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IN THE SUPREME COURT OF THE STATE OF DELAWARE

NORTH AMERICAN LEASING, INC., a Michigan corporation, DORE & ASSOCIATES CONTRACTING, INC., an Indiana corporation, NASDI, LLC, a Delaware limited liability Company, and YANKEE ENVIRONMENTAL SERVICES, LLC, a Delaware limited liability Company,	)	No. 192,2020
Defendants Below, Appellants.	)	COURT BELOW:
v.	)	COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 2017-0399-KSJM
NASDI HOLDINGS, LLC, a Delaware limited liability company, and GREAT LAKES DREDGE AND DOCK CORPORATION, a Delaware Corporation,	)	
Plaintiffs Below, Appellees.	)	

APPELLANTS' OPENING BRIEF

Dated: July 23, 2020

CHIPMAN BROWN CICERO & COLE, LLP
Paul D. Brown (#3903)
Joseph B. Cicero (#4388)
Hercules Plaza
1313 North Market Street, Suite 5400
Wilmington, Delaware 19801
(302) 295-0191

Attorneys for Defendants Below, Appellants

OF COUNSEL:

Mark L. McAlpine
Douglas W. Eyre
MCALPINE PC
3201 University Drive, Suite 200
Auburn Hills, MI 48326
(248) 373-3700

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NATURE OF PROCEEDINGS

This is an appeal of the Court of Chancery's granting of plaintiffs below NASDI Holdings, LLC and Great Lakes Dredge and Dock Corporation's ("Plaintiffs" or the "Selling Parties") motion for partial summary judgment and subsequent motion for final judgment. Plaintiffs sued defendants below ("Defendants" or the "Buying Parties") for indemnification and equitable subrogation stemming from construction bond losses following Defendants' purchase of a demolition contracting company from Plaintiffs. The dispute arises from a demolition project which commenced prior to the sale closing where Plaintiffs provided bonding support secured by a letter of credit after Plaintiffs sold the demolition company to Defendants. In the Ownership Interest Purchase Agreement executed on April 23, 2014 (the "Agreement"), the parties specifically limited the type and time period for claims. The trial court's rulings ignore the bargained-for terms of the Agreement.

The trial court erred by: (i) failing to enforce a limitation of claims provision in the Agreement for the sale of two businesses[1] to defendant below North American Leasing, Inc. ("Buyer") by plaintiff below NASDI Holdings, LLC ("Seller"); and (ii) holding that Defendants waived their affirmative defense of set-off/recoupment

[1] NASDI, LLC ("NASDI") and Yankee Environmental Services ("Yankee," collectively, the "Purchased Companies").

by not briefing it in response to a motion for partial summary judgment that sought an interlocutory ruling as to liability alone without raising Defendants' set-off/recoupment defense. The trial court compounded these errors by entering final judgment in Plaintiffs' favor in excess of the amount sought in their Verified Complaint, and disregarding Defendants' voluminous evidence that Plaintiffs' alleged damages should be reduced under the terms of the Agreement.

At the time the Selling Parties sold the Purchased Companies to the Buying Parties, NASDI had several ongoing demolition projects. The Selling Parties made numerous representations and warranties for these projects in the Agreement. The parties agreed to indemnification provisions obligating each side to indemnify the other for various types of claims, and providing explicit deadlines for bringing specific types of claims. Of note, the Selling Parties generally must indemnify Buyer for claims arising from pre-sale events, and Buyer generally must indemnify the Selling Parties for claims arising from post-sale events. The Agreement requires all notices of claims for indemnification to be given by March 31, 2016 (the "Termination Date"), other than for specific representation/warranty claims with longer survival periods specified in the Agreement. The Agreement provides that except for claims of fraud and equitable subrogation, the enumerated indemnification claims are the parties' sole remedy under the Agreement. For good measure, the Agreement directly states that these indemnification terms were

negotiated and reflected in the consideration. In other words, the parties knowingly agreed to limit potential claims and the Court should enforce their agreement, especially here, where Plaintiffs are not denied relief because the Agreement allows them to proceed on a claim of equitable subrogation.

Prior to the closing of the sale on April 23, 2014 (the "Closing Date"), NASDI (under the Selling Parties' ownership) encountered significant problems on the Bayonne Bridge "Raise the Roadway" demolition project (the "Project"). NASDI claimed the Project's general contractor, a joint venture of Skanska and Kiewit (the "General Contractor"), caused these problems by directing pervasive changes to NASDI's work. The General Contractor, however, blamed NASDI for the problems and rejected any attempts by NASDI (under the Selling Parties' ownership) to remedy severe losses NASDI had incurred before the Closing Date. Ultimately, the General Contractor forced NASDI off the job and immediately made a claim on NASDI's performance bond. After the surety company paid the performance bond to the General Contractor, the Selling Parties filed the action below, claiming a right to indemnification from the Buying Parties for that loss under the Agreement

The plain language of the Agreement bars the Selling Parties' claim for indemnification because it accrued after the Termination Date. Equitable subrogation is the Selling Parties' sole remedy under the circumstances, and the Selling Parties included a claim for equitable subrogation in their Verified

Complaint. In response, the Buying Parties raised several affirmative defenses, including set-off/recoupment. This affirmative defense seeks to reduce the Selling Parties' damages on their indemnification claim to account for evidence that: (i) the losses incurred on the Project arose pre-sale under the Selling Parties' ownership, and therefore are not indemnifiable; and (ii) the General Contractor is claiming in a related litigation in New York federal court (the "New York Action") that NASDI was negligent in its work while owned by the Selling Parties, which, if established, would bar the Selling Parties from obtaining indemnification caused by their own negligence.

Seeking to avoid equitable defenses to their equitable subrogation claim, the Selling Parties filed a motion for partial summary judgment on their indemnification claim and certain enumerated affirmative defenses ***as to liability alone***. Specifically, the Selling Parties did not move for summary judgment on their equitable subrogation claim or the Buying Parties' setoff/recoupment defense, and did not seek to substantiate their amount of damages. Accordingly, Plaintiffs never challenged the validity of the setoff/recoupment defense and Defendants did not brief the issue in response to the motion. The issues raised by Plaintiffs' Motion for Partial Summary Judgment was whether Plaintiffs could pursue a claim for indemnification after the Termination Date under the terms of the Agreement. The Motion had nothing to do (and Plaintiffs did not provide any evidence of) the amount it sought

on its claim or whether that amount should be reduced for Defendants' set-off/recoupment defense. The trial court recognized this when it granted the Plaintiffs' motion for partial summary judgment as a matter of "pure contractual interpretation," without addressing the appropriate amount of the Plaintiffs' damages or Defendants' set-off/recoupment defense.

Shortly after obtaining this interlocutory ruling on liability, Plaintiffs abandoned their equitable subrogation claim and moved for entry of final judgment in the full amount sought in their Verified Complaint (and more) under the indemnification theory. Defendants opposed entry of final judgment because the trial court could not calculate damages until it had addressed their affirmative defense of set-off/recoupment and analyzed factual evidence showing that any indemnification awarded should be reduced due to pre-Closing Date losses and Plaintiffs' own alleged negligence during the Project. The trial court disregarded this evidence, holding that Defendants waived their set-off/recoupment defense by not briefing it in response to the motion for partial summary judgment, even though that motion did not challenge the affirmative defense of set-off/recoupment and sought a determination as to liability alone. The trial court subsequently entered final judgment in the full amount of Plaintiffs' demand for indemnification without considering Defendants' evidence that this amount should be reduced – which the trial court should have done *sua sponte*.

Defendants contend that the trial court committed clear error in three of its Orders. ***First,*** the trial court erred in its Order granting Plaintiffs' motion for partial summary judgment by either: (a) misconstruing the Agreement's unambiguous contractual language barring the indemnification claim; or (b) in the alternative by failing to find the language ambiguous and then ignoring clear evidence of the parties' intent. ***Second,*** in granting Plaintiffs' motion for entry of final judgment, the trial court erred in finding Defendants to have waived their set-off/recoupment defense, applying waiver standards that are procedurally inapplicable to motion practice, as opposed to appeals or trials. ***Third,*** the trial court erred in entering final judgment in the full amount of Plaintiffs' indemnification demand without considering voluminous evidence that the amount should be reduced per the Agreement and/or Delaware law. In sum, Defendants respectfully ask that this Court reverse all three of the aforementioned Orders, and to remand this matter for discovery and additional proceedings consistent with their reversal.

SUMMARY OF ARGUMENT

1. The trial court reversibly erred when it held that the Agreement's Termination Date does not apply to indemnification claims arising from letters of credit, despite the plain language of the Agreement and the drafting history of the Agreement. Alternatively, the trial court should have found the Agreement's provisions to be ambiguous and therefore denied summary judgment.

2. The trial court reversibly erred when it held that Defendants waived their affirmative defense of set-off/recoupment by not raising it in response to Plaintiffs' motion for partial summary judgment, despite the fact that Plaintiffs' motion challenged only the validity of several other affirmative defenses but not set-off/recoupment, and overtly sought a ruling as to liability alone.

3. The trial court reversibly erred when it entered judgment on Plaintiffs' breach of contract claim in the full amount sought by Plaintiffs (other than attorneys' fees and prejudgment interest), because the trial court disregarded evidence submitted by Defendants that Plaintiffs' indemnification demand should be reduced to account for the facts that Plaintiffs' losses: (i) arose prior to the Closing Date; and (ii) may have resulted from Plaintiffs' own alleged negligence and therefore would not be recoverable under Delaware law.

STATEMENT OF FACTS

A. The Selling Parties Incurred Major Cost Overruns And Damaged NASDI's Relationship With The General Contractor On The Project.

The Project aimed to increase the clearance under the Bayonne Bridge to allow post-Panamax container ships to safely travel underneath to New Jersey ports. A722. Instead of building a new bridge, the Project's owner (the Port Authority of New York and New Jersey or the "Port Authority") chose to build a new bridge deck and approaches in the existing bridge's footprint, supported by taller piers and a strengthened arch structure. *Id*. The Port Authority committed to maintaining two-way traffic at all times, subject to intermittent night and weekend closures. *Id*. According to the General Contractor, the Port Authority rushed the Project to market without final, constructible plans – which the Port Authority has denied. A723.

NASDI won the bid for the demolition scope of work on the Project, as subcontractor to the General Contractor. *Id*. The General Contractor insisted on pervasive changes to the job which forced NASDI to change its overall schedule, work sequence, means and methods, timing of work shifts, and job site access compared to what NASDI had bid. These changes, in turn, drastically increased NASDI's costs during the first two stages of demolition work. A723-728. Rather than grant NASDI change orders, however, the General Contractor concocted a plan in 2013 to blame NASDI for the problems. Zurich North American Insurance Company ("Zurich") was Skanska's "lead surety" and the General Contractor

anticipated that it could recoup an additional $20 million if it could portray NASDI as having defaulted so that Zurich would disburse NASDI's performance bond to the General Contractor. A725-728. The General Contractor has taken the position – both with NASDI under the Selling Parties' ownership as well as in subsequent litigation in New York federal court – that NASDI "blew its bid," negligently managed its work, used inefficient work practices that drove up its costs, and/or lacked the experience necessary to do the job in the first place. A728.

B. The Parties Negotiate And Execute The Agreement And The Selling Parties Offload The Purchased Companies.

The Selling Parties and Buying Parties began negotiating the sale of the Purchased Companies, including NASDI, in early 2014. The terms of the transaction were finalized in the Agreement. A244-306. The value of NASDI was in large part based on Selling Parties' representations of the cost and completion status of several ongoing jobs being performed by the Purchased Companies, including the Project. A265-267, A407. The Agreement specified that the Selling Parties would support the existing bonding for all ongoing demolition jobs, secured by a letter of credit in the event one of the bonds was called based on an alleged default. A291-293.

In this action, the key aspect of the Agreement is the date by which one party can make claims against the other if it incurs losses arising from letters of credit—whether claims for indemnification based on losses as a result of letters of credit are

cut off by the March 31, 2016 Termination Date. *See* A261 (defining "Termination Date").

During the negotiation and drafting of the Agreement, on or about March 26, 2014, revisions to a draft of the Agreement (the "Draft Agreement") were made by the Selling Parties' transactional counsel and circulated to counsel for the Buying Parties. A515-578. Two key provisions of the Draft Agreement were different from the execution version in two important ways:

Draft Agreement [A564]	Execution version [A297-298]
but in any event before the Termination date	but in any event before the later of the Termination Date or the survival period provided in Section 9.5 with respect to particular representation or warranty to which the matter applies (the "Applicable Claim Period")

In addition, the prior version of Section 9.7 is different from the one contained in the execution version of the Agreement:

Draft Agreement [A566]	Execution version [A299-300]
Notwithstanding the foregoing, nothing in this Agreement shall limit any Person's liability for such Person's common law fraud.	Notwithstanding the foregoing, nothing in this Agreement shall limit (i) any Person's liability for such Person's common law fraud or (ii) any rights of subrogation the Parent or any Subsidiary of the Parent may have under or with respect to any Company Surety Bonds, and Company Surety Bond Obligations, the Parent Bond Guarantees, any Company LC Obligations or the Letter of Credit.

During negotiations, the parties recognized two types of claims that might arise after the Termination Date and took different approaches to avoid these claims being barred prematurely by the Agreement. First, the parties provided an exception to the Termination Date for specific representations with express survival periods beyond the Termination Date. Second, the parties exempted fraud and equitable subrogation claims, including bond claims, from the Termination Date. *See* A299-300.

The Agreement also allocates indemnification responsibilities between the parties based on whether losses occurred pre- or post-closing: Article 9.1(a) of the Agreement requires the Selling Parties to indemnify the Buying Parties for losses that "***arise from, relate to or are incurred in connection with*** the Dore Surety Bond Obligations, in each case, ***as a result of*** events occurring prior to the Closing." A295 (emphasis added). The Buying Parties have a corresponding obligation to the Selling Parties for losses arising from events occurring after the Closing. A297.

C. The General Contractor Forces NASDI Off The Job.

In early 2017, after a nineteen-month delay, the General Contractor finally authorized NASDI to commence demolition for Stage 4 of the Project, the last and most cost- and labor-intensive stage. A732-733. Prior to authorizing NASDI to start Stage 4, the General Contractor asked NASDI to submit its estimate of the additional costs NASDI would incur due to this substantial delay. NASDI submitted an estimate of approximately $7.5 million. *Id*. The General Contractor performed two

rounds of estimates verifying NASDI's claim and passed the claim to the Port Authority, but then the General Contractor summarily rejected the entire claim and demanded that NASDI give the General Contractor a $750,000 credit after the Port Authority informed the General Contractor that the Port Authority would disburse delay claim funds in a lump sum which the General Contractor could allocate among subcontractors (or not at all) in its discretion. *Id*. After being backed into a corner, on February 17, 2017, NASDI responded with a notice of termination, with an effective date of February 21, 2017. A733. On February 19, 2017, the General Contractor rejected NASDI's notice and ordered NASDI to rescind it. *Id*. NASDI obliged and rescinded its termination notice on February 23, 2017, but asked the General Contractor to pay NASDI $1.9 million of the $7.5 million amount requested in NASDI's claim. *Id*. Despite the fact that the General Contractor had estimated the value of this same claim at $5 million shortly after it was received in June 2016, and had been considering providing a $7 million incentive schedule to NASDI a few weeks earlier, the General Contractor rejected this proposal and kicked NASDI off the job. *Id*.

D. The General Contractor Draws On The Letter Of Credit, Administered By Its "Lead Surety".

The General Contractor immediately sent a letter to the attorney for NASDI's sureties, stating the General Contractor's intent to draw on NASDI's performance bond due to NASDI's "default." A733-734. Although the sureties agreed to make

bond payments to the General Contractor, the sureties made very clear that they were taking no position as to the General Contractor's right to retain these funds:

> However, given NASDI's position as to the [General Contractor]'s breaches of the bonded subcontract, the Sureties will make such payments subject to the full and complete reservation of the rights, claims and defenses of both NASDI and the Sureties, whether arising under the subcontract, the bond or otherwise, as to [the General Contractor]'s default and termination of NASDI and all claims for additional compensation and other contested issues between NASDI and [the General Contractor].

Id. To date, the sureties have not expressed an opinion as to the cause or blame for NASDI's termination from the Project, or retracted their reservation of NASDI's rights, claims and defenses. A734.

E. The Parties Commence Actions Against Each Other In The Court Of Chancery.

On January 14, 2015, the Selling Parties commenced an action in the Court of Chancery, C.A. No. 10540-VCL (the "First Action"), alleging claims for Specific Performance, Declaratory Judgment, Breach of Contract, Unjust Enrichment, and Attorneys' Fees in connection with adjustments to the purchase price for the Purchased Companies. A59-61. The Buying Parties counterclaimed for fraud in the inducement, alleging that the Selling Parties induced the Buying Parties to buy the Purchased Companies by intentionally misrepresenting that the schedule delineating the cost and percentage of completion of the Purchased Companies' demolition projects was prepared using the percentage of completion method of accounting

according to Generally Accepted Accounting Principles ("GAAP"). *Id.* This misrepresentation falsely inflated the amount of work the Selling Parties had performed on the projects as of the Closing Date. *Id*. The Selling Parties moved to dismiss the fraud counterclaims pursuant to Court of Chancery Rules 9(b) and 12(b)(6). The Court of Chancery denied the motion to dismiss and referred the proceedings to an accounting Special Master to determine, among other things, whether the closing schedule was prepared in accordance with the cost of completion method pursuant to GAAP. A235-237. Following the Special Master's issuance of his "reports" containing his proposed rulings, which included, *inter alia*, a ruling that the schedule was prepared to GAAP, on August 19, 2019, the Court of Chancery ruled that the Special Master had failed to provide sufficient factual support for several of his conclusions and referred to matter to further proceedings, including an evidentiary hearing before the Court. That hearing was postponed due to the COVID-19 pandemic, and has not yet been rescheduled.

The Selling Parties filed the action below on May 26, 2017, seeking indemnification from the Buying Parties for the full amount of the letter of credit drawn down by Zurich to pay the General Contractor. In their Verified Complaint, the Selling Parties alleged three causes of action: (i) breach of contract; (ii) equitable subrogation; and (iii) declaratory judgment. A23-41.

Defendants moved to dismiss or stay the action below, on the grounds that the First Action was not only filed first, but sought a determination of the legitimacy of the Agreement (including the indemnification provisions at issue in the case now being appealed). A44-119. The trial court heard oral argument on the motion on December 1, 2017, at which time the trial court asked the Selling Parties to submit a letter addressing whether the to the trial court properly had subject matter jurisdiction to adjudicate the claims below. A179-204. In its letter submission to the trial court, the Selling Parties admitted that if their complaint did not include an equitable subrogation claim, the trial court would lack subject matter jurisdiction:

> As we noted at the oral argument on Buyers' motion to dismiss, if this dispute were limited to the first count [alleging breach of the Agreement] and were purely a matter of money damages, ***we agree that the action should be adjudicated in the Superior Court.*** However, because the owner made a claim on Zurich, which in turn executed on the security posted by Sellers for the bond as surety, Sellers asserted an equitable subrogation claim as an additional theory of recovery … ***The equitable subrogation claim is distinct from [Appellees'] breach of contract claim.***

A205-208 (emphasis added). In other words, the Selling Parties recognized that equitable subrogation is the appropriate remedy for their claims for losses on their letter of credit, a remedy distinct from indemnification claims, and they used that claim to convince the Court of Chancery to retain jurisdiction. *Id*.

The Buying Parties answered the Verified Complaint, denying that NASDI had defaulted on the Project and asserting that the trial court should dismiss the Selling Parties' indemnification claim because it was not asserted by the Termination Date. Appellants' Answer also asserted the following affirmative defenses: (i) unclean hands; (ii) waiver/estoppel; (iii) set-off and/or recoupment; and (iv) failure to mitigate. A209-234.

F. Plaintiffs File A Motion For ***Partial*** Summary Judgment, Without Challenging Defendants' Affirmative Defense Of Set-Off/Recoupment Or Submitting Proof Of The Amount Of Their Damages.

On March 9, 2018, Plaintiffs filed their Motion for ***Partial*** Summary Judgment claiming that the Agreement is unambiguous and that the Termination Date applies only to claims for certain representations and warranties, not to Plaintiffs' claims based on the letter of credit Zurich called to satisfy the General Contractor's claim that NASDI had defaulted on its contractual obligations to complete the Project. A445-479. In doing so, Plaintiffs overtly disclaimed that they were seeking summary judgment on their claim for equitable subrogation. A473. Plaintiffs also specifically sought summary judgment on several, ***but not all***, of Defendants' affirmative defenses. ***Plaintiffs did not even mention the Defendants' recoupment/set-off affirmative defense in their motion***. *See* A445-479. Further, Plaintiffs reiterated they sought damages of $20,934,028.56 as stated in their Verified Complaint, but did not present any evidence or argument as to the amount

of damages to account for any reduction as a result of Defendants' set-off/recoupment affirmative defense. *Id.* Neither the amount of Plaintiffs' damages nor Defendants' right to set-off/recoupment were raised in the motion for partial summary judgment. *Id.* Indeed, Plaintiffs directly stated that although "Defendants have raised some affirmative defenses … none of them creates an issue of fact ***concerning their liability***." A456 (emphasis added). In their very own words, Plaintiffs sought an interlocutory judicial determination of their entitlement to indemnification claims arising from losses on letters of credit – not a determination of the amount of their damages. *Id.*

Defendants timely filed their opposition to the partial summary judgment motion on April 20, 2018. A480-579. In that opposition, Defendants argued that Defendants' interpretation of the Agreement was erroneous, for at least the following reasons:

- the plain language of the Agreement designates March 31, 2016 as the Termination Date for all indemnification claims, including those arising from letters of credit; [A495-497; A499-501]
- the Agreement makes equitable subrogation the parties' remedy for claims based on letters of credit after the Termination Date, which the parties would not have done if the Agreement allowed indemnification claims after that date; [A506]
- Plaintiffs had not factually established that Appellants breached the Agreement; [A494-495]

- the Agreement's reference to a "Bond Covenant Termination Date," by its plain text, does not extend the deadline for claims based on letters of credit; [A497-498; A501-503]

- to the extent the trial court deemed the Agreement ambiguous, the trial court should consider evidence of the parties' negotiation and drafting history, which raises a genuine issue of material fact that Defendants' interpretation of the Agreement is correct; [A491-493; A503-506]

- Plaintiffs had no grounds to challenge Defendants' affirmative defenses of unclean hands and failure to mitigate. [A506-510]

Because Plaintiffs had filed a motion for ***partial*** summary judgment on liability alone, which specifically challenged some of Defendants' affirmative defenses but not others, Defendants did not brief their affirmative defense of set-off/recoupment in their opposition. Defendants had no reasonable basis to believe that Plaintiffs were challenging Defendants' set-off/recoupment claim. Plaintiffs did not present arguments against set-off/recoupment to which Defendants could respond within the scope of the briefing. Plaintiffs' own statements in their motion showed their understanding that Defendants' affirmative defense of set-off/recoupment presented a dispute of material fact related to damages, not liability, and therefore was not a proper subject of partial summary judgment seeking an interlocutory contract interpretation.

G. The Trial Court Grants Plaintiffs' Motion For Partial Summary Judgment Based Purely On "Contractual Interpretation."

Following oral argument (A614-659), on April 8, 2019, the trial court issued a written opinion granting Plaintiffs' motion for partial summary judgment (the

"Summary Judgment Opinion," Exhibit A). The trial court noted that under Delaware law, "pure matters of contractual interpretation [are] readily amenable to summary judgment." *Id.* at 9. Although the trial court quoted § 9.3(a) of the Agreement, the trial court concluded that contrary to recognized principles of contract drafting which the opinion itself cited, the clause's use of the phrase "in any event" only applied to claims for breaches of specific representations and warranties – all other claims need only be made within a "reasonable time." *Id.* at 11-14. The trial court also dismissed Defendants' affirmative defenses of unclean hands and failure to mitigate. *Id.* at 14-17. The Summary Judgment Opinion does not mention Defendants' set-off/recoupment defense – even in passing – because that issue was not before the court on Plaintiffs' partial motion. *See generally* Exhibit A. Defendants filed a motion for reargument regarding the scope of Defendants' unclean hands defense, which the trial court denied, but confirmed that the doctrine of unclean hands applies to the equitable subrogation claim.

H. The Trial Court Grants Plaintiffs' Motion For Entry Of Final Judgment, Deeming Defendants' Recoupment Defense Waived.

On July 15, 2019, Plaintiffs moved for entry of final judgment, relying on the Summary Judgment Opinion. A660-669. In their motion for a final judgment, Plaintiffs sought: (i) the full amount of their original indemnification demand; (ii) an attorneys' fee award; and (iii) additional damages accrued due to a subsequent bond

draw by Zurich – none of which had been briefed in connection with Plaintiffs' motion for partial summary judgment. A668-669.

Defendants opposed the motion for final judgment on the grounds that: (i) Plaintiffs had not challenged Defendants' set-off/recoupment defense, and thus the trial court could not enter final judgment in Plaintiffs' favor prior to addressing that defense (A735-737); (ii) extensive factual evidence obtained in the New York Action demonstrated that Plaintiffs' losses arose prior to the Closing Date, and therefore Defendants had no responsibility to indemnify Plaintiffs for their losses (*id.*); and (iii) if the General Contractor proved in the New York Action that NASDI negligently performed the Project while under Plaintiffs' ownership, the amount of Plaintiffs' indemnification claim would need to be reduced because Delaware law prohibits indemnification for a party's own negligence (A738-739). Oral argument was held in January 2020 and the trial court took the motion under advisement. A1896-1913.

On April 13, 2020, the trial court issued an opinion granting Plaintiffs' motion for entry of final judgment in part (the "Final Judgment Opinion," Exhibit B). Although the trial court denied Plaintiffs' request for attorneys' fees and prejudgment interest, the trial court granted the motion for entry of final judgment on Plaintiffs' breach of contract claim. Exhibit B at 16. In doing so, the trial court disregarded Defendants' evidence against entering final judgment in the full amount

sought by Plaintiffs because it found that Defendants had waived their affirmative defense of set-off/recoupment by not briefing it in response to Plaintiffs' previously filed motion for partial summary judgment. *Id.* at 7-8. The trial court relied on authorities outside the summary judgment context – primarily appellate cases concerning failure to raise issues on appeal – for the proposition that arguments not raised in briefing are deemed waived. *Id*.

I. The Trial Court Enters Final Judgment In The Full Amount Sought by Plaintiffs, Without Considering Evidence Refuting The Amount.

On May 8, 2020, the trial court entered final judgment in the full amount sought by Plaintiffs on its breach of contract claim. Exhibit C. The trial court did not consider any of the uncontroverted evidence set forth in Defendants' opposition to the motion for entry of final judgment, in particular, facts showing that: (i) Plaintiffs' claimed losses were largely, and perhaps wholly, related to pre-Closing Date events, and therefore not subject to indemnification; and (ii) the General Contractor was arguing in the New York Action that Plaintiffs' pre-Closing Date negligence caused losses to NASDI, which if proven would bar Defendants from recovery since Delaware law does not allow a party to be indemnified for its own negligence. After deeming that Defendants waived their set-off/recoupment defense, the trial court did not analyze the facts supporting that affirmative defense – even though those facts directly bear on the proper amount of Plaintiffs' damages notwithstanding the issue of waiver.

ARGUMENT

I. THE TRIAL COURT REVERSIBLY ERRED BY FAILING TO INTERPRET THE AGREEMENT ACCORDING TO PRINCIPLES OF DELAWARE CONTRACT LAW

A. Question Presented

Whether the trial court reversibly erred by ruling that the Termination Date applies only to representations and warranties rather than all claims for indemnification. *See* A480-579.

B. Standard of Review

This Court reviews issues of contract interpretation *de novo*, drawing its own conclusions from the evidence in the record. *Merrill v. Crothall-American, Inc.,* 606 A.2d 96, 99-100 (Del. 1992).

C. Merits of the Argument

1. The Agreement Unambiguously Cuts Off Claims Based On Letters Of Credit At The Termination Date

Delaware law requires courts to enforce contracts according to their plain meaning. *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.,* 616 A.2d 1192, 1195 (Del. 1992). An exception to this rule exists when the contract is ambiguous, meaning that "the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings." *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.,* 36 A.3d 776, 780 (Del. 2012) (citation omitted). Under Delaware law, contracts are to be interpreted as a

whole so that all provisions are effective and none are rendered contradictory or meaningless. *Seabreak Homeowners Ass'n, Inc. v. Gresser,* 517 A.2d 263, 269 (Del. Chan. 1986). Delaware law also recognizes that "it is not the proper role of a court to rewrite or supply omitted provisions to a written agreement"; in the rare case that a court deems it appropriate to rewrite the contract to honor the parties' reasonable expectations, the court should only do so in manner that is "fact-intensive, turning on issues of compelling fairness." *Cincinnati SMSA Ltd. v. Cincinnati Bell,* 708 A.2d 989, 992 (Del. 1998).

The Agreement unambiguously states that the Indemnification Claims must be made by the Termination Date of March 31, 2016, except for the specified representation and warranty claims with designated survival periods:

> An Indemnitee shall give notice of a Claim … within a reasonable time after such Indemnitee becomes aware of the existence of any potential Claim … but in any event before the later of the Termination Date or the survival period provided in Section 9.5 with respect to particular representation or warranty to which the matter applies (the "Applicable Claim Period"), arising out of or resulting from: (a) any item Indemnified pursuant to the terms of Section 9.1 or 9.2 . . .

A297-298. Section 9.7 of the Agreement provides that except for claims of common law fraud and equitable subrogation on bond claims, the parties are limited to indemnification claims as defined and controlled by the Agreement. Sections 9.1 and 9.2 identify the respective indemnification claims of buyers and sellers. Section 9.3

lays out the claims process of the Agreement and begins by defining a "Claim" as a written claim for indemnification "for Losses under this Article 9," without limitation for specific types of Losses. *Id*. The Agreement then provides that an Indemnitee shall make a Claim "within a reasonable time" after the Indemnitee learns of a potential Claim "under this Article 9," without limitation as to the type of Losses. *Id.* Section 9.3 then qualifies the "reasonable time" provision by specifying that a Claim must be made "***in any event*** before the later of the Termination Date or the survival period provided in Section 9.5 with respect to particular representation or warranty to which the matter applies (the "Applicable Claim Period.")." *Id.* (emphasis added).

Section 9.5 of the Agreement, unlike Section 9.3, does not pertain to Claims but to the survival periods for the Agreement's representations and warranties. Section 9.5 provides that all representations and warranties terminate on the Termination Date, other than those made under Sections 4.1, 4.2, 4.9, 4.13, 4.15, 4.17, 5.1, and 5.3. A298-299. Thus, the "Applicable Claim Period" set forth in Section 9.3 accounts for the fact that the right to make indemnification claims based on specific representations and warranties that do not terminate on the Termination Date survives as long as those representations and warranties themselves survive.

After defining the Applicable Claim Period as (1) the Termination Date or (2) the survival date set forth in § 9.5 for specifically-identified representations and

warranties, Section 9.3 returns to general language that demonstrates that the temporal limitation of indemnification claims applies to all claims by specifically stating that it applies to "***any item*** Indemnified pursuant to the terms of Section 9.1 or 9.2." A297-298 (emphasis added). Then, after clearly stating that the notice provision applied to all claims, the Agreement states that indemnification rights and obligations will not be limited, so long as notice of the Claim is given before the Applicable Claim Period. A297-298. By these terms, the only logical reading of the Purchase Agreement is that ***all claims*** for indemnification are subject to the ***Applicable Claim Period***. That is, all Claims must be made by the Termination Date of March 31, 2016, other than the specific representations and warranties that survive the Termination Date as provided in the Agreement.

The trial court acknowledged that § 9.3 of the Agreement imposes two sets of deadlines: (i) "within a reasonable time" after the claimant has notice of the claim; and (ii) the later of the Termination Date or the deadline applicable to specific representations and warranties defined in the Agreement. Exhibit A at 11. The trial court recognized that the Agreement's use of the phrase "in any event" between these two clauses is generally recognized under contract drafting principles as imposing a limiting or qualifying clause. *Id*. Yet, the trial court erred by then pivoting to an extra-contractual interpretation based on "the purpose of the indemnification provisions as a whole." *Id.* at 12. In the Summary Judgment Opinion, the trial court

concluded that because Plaintiffs could not have sought indemnification for losses on their letter of credit that accrued after March 31, 2016, applying the black-letter interpretation the trial court itself laid out a few paragraphs earlier in the Summary Judgment Opinion would "undermine the purpose of the indemnification provisions" because Plaintiffs' claim accrued after the Termination Date, namely, when Zurich drew on NASDI's bond in February 2017. *Id.* at 12-14.

The trial court's interpretation does not comport with the plain meaning of the Agreement. Whether or not the trial court believed it was fair to terminate indemnification rights on letters of credit at the Termination Date, "[p]arties have a right to enter into good and bad contracts, the law enforces both." *Nemec v. Shrader,* 991 A.2d 1120, 1126 (Del. 2010). Further, terminating indemnification claims on the Termination Date is not a "bad contract" for Plaintiffs, who were represented by sophisticated counsel. The purpose of Section 9 of the Agreement is to contractually limit the claims that can be brought under the Agreement. It is not intended to provide rights that do not exist under law or extend any limitations period. Generally speaking, a seller would be more concerned with limiting exposure under a purchase agreement than a buyer, and a limitation on claims, and the time period in which they could be asserted, viewed at the time the Agreement was entered, would presumably benefit Plaintiffs more than Defendants. That is why the Agreement clearly states that "[t]he provisions of this ARTICLE 9 were specifically bargained

for and reflected in the amounts payable to [Plaintiffs] in connection with the transactions contemplated hereby." A300. The clear terms of the Agreement demonstrate the parties intended the indemnification provision to bar some potential claims.

However, the parties expressly allowed Plaintiffs to make claims of equitable subrogation for any bond losses incurred after the Termination Date. In fact, the exception for claims of equitable subrogation is unnecessary if indemnification claims could be made indefinitely. A party would have no need to seek equitable subrogation if it could recover on a claim for indemnification.

The trial court's holding also disregards the principle of *expressio unius*: if a contract lists specific items, it thereby excludes other similar items. *See Delmarva Health Plan, Inc. v. Aceto,* 750 A.2d 1213, 1216 (Del. Ch. 1999). Section 9.7 of the Agreement provides that the Agreement does not limit a party's liability under theories of (i) common law fraud or (ii) equitable subrogation, including claims based on letters of credit. A299-300. Had the parties intended to make the time for ***indemnification*** claims based on letters of credit unlimited, they would have drafted Section 9.7 of the Agreement also to include indemnification claims based on letters of credit. The parties, however, did not specifically list indemnification claims in Section 9.7. Thus, the trial court's interpretation of the Agreement does not comport with Delaware law and is erroneous, and therefore should be reversed.

2. In The Alternative, The Trial Court Did Not Consider Extrinsic Evidence To Interpret Ambiguities In The Agreement

The trial court's Summary Judgment Opinion infers that there may be two reasonable but conflicting interpretations of whether the Termination Date applied to all claims or only representation and warranty claims without extended survival periods. *See* Exhibit A at 9-12. The trial court determined that the first interpretation is unreasonable because it defeats the purpose of the indemnification provisions, as interpreted by the trial court. *Id.* at 12-14. As described above, however, that conclusion ignores the parties' more specific provision that equitable subrogation would remain as a remedy for letter of credit claims subsequent to the Termination Date.

There is nothing inherently unreasonable about limiting claims under a contract. This generally benefits both parties, and in a commercial sale transaction, the seller more significantly. In this case, the Court mistakenly relies upon bond obligations under Section 7 (Section 7.7 and the Bond Covenant Termination Date, specifically) to infer that the deadline of the Termination Date "undermine[s] the purpose of the indemnification provisions." *Id.* That is simply untrue and ignores Section 9.7.

In this case, the parties expressly negotiated provisions that restricted the type and time period of indemnification claims, but specifically allowed Plaintiff

equitable subrogation claims on bond and letter of credit claims without restriction. The purpose of the indemnification provision is not frustrated if it bars an indemnification when the aggrieved party has a remedy at law expressly allowed by the Agreement.

Equitable subrogation has been a recognized remedy in Delaware for over a century and would fully protect Plaintiffs' right to seek relief for losses on letters of credit. *See, e.g., Eastern Sav. Bank, FSB v. CACH, LLC,* 124 A.3d 585, 591(Del. 2015) (explaining nature and elements of equitable subrogation). Indeed, Count II of Plaintiffs' Verified Complaint alleges a claim for equitable subrogation, seeking to step into the shoes of Zurich and recover all amounts paid on Defendants' performance bond obligations following Plaintiffs' payment of the bond obligations. A35-36. The only difference between seeking equitable subrogation versus indemnification is that the defendant can raise equitable defenses in response to the equitable subrogation claim. *See* Exhibit A at 15 ("[a] court of law does not permit the defense of unclean hands"). Although Defendants maintain more defenses to equitable subrogation than to a purely contractual claim under Delaware law, the Agreement was fully negotiated at arm's length, and thus the trial court should not "rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal." *Nemec,* 991 A.2d at 1126. Accordingly, the trial court should have found, at the very least, that the aforementioned provisions of the

Agreement are ambiguous and considered extrinsic evidence regarding the parties' intent.

As described above, the drafting history of the Agreement demonstrates that the parties chose to add equitable subrogation as the sole remedy for claims based on letters of credit following the Termination Date. Because there was no discovery in the action below prior to the trial court's granting of Plaintiffs' motion for partial summary judgment, Defendants could not submit additional evidence and obtain testimony regarding the parties' intent. If this Court does not find that the terms of the Agreement unambiguously bars claims for indemnification on the letter of credit after the Termination Date, minimally, the Agreement is open to two reasonable interpretations and Defendants respectfully request that this Court remand this action to the trial court for discovery about the parties' intent and further proceedings consistent therewith.

II. THE TRIAL COURT REVERSIBLY ERRED WHEN IT FOUND THAT DEFENDANTS WAIVED THEIR RECOUPMENT DEFENSE

A. Question Presented

Whether the trial court reversibly erred in holding that Defendants waived their affirmative defense of set-off/recoupment by not raising it in response to Plaintiffs motion for partial summary judgment. *See* A456 ("The Indemnifying Defendants have raised some affirmative defenses, but, as explained below, none of them creates an issue of fact ***concerning their liability***. This case is therefore ripe for summary judgment in favor of Plaintiffs.") (emphasis added); *cf.* A710-743 (Defendants' opposition to Plaintiffs' motion for entry of final judgment, setting forth numerous material facts relevant to ***damages***); A1905 16:21 (Defendants' counsel refuting Plaintiffs' argument that in motion practice, any argument not raised in an opposition brief is deemed waived).

B. Standard of Review

This Court reviews a trial court's finding of waiver under the standard of plain error. *Med. Ctr. of Del., Inc. v. Lougheed,* 661 A.2d 1055, 1060 (Del. 1995) (citations omitted). "In order for this Court to find plain error, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Id.* (citations and quotations omitted).

C. Merits of the Argument

The trial court's finding that Defendants waived their set-off/recoupment defense meets the plain error standard. In ruling that Defendants waived their setoff/recoupment defense, the trial court eliminated Defendants' ability to present extensive evidence supporting a multi-million-dollar reduction in Plaintiffs' claim for indemnification. As set forth in Defendants' opposition to Plaintiffs' motion for entry of final judgment, Plaintiffs' claimed damages actually were caused by: (i) events that occurred prior to the Closing Date and/or (ii) Plaintiffs' own alleged negligence on the Project. *See* A722-739. Defendants have no obligation to indemnify Appellees under either circumstance. *Id*. To the contrary, Defendants are entitled to recoup amounts of damages caused by NASDI that occurred during Plaintiffs' ownership prior to the Closing Date. *Id.* The trial court disregarded evidence of Plaintiffs' conduct that occurred prior to the Closing Date and found that Defendants waived these arguments by not presenting them in response to Plaintiffs' motion for partial summary judgment – ***despite the fact that Plaintiffs never challenged Defendants' set-off/recoupment defense in their motion for partial relief, and sought the trial court's ruling only as to liability.***

None of the authorities relied upon by the trial court in finding that Defendants waived their set-off/recoupment defense address waiver in the context of summary judgment motion practice, much less in the context of a motion for ***partial*** summary

judgment. Each case relied upon – as well as the internal citations in those cases – concern either an appeal, or a "paper trial." Exhibit B at 7-8. The rules governing appeals and trials are vastly different from motion practice, because a party waives arguments not raised at trial prior to appeal, or in its opening appellate brief. That is not the case with partial summary judgment motions. The Delaware Court of Chancery Rules permit a party filing a motion for partial summary judgment to leave issues to open to be decided at trial that are outside the scope of the motion. *See* Del. Ct. Ch. R. 56. Defendants are unaware of any Delaware case law in support of the trial court's conclusion that a party waives an affirmative defense if its opponent moves for partial summary judgment and does not direct the motion against a particular affirmative defense, yet the non-moving party is deemed to have waived the affirmative defense ***that is not a subject of the motion*** by not briefing in in its opposition papers. Such a rule is particularly problematic and prejudicial in in this action, where the defense pertains to damages rather than liability, and serves to reduce the amount to which the Plaintiffs would otherwise be entitled. The trial court's interpretation of waiver would eviscerate a stated mechanism of Rule 56(c): to permit the moving party to seek summary judgment as to liability while leaving disputed material facts quantifying damages for further proceedings. If the non-moving party was required to support every element of its affirmative defenses, including those not being challenged, the judicial efficiency and conservation of

party resources would not be served and a portion of Rule 56(c) would be nullified: every summary judgment motion, even a partial summary judgment motion, would require the same scope of briefing by the non-moving party. *See* Del. Ct. Ch. R. 1 ("These Rules … shall be construed and administered to secure the just, speedy and inexpensive determination of every proceedings.").

Under Delaware law, in order for waiver to apply, there must be a finding of a "voluntary and intentional relinquishment of a known right." *AeroGlobal Capital Mgmt. v. Cirrus Indus.,* 871 A.2d 428, 444 (Del. 2005). "[Waiver] implies knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those contractual rights." *Id.* Defendants did not intend to waive their setoff/recoupment defense: that defense does not pertain to liability, and Plaintiffs averred in their motion for partial summary judgment that they were seeking a ruling as to liability alone. Defendants timely raised it in their answer to Plaintiffs' Verified Complaint, and supported that defense in their opposition to Plaintiffs' motion for entry of final judgment at the time when the issue of damages came before the trial court, thereby implicating Defendants' set-off/recoupment defense for the first time. *See Finger Lakes Capital Partners, LLC v. Honeoye Lake Acquisition, LLC,* 151 A.2d 450, 453 (Del. 2016) ("[s]et-off is a mode of defense by which the defendant acknowledges the justice of the plaintiff's demand, but sets up a defense of his own against the plaintiff, to counterbalance it in whole or in part …

the defense of recoupment goes to the reduction of the plaintiff's damages for the reason that he, himself, has not complied with the cross obligations arising under the same contract."). Based on the foregoing, the trial court reversibly erred in holding that Defendants waived an affirmative defense to damages by not raising it in response to Plaintiffs seeking partial summary judgment as to liability. Accordingly, this Court should reverse this holding and remand for further proceedings in connection therewith.

III. THE TRIAL COURT REVERSIBLY ERRED IN GRANTING PLAINTIFFS THE FULL AMOUNT OF THEIR INDEMNIFICATION CLAIM, WITHOUT CONSIDERING EVIDENCE THAT THE AMOUNT OF THE CLAIM SHOULD BE REDUCED

A. Question Presented

Whether the trial court reversibly erred in entering final judgment in the full amount sought by Plaintiffs, without considering evidence submitted by Defendants in their opposition to Plaintiffs motion for entry of final judgment that Plaintiffs are not entitled to the full amount of their indemnification claim. *See generally* A710-1771 (presenting voluminous evidence that Plaintiffs are not entitled to the full amount of their damages demand because all or part of those claimed damages: (i) arose from presale events; and/or (ii) resulted from Plaintiffs' own alleged negligence).

B. Standard of Review

This Court reviews the trial court's decisions regarding damages awards under an abuse of discretion standard. *Law v. Law,* 753 A.2d 443, 445 (Del. 2000). A trial court abuses its discretion when it "has exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice to produce injustice." *Parker v. State,* 85 A.3d 682, 684 (Del. 2014) (citations and quotations omitted).

C. Merits of the Argument

In the Court of Chancery, parties must prove their damages by a preponderance of the evidence. *See, e.g., Beard Research, Inc. v. Kates,* 8 A.3d 573, 613 (Del. Ch. 2010). The trial court cannot set damages based on mere speculation or conjecture. *Id.* Mathematical certainty is not required, but the trial court must have a basis to make a responsible estimate. *Id*. (citations and quotations omitted). Further, Court of Chancery Rule 56(d) requires the trial court to "make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just." Del. Ct. Ch. R. 56(d).

The trial court did not adhere to these principles in entering final judgment in favor of Plaintiffs for the full amount of their indemnification claim (other than attorneys' fees and prejudgment interest). The trial court did not consider the weight of any of Defendants' evidence set forth in their opposition to Plaintiffs' motion for final judgment after finding that Defendants had waived their affirmative defense of set-off/recoupment. Notwithstanding the issue of waiver, Defendants submitted evidence that Plaintiffs' damages should be reduced because questions of fact existed as to whether: (i) the causes of the "loss" to the letter of credit arose pre-sale, thereby alleviating Defendants of indemnification responsibilities; and (ii) Plaintiffs' own negligence triggered that loss – as the General Contractor has

been endeavoring to prove in the New York Action. Without considering these issues, the trial court could not properly enter final judgment against Defendants in a specific amount. Indeed, the trial court's opinion notes in passing that Defendants' factual assertions supporting set-off/recoupment are "unproven," ignoring that in the absence of discovery or a trial on the issues there was no way for Defendants to prove these facts. Exhibit B at 9.

In its Final Judgment Opinion, the trial court did not find that Defendants' evidence was inadmissible, unreliable, or otherwise undeserving of consideration. Nor did Plaintiffs provide any basis for the trial court to make that finding. Rather than allowing a process to consider this evidence about the proper amount of Plaintiffs' damages, the trial court awarded Plaintiffs the full amount of their indemnification claim as alleged in the Verified Complaint. Doing so was an abuse of the trial court's discretion, and this Court should reverse the trial court's entry of final judgment and remand for further proceedings consistent herewith to determine the proper amount of Plaintiffs' indemnification claim.

CONCLUSION

For the forgoing reasons, Defendants respectfully request that this Court: (i) reverse the trial court's order granting Plaintiffs' motion for partial summary judgment and (ii) reverse the trial court's order granting Plaintiffs' motion for entry of final judgment on breach of contract claim in the full amount Plaintiffs sought on their breach of contract claim; and (iii) remand this action to the trial court for discovery and other proceedings consistent with reversal of the aforementioned orders.

Dated: July 23, 2020

CHIPMAN BROWN CICERO & COLE, LLP

/s/ Joseph B. Cicero
Paul D. Brown (#3903)
Joseph B. Cicero (#4388)
Hercules Plaza
1313 North Market Street, Suite 5400
Wilmington, Delaware 19801
(302) 295-0191

Attorneys for Defendants Below, Appellants

OF COUNSEL:

Mark L. McAlpine
Douglas W. Eyre
MCALPINE PC
3201 University Drive, Suite 100
Auburn Hills, MI 48326
(248) 373-3700