *accord Schwartz*, 2010 Del. Ch. LEXIS 235, at *31 n. 69 ("The ability of a party

unilaterally to require execution of a contract before it will become binding makes sense in light of the principle that a settlement agreement will only become binding if all materials terms have been negotiated and *all* parties intend to be bound by them.").

The parties' interactions, and specifically Magellan's conduct throughout the negotiations, make clear that the parties intended that a signed writing would be a necessary prerequisite to the consummation of the settlement agreement.

First, on November 16, 2018, Magellan responded to Delphi's proposed November 14 draft agreement, and characterized the settlement as "tentative", cautioning Delphi that additional time was required to "agree on the written documents". A305.[3] Magellan thus made clear its intention to make an executed signed writing as condition precedent for the consummation of the settlement agreement. Magellan's insistence on a signed writing would inform the parties' continued negotiations.

Second, on December 20, 2018, Magellan offered to pay $1,050,000 to:

[3] The trial court dismissed this email because "the parties had not engaged in either a formal offer or acceptance." A188. In fact, both Delphi and Magellan made formal offers to settle the litigation in October and November, 2018. A431-437. Magellan made a formal settlement offer as early as October 8, 2018. A431-433; A597-623. These November negotiations immediately preceded the December Exchange and establish that the parties mutually intended all along that the case could be settled only by a signed agreement.

> settle any and all claims Delphi may have against Magellan, known or unknown, including but not limited to all claims that were or could have been brought in the litigation, any claims or allegations arising in any way out of the relationship and contracts between Magellan and Delphi, and alleged "new" claims related to Tanks 3 and 10. **Magellan insists on the broadest release possible-any claim Delphi could ever possibly assert against Magellan even remotely related to their business relationship must be released**.
>
> A459-461 (emphasis added).

The release description was acceptable to Delphi. Magellan's December 20, 2018 offer did not give it license to demand a broader release involving other entities and an indemnification. That additional language was surely not 'boilerplate" material of little real consequence.[4] Magellan treats the words "broadest release possible" taken from its settlement offer as if the language allowed it to create any release it chose after Delphi had agreed to the release in Magellan's December 20, 2018 offer, that covered any claim Delphi could ever possibly assert against Magellan. That is, Delphi and Magellan alone, and not the multitude of additional third party persons and entities Magellan subsequently demanded be included in the release after Delphi agreed to the release on December 21, 2018. The trial court noted Magellan's attempts to expand the release, calling them "attempts to

[4] As only one example, the supposed "boilerplate" as initially demanded by Magellan would have voided a separate $10,000,000 environmental indemnification in favor of Delphi, a provision Delphi could not and did not accept.

gain a post-agreement advantage." A163. More than that, Magellan breached the agreement by refusing to perform the alleged settlement agreement unless Delphi acceded to Magellan's overreaching demands.

Nor did its December 20 offer give Magellan any room to expand the release by attempting to disguise the language as mere "boilerplate". It vastly expanded the release Delphi had agreed to and added an indemnity that had never been discussed much less agreed. Magellan's attorneys drafted the release it demanded of Delphi in the December Exchange; Magellan could have added the "boilerplate" had they wanted to. They did not. When Magellan propounded its draft of the formal settlement agreement for the $1,000,000 settlement on November 14, 2018, A307, it did not include the supposed "boilerplate" language, just like Magellan did not include the "boilerplate" language in its December 20 offer. Magellan only required Delphi to release Magellan and that is what Delphi agreed to on December 21, nothing more or less.

Third, Delphi's acceptance of the December 20, 2018 offer explicitly contemplated a signed writing:

> Delphi accepts Magellan's offer. We'll work out the paperwork next week. A462-463.

Magellan agreed. Magellan Brief at 16. Delphi's statement was entirely consistent with Magellan's prior insistence that the parties execute a signed writing in order to complete the consummation of the contract.

Fourth, in its December 26, 2018 email to Delphi, in which it rejected proposed release language, Magellan made abundantly clear that it considered a signed writing a necessity. Magellan plainly stated that its payment obligations would not be triggered until the execution of a signed writing:

> Magellan will forward you its Settlement Agreement for Delphi's review in due course. **After the parties execute the agreement, Magellan will make payment in compliance with the terms of the written agreement**. (emphasis added). A320.

Magellan's December 26, 2018 email also made clear that Magellan's December 20, 2018 offer explicitly contemplated a future agreement as to the precise terms of a final release: "The document Delphi provided is not what Magellan's [December 20, 2018] offer made clear would be needed—**creation of a full and final release and settlement agreement**." (emphasis added). *Id.*

Thus, Magellan admits that the "creation of a full and final release", an indisputably essential term, had yet to be drafted even five days after the supposed December 21, 2018 full and final settlement, and although Delphi attempted strenuously to accommodate Magellan's new and broader release demands, the "creation of a full and final release and settlement agreement" never occurred.

The December 26 email also stated that "management personnel who need to . . . approve the agreement and make payment" were not in the office," A320, Paragraph 4, clearly admitting that even though the attorney had made the offer, she did not believe it to be binding until Magellan's management personnel returned to the office, which further supports that she and Magellan did not believe the settlement agreement to be binding until Magellan executed a formal settlement agreement acceptable to Magellan's management after it returned to the office and was able to review all the terms and conditions. It is apparent that when Magellan's management did return it had a different idea for the release Magellan wanted and that resulted in the demand for the new and broader scope of release and new indemnification rejected by Delphi and the trial court.[5]

Fifth, in its January 4, 2019 and January 7, 2019 communications, Magellan made explicit that it believed that its obligation to pay the settlement was contingent on the execution of a signed document. Magellan wrote to Delphi on January 4, 2019:

[5] Magellan's only justification for its failure to pay $1,050,000 is that "Magellan's internal processes, *i.e.*, a corporate entity will not permit an employee to sign a written agreement…without following corporate protocols." Magellan Brief at 42. This is an admission that, as of December 20, 2018 when Magellan made its offer through its attorney, it did not consider itself bound to disburse any funds pursuant to that agreement until an employee had executed a signed writing.

> We believe Magellan's obligation [to pay $1,050,000] should be triggered only after the agreement [still to be negotiated] is fully executed. A290.

Magellan claims that its January 4, 2019 email "did not suggest [Magellan] would have no obligation to pay at all if the document were not executed." See generally A748-749. Magellan ignores its January 7, 2019 email, where it said: **Magellan will not wire any money until Delphi has signed the final approved version of the Agreement**. A237 (Emphasis added). Again, Magellan clearly required a signed writing as a condition precedent for settlement.

Sixth, the language of Magellan's proposed release aligned with Magellan's pre-existing requirement that a signed writing be executed. On January 7, 2019, Magellan sent Delphi its "FULL, FINAL, RELEASE AND SETTLEMENT AGREEMENT" which included as Paragraph 2:

> If Delphi delivers the final, approved Agreement (in the exact form agreed upon by the parties) signed by its authorized representatives . . . Magellan shall [pay]. *Id.*

Magellan thus explicitly told Delphi that Magellan would not pay the settlement amount unless Delphi signed Magellan's new settlement agreement—which included a previously uncontemplated indemnity obligation and the broader scope of release rejected by both Delphi and the trial court.

Magellan makes the baseless allegation that "Magellan did not attempt to "expand the scope of the release, and the Superior Court made no finding to that

effect." Magellan Brief at 6. In fact, the trial court explicitly found Magellan had attempted to expand the release: "[s]ubsequent attempts by Magellan to expand the scope of the release …." Opinion of April 23, 2020 at 4. Magellan claims that it did not rescind the agreement by its new demands, Magellan Brief at 6, Paragraph 5, but it certainly repudiated and breached the agreement by refusing to perform under the December 21, 2018 agreement found by the trial court.

Seventh, when Magellan filed its Answering Brief in Delphi's prejudgment interest appeal on December 26, 2018, it said nothing to this Court, then or ever, about the December Exchange five days earlier that it now claims settled the dispute. Magellan informed the trial court of the alleged final settlement only after issuance of this Court's Mandate.[6] A624. Magellan tries to excuse its failure to tell the trial court or this Court that it believed the matter settled and was being finalized. If Magellan truly believed that the December Exchange created a binding agreement it should have told the courts that the matter had been settled.

Furthermore, Magellan suggests that Delphi agreed with Magellan not to inform the Court that the agreement was settled because the settlement agreement

[6] Magellan's allegation that Delphi changed its position concerning the December Exchange only after this Court ruled in Delphi's favor in the prejudgment interest appeal is manifestly untrue. Besides declaring the negotiations for that settlement agreement at an impasse on January 16, 2019, Delphi's April 9, 2019 email clearly stated that Delphi was proceeding with its second action concerning tank billing, a portion of that email Magellan fails to acknowledge. A565.

"would be finalized and executed." Delphi had no such understanding or agreement with Magellan to not inform the courts. Delphi did not inform the courts that the litigation was settled because Delphi did not believe it was settled. Delphi's actions are consistent with its beliefs that the December exchange was not a binding settlement; Magellan's actions are inconsistent with its claim that the litigation had been fully settled on December 21, 2018.

Magellan made it clear that it would not pay until Delphi signed off on the new and onerous release language demanded by Magellan. Magellan cannot credibly say, in light of the communications identified above, that it did not agree with Delphi that a binding settlement required a signed agreement. Indeed, in its Answering Brief, Magellan essentially admits that, in order for it to comply with "corporate protocol", a signed agreement was a pre-condition for its payment of the settlement amount. Answering Brief at 42.[7] In its emails accompanying its draft agreements, Magellan could not have been clearer that it would not pay Delphi until a writing was signed.

A reasonable negotiator viewing the entirety of the relationship and specific communications between Delphi and Magellan could only conclude that a writing

[7] Although Magellan alleges the December Exchange contained all the essential terms of the settlement it alleges it thus admits it could not pay the settlement amount because Magellan's corporate protocol required a signed settlement agreement, a precondition it had not included in its December 20, 2018 offer.

was required by both parties. This Court's and the trial court's rulings in this case found that Magellan engaged in bad faith misconduct. A722. On this basis alone, a reasonable negotiator could not assume that the parties intended to be bound by a simple agreement in principle, which itself called for an agreement to be prepared, followed by a month of exchanging drafts during which Magellan repeatedly told Delphi that if it wanted the settlement proceeds, it had to sign the agreement. Magellan's intransigence in insisting on an overbroad release caused the failure of the settlement. Recognizing that the deal was not final, Magellan continued to negotiate the agreement and amend it to its advantage.

Magellan rejected all of Delphi's attempts to accommodate Magellan's demands for the broader release, and the negotiations came to an end on January 17, 2019. Magellan had not paid Delphi even though Magellan says that it was required to pay because it had entered into a full and final settlement with Delphi without any conditions, and Delphi had not requested payment because it knew it had agreed that no settlement would be final unless executed by both parties. The parties awaited this Court's decision on the prejudgment interest appeal.

On April 15, 2019, this Court ruled in favor of Delphi. This Court rejected Magellan's prejudgment interest calculation as having "failed to account for a significant portion of [Magellan's] misconduct during the parties' relationship" and

awarded Delphi additional prejudgment interest based on the calculation of Donald Dahl, a CPA.

Magellan predictably casts Delphi as unreasonably litigious, ignoring that Magellan admitted to overbilling Delphi hundreds of thousands of dollars for heating oil, as well as concealing those overbills for years. Delphi did initiate a second action against Magellan on May 1, 2019, and for good reason. Delphi discovered additional instances of billing misconduct by Magellan in the records maintained by the Delaware Department of Natural Resources and Environmental Control ("DNREC"). Magellan assessed Tank 3 rental charges at the same time Magellan informed DNREC that Tank 3 was out of service. A450-52. The Terminalling Agreement between the parties prohibited this species of overbilling. The documents, although clearly relevant, were not produced by Magellan in discovery and were not discovered until after trial. *Id.* Delphi alerted Magellan to the Tank 3 claim.

On May 28, 2019, five months after the December Exchange, and more than a month after this Court ruled against it on the issue of prejudgment interest, Magellan paid Delphi $1,050,000.[8] Then, on May 31, 2019, Magellan moved to enforce the December Exchange. A383.

[8] Magellan alleges Delphi accepted Magellan's payment as the payment of the settlement amount. Magellan Brief at 53. That statement is incorrect. By email on

Magellan did not believe a binding agreement was made on December 21, and that a written agreement was mere surplusage. If the settlement were binding and complete, why would Magellan wait more than five months to pay the settlement proceeds? After reaching an impasse in the negotiation of the written agreement, Magellan and Delphi decided to await this Court's ruling on the second appeal. Magellan had no intention of paying without a signed agreement. In April 2019, the Court rendered its decision adverse to Magellan. Only then, and only because of the ruling, did Magellan pay Delphi $1,050,000 as part of the groundwork for its belated Motion to Enforce in order to escape the Court's ruling.

Here, as in *Schwartz*, a reasonable negotiator would not believe that either party intended to be bound unless and until a fully negotiated contract had been drafted and signed. A722. A reasonable negotiator reviewing the parties' communications would not assume that the parties intended to be bound by a simple agreement in principle, which itself called for the documentation to be developed.

May 23, 2019 Delphi informed Magellan that if Magellan decided to pay Delphi the payment would be accepted only as payment on account of a larger sum owed pursuant to this Court's April 15, 2019 Order. A 254. Magellan thus knew before it paid the $1,050,000 that Delphi refused it as full payment.

III. None of Delphi's Post December 21, 2018 Statements Evidences a Binding Agreement Was Created on December 21, 2018

Magellan relies heavily on statements made by Delphi after December 21, 2018. Magellan attempts to show that Delphi recognized the case had been settled by the December Exchange without a signed agreement. While the parties agreed on certain terms on December 21, 2018, the fact remains that the parties understood and agreed that the settlement would not be final and binding until a settlement agreement was executed.

Magellan cites Delphi's January 7, 2019 request to this Court for an extension of time to file its reply, in which Delphi stated that "the matter is settled in principle and the settlement is in its final stages." A482-483. But referring to a matter as "settled in principle" does not create an enforceable contract. See *New York Life Insurance Company v. KN Energy, Inc.*, 80 F.3d 405, 410 (10th Cir. 1996) (finding that a document denominated an "agreement in principle" was not an enforceable contract); *Engineered Date of Products, Inc. v. Art Style Printing, Inc.*, 71 F.Supp. 2d 1073, 1078 (D. Colo. 1999) (noting, as a rule, agreements in principle that refer to subsequent formal agreements are not binding) (quoting *Skycom Corp. v. Telstar Corp*, 813 F.2d 810, 815 (7th Cir. 1987)). It was thus entirely appropriate for Delphi to refer to the matter as "settled in principle": the matter was in its "final stages" of negotiation, and no enforceable contract had yet

been executed. Delphi's request to this Court for the extension to file its Reply shows that Delphi did not believe that a settlement had been reached:

> Appellant, Delphi Petroleum, Inc. moves the Court, pursuant to Rule 15(b), for an order extending the time for service and filing of the Reply brief under Rule 15(a) from January 10, 2019 to January 21, 2019, on the grounds that the matter is settled in principle and the settlement agreement is in its final stages. This is the first request for an extension of time to file the Reply brief. Opposing counsel consents to the extension of time. This motion is being filed less than five days in advance of the filing deadline under rule 15(b)(iv) **because until this point, settlement was not imminent. At present, Appellant believes a full and final settlement is imminent** and thus requests that the Court delay the filing deadline for the Reply brief. *Id.* (Emphasis added.)

Thus, two weeks after the December Exchange, Delphi did not say that a settlement had been reached, only that Delphi thought it was then imminent.[9] *Id.* Magellan knew that Delphi still believed that a settlement was not reached in the December Exchange. Magellan also relies on Delphi's reservation of its rights

[9] Because Delphi believed on January 7, 2019 that a settlement had finally been reached with Magellan, it sent Magellan a settlement agreement fully executed by Delphi's president incorporating Magellan's expanded release wording. A330. But Magellan rejected that fully executed settlement agreement and did not pay the $1,050,000. The trial court made no mention of this January 8, 2019 fully executed settlement agreement or of Magellan's rejection. Magellan's rejection made clear that settlement was not imminent. Magellan states that a reason for its rejection of Delphi's executed settlement agreement was Delphi's insertion of the words "concerning the subject of the Release." Magellan Brief at 18. However, as Delphi's email of January 9, 2019 made clear those words were Magellan's not Delphi's. A346, third paragraph.

concerning the December Exchange and the statement that Delphi might move to enforce that agreement. A542. But Delphi did not make any statement concerning the enforcement of the Agreement after Magellan rejected Delphi's January 16, 2019 draft and Delphi deemed the negotiations ended. Delphi notified Magellan that if Delphi's January 16, 2019 draft was not acceptable to Magellan, Delphi would consider the negotiations at an impasse. A362. Magellan did not accept Delphi's January 16, 2019 draft. A370. Delphi thus filed its Reply in this Court on January 22, 2019. A111. Delphi never asked Magellan for the settlement amount nor did Delphi move to have the December Exchange enforced.

The email communications between the parties referring to the December Exchange as a settlement do not change the result. Delphi believed the parties had a deal based on that exchange, subject to working out the execution of a signed agreement to make it binding.

CONCLUSION

Delphi and Magellan entered into a settlement on December 21, 2018, subject to the drafting and execution of a written settlement agreement. The parties attempted to draft that agreement from December 26, 2018 to January 17, 2019 but failed because Magellan attempted to "gain a post-agreement advantage" by its demands "to expand the scope of the release," as the trial court found. Opinion of April 23, 2020 at 4,23. Magellan repudiated and breached the settlement, by refusing to pay the settlement unless Delphi accepted Magellan's demands for a new and expanded release. On January 16, 2019 Delphi declared the settlement negotiations at an end. No new negotiations occurred and on April 15, 2019 this Court issued its Order in Delphi's prejudgment interest appeal. Only then did Magellan attempt to revive the December settlement by paying the settlement amount on May 28, 2019, five months after the payment was owed.

Delphi respectfully requests that the Court reverse the trial court's rulings of April 13, 2020 and July 15, 2020 on the ground that the parties made their settlement agreement contingent on execution of a written, signed settlement agreement, which never occurred. In the alternative, Magellan breached the agreement and cannot enforce it.

Respectfully submitted,

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