IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEMATIC CORP.,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 180, 2023
v.	)	
	)	Court Below – Superior Court of the
FORTIS ADVISORS, LLC,	)	State of Delaware,
	)	C.A. No. N18C-12-104 MAA CCLD
Plaintiff-Below,	)	
Appellee.	)	
	)	

[CORRECTED] OPENING BRIEF OF DEFENDANT-BELOW/APPELLANT DEMATIC CORP.

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Dated: August 23, 2023

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NATURE OF PROCEEDINGS

This appeal involves an "earn-out" dispute arising from a merger between Dematic Corp. and Reddwerks Corporation. Instead of simply enforcing the terms of the parties' agreement, the Superior Court manufactured a contractual ambiguity, then employed an atextual contract interpretation, and finally imposed a draconian evidentiary presumption that preordained the verdict at trial. The Superior Court's decision was wrong for several independent reasons. But the most glaring among them was the Superior Court's disregard for every tool of contractual construction endorsed by this Court—from plain text to *ejusdem generis*—all of which weigh decisively in favor of Dematic's plain reading of the agreement. Simply stated, the parties entered into an agreement containing an express definition of the term "Company Products" as well as a list of products that fell within that definition. The Superior Court essentially amended the parties' agreement to add "source code," which is not a Company Product but simply a component of a Company Product, to that contractual list of Company Products. That was clear error, and this Court should reverse.

* * *

Dematic and Reddwerks operate in the supply-chain logistics space. In 2015, Dematic purchased Reddwerks pursuant to a heavily negotiated Merger Agreement

("Agreement").[1] Dematic agreed to pay approximately $45 million up-front and up to $13 million to "Company Holders"——Reddwerks' former shareholders—of additional Contingent Consideration. The amount of Contingent Consideration would depend on whether revenue ("Order Intake") and EBITDA thresholds for sales of "Company Products" were met during the fourteen-month post-merger Earn-Out Period.

Company Holders were represented in the merger by Fortis Advisors, LLC. At the end of the Earn-Out Period, Dematic sent Fortis calculations showing that although Order Intake slightly exceeded the minimum contractual threshold, EBITDA from Company Product sales was well below the threshold. Consequentially, $3 million of Contingent Consideration being held in escrow had to be released to Dematic. Fortis objected to Dematic's calculations, but ultimately jointly signed with Dematic an authorization releasing the escrow to Dematic.

In December 2018, Fortis sued Dematic in the Superior Court, claiming entitlement to the full $10 million in Order Intake; Fortis did not seek recovery for any EBITDA amount. After asserting various theories to support its claim—each of which was dropped as the record evolved—Fortis raised a new theory just two

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[1] A98-A256.

months before trial: Dematic had deflated Order Intake and EBITDA by employing a too-narrow interpretation of Company Products.

Dematic vigorously disputed that eleventh-hour claim. Consistent with the contractual definition of Company Products, Dematic had calculated Order Intake and EBITDA based on sales—either by Dematic-Reddwerks (Reddwerks' post-merger name) or by Dematic itself—of specified *Products* that the *Company* (Reddwerks) had been distributing at the time of the merger. Fortis now claimed, however, that Company Products *were not* limited to products that Reddwerks was distributing as-of the merger. Instead, Company Products also encompassed *subcomponents* of those products, specifically, lines of software source code. This contractual question is the essence of the parties' dispute.

Despite the plain language of the Company Products definition and multiple provisions of the Agreement rendering Fortis's position legally and logically incoherent, the Superior Court found a definitional ambiguity, which the court then resolved in Fortis's favor. That, in turn, triggered an evidentiary presumption—an earlier-imposed discovery sanction for what the Superior Court found was Dematic's failure to produce data reflecting Dematic's incorporation of Reddwerks source code into Dematic products. Under that presumption, if Fortis's contractual interpretation prevailed, the Order Intake and EBITDA targets would be deemed satisfied. The court ultimately adopted Fortis's contractual interpretation, triggering the

presumption entitling Fortis to the full $13 million in Contingent Consideration, despite Fortis having failed to adduce any admissible evidence supporting its entitlement to any damages. The court entered judgment for that amount against Dematic.[2]

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[2] In awarding judgment to Fortis, the Superior Court dismissed Dematic's counterclaim addressed in Argument IV.

SUMMARY OF ARGUMENT

1.   The Superior Court reversibly erred by determining, contrary to the Agreement's plain text, that source code—computer instructions that make up software products—is itself a Company Product.   Neither the unambiguous definition of Company Products, nor the presence of source code *within* Company Products, nor Dematic's commitment "to integrate Company Products into [Dematic's] products and services," support that conclusion.

2. The Superior Court reversibly erred by imposing, as a discovery sanction, a conditional evidentiary presumption that put Fortis in a materially better position than Fortis would have occupied had it received the evidence for which the presumption was intended to substitute.   By conclusively establishing Fortis's entitlement to its full damages claim without requiring Fortis to make any evidentiary showing of damages, the sanction impermissibly relieved Fortis of its substantive burden of proof.

3. The Superior Court reversibly erred by concluding that Dematic waived or was estopped from arguing that Fortis's release of the $3 million EBITDA Adjustment to Dematic precluded Fortis from challenging that very release in court. That result was based on the erroneous factual conclusion that Dematic had consented to Fortis's reservation of rights to assert a later challenge. The record establishes that Dematic had expressly rejected that reservation. The court further

erred by permitting Fortis to pursue the $10 million in Order Intake despite having failed to appoint an accountant to review the calculation, the procedure set by the Agreement for resolving such disputes.

4. The Superior Court reversibly erred by rejecting as a matter of law Dematic's counterclaim seeking indemnification for the losses it incurred retrofitting Reddwerks' defective PTL system. The court concluded that Dematic had failed to show that Reddwerks had *actual* knowledge of the defect when Reddwerks represented in the Agreement that it had no knowledge of any basis for future claims that would require replacing any PTL system. That conclusion was legally erroneous because under the Agreement's plain terms, all Dematic had to—and did—establish was that Reddwerks *reasonably should have known* about the defect.

STATEMENT OF FACTS

A.   The Merger

In negotiating the Agreement, the key dispute between the parties was price. Given Reddwerks' historically modest revenue, Dematic was reluctant to pay the significant valuation Reddwerks gave itself based on its optimistic projections. To bridge their valuation gap, the parties agreed to a hybrid model for merger consideration: $45 million up-front, plus post-merger Contingent Consideration (up to $13 million) whose magnitude would depend upon achieving Order Intake and EBITDA target sales of Company Products during the fourteen-month Earn-Out Period.

To be entitled to any of the up-to-$10 million Contingent Consideration for Order Intake, the revenue on Company Product sales had to be at least $36 million. Company Holders would then accrue the $10 million *pro rata* until becoming entitled to the full amount if sales reached $48 million. A2750; A2755-A2756. And if Company Products sales yielded at least $9.3 million in EBITDA, Company Holders would be entitled to $3 million that Dematic had placed in escrow at closing. The Agreement included an EBITDA Adjustment that imposed "dollar-for-dollar" deductions from the $3 million for every dollar that EBITDA fell below $9.3 million. The EBITDA Adjustment (and other permitted deductions) would be paid to

Dematic; any monies remaining would be paid to the Company Holders and Management Bonus Pool.

Both the Order Intake and EBITDA calculations turned on the magnitude of Company Product sales. Essential to the calculation, therefore, was the scope of Company Products, which is a defined term under the agreement:

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

A145 (§4.12(h)). Schedule 4.12(h), Part 1 (the "Company Products List" or "List") listed the specific software and hardware products that Reddwerks was distributing at the time of the merger. A301. The software products in the List were divided into four categories: "Core Software Modules," "Optimization Software Modules," "Warehouse Control Software Modules," and "Workflow Software Modules." *Id*. The List enumerated specific software modules under each category, each named according to the function they perform in the Warehouse Execution System. For example, some modules included under "Workflow Software Modules" were for "Receiving," "Putaway," "Inventory Move," "Palletizing," and "Loading." *Id*. The List also included two categories of hardware products: Reddwerks Pick-to-Light ("PTL") and Third-Party Hardware. *Id*. As with software products, the List

enumerated specific hardware products within each of these two categories. Importantly, source code is not identified in the Company Products List.

Reddwerks' negotiators (who were among Reddwerks' larger Company Holders) took a strong interest in the Contingent Consideration formulation and how contractually to maximize the likelihood of a full payout. A2574-A2578. The primary assurance they received was Dematic's agreement that, during the Earn-Out Period, Dematic would "(i) incentivize its sales force to sell Company Products and (ii) utilize its engineers and the engineers of [Dematic-Reddwerks] to integrate Company Products into [Dematic's] products and services." A124 (§3.1(h)(i)). In their testimony, Reddwerks' negotiators claimed this term meant that Dematic would expand the footprint of Company Products by integrating elements from Company Products into Dematic products, and then allocating credit generated from sales of those integrated products to Contingent Consideration. A2630, A2634. The Agreement, however, reflects no such intent, as it provides no formula or metric by which the sale of Dematic products containing some sub-elements of a Company Product could be translated into measurable Order Intake or EBITDA. Ex. C, Post-trial Memorandum Opinion ("Op."), 54. In contrast, the Agreement does provide explicit instructions for apportioning the sales value of other modes of Company Product integration, *e.g.*, where Dematic sells a solution that includes Dematic products and Company Products. A125 (§3.1(h)(iv)).

B.   Post-merger, Dematic Quickly Learns That Reddwerks' PTL System Is Defectively Designed

One of the Company Products was hardware called the "Pick-to-Light" or PTL Solution—an automated order-picking system wherein traffic-light-like fixtures direct human operators to select products for orders. A1501. In February 2016, ten weeks after the merger closed, Dematic engineers were shown "for the first time" "the electrical implementation of the [PTL] system," and communicated that "[i]mmediately, it became obvious that the design did not follow common safety guide lines for its power distribution system." A1303. One of several easily identified deviations from basic safety principles was a defect with the PTL system's wiring, where excessive current could flow through the wiring, risking overheating, melting, and fire. A1304 ("[A] wiring fault can…become a fire hazard for average current levels above 4A.").

Given the defect's significance, the issue quickly "escalat[ed]" within Dematic. A1295. In March 2016, Dematic engaged an independent engineering firm—Safety Engineering Laboratories—to investigate the defect, and promptly notified Fortis of the issue, too. A2730; A1244-A1245. It took Dematic two years to develop a plan to correct the defect. A2653. After notifying customers of the defect, A2738; A1254, Dematic retrofitted the PTL systems in nearly seventy customer facilities, A2730; A1244-A1245, at a cost of $5,377,619.94 as of June 2021, A2645; A2619.

C. Dematic Calculates Order Intake and EBITDA, and the Parties Agree to Release the Escrow to Dematic.

The Agreement obligated Dematic to send Fortis monthly updates "show[ing] the Order Intake Amount for such month and year-to-date periods," A127 (§3.1(k)(ii)), and to provide, by March 31, 2017, "its good faith calculation of (1) the Order Intake Amount for the Earn-Out Period and (2) the Earn-Out Period EBITDA in reasonable detail," A124-A125 (§3.1(h)(ii)). Dematic complied with both obligations. A593, A1235. The September 2016 report covering the Period through July 31, 2016, made it apparent that Company Products sales would not reach the thresholds for payment of the full $13 million in Contingent Consideration. A606. On March 9, 2017, Dematic notified Fortis that Order Intake was $37,873,474 and EBITDA was $4,352,449.42. A1235. Although Order Intake was sufficient to trigger payment to Fortis of $1,561,228, Dematic properly offset that payment by its incurred indemnifiable losses. *Id.* And because EBITDA had fallen nearly $5 million short of the $9.3 million threshold, Dematic sought the full $3 million EBITDA Adjustment from escrow. *Id.*

"[F]rustrated" by the unfavorable results, A1240, Fortis for the first time disputed Dematic's calculations.[3] A1480-A1481. By June 2017, Fortis had

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[3] Despite the updates being prepared with the involvement of former Reddwerks executives who were in communication with Fortis, Fortis never objected to any monthly update calculation.

persuaded itself that the Company Products' less-than-hoped-for performance *had to be* the result of *some* Dematic misconduct. *See* A1251-A1253; A1240. But Fortis never sought to "retain a nationally or regionally recognized independent accounting firm mutually…to review the calculation," as required by the Agreement to resolve calculation disputes. A124-A125 (§3.1(h)(ii)); Op. 17.

Dematic, on June 27, 2017, sent the escrow agent an "Undisputed Amount Notice" (the "EBITDA Notice") seeking payment of the $3 million by reason of Fortis's failure to meet the EBITDA threshold. A1266. Despite initially objecting to the EBITDA Notice, A1265, Fortis ultimately jointly submitted with Dematic the "Undisputed Amount Notice" (the "Joint Notice") contemplated by §1.4(c) of the Escrow Agreement, A1268. The Joint Notice "certif[ied] that the amount of $3,000,000.00 (the "Claimed Amount"), which is the subject of a Claims Notice based solely on the Parent's calculation of the Earn-Out Period EBITDA (the "Undisputed Amount") is owed in full to [Dematic]." A1272. Despite voluntarily joining the notice, Fortis purported to assert a "reservation of rights . . . including those with respect to questions or issues relating to the calculation of the Earn-Out Period EBITDA" that was flatly incompatible with the release Fortis signed. A1274. In response, Dematic steadfastly maintained its position that the Joint Notice "fully and finally resolves any dispute related to the calculation of the Earn Out Period EBITDA." A1275.

The Agreement required that indemnification claims related to representations and warranties be asserted during the claims' eighteen-month survival period. A165 (§7.2(a)). Accordingly, in June 2017, Dematic formally notified Fortis of Dematic's entitlement to indemnification for the losses incurred because of the representations and warranties Reddwerks had breached by failing to disclose the PTL defect. A1244-A1245.

D. Fortis Sues without a Clear Legal Theory, Shifting to "Source Code" Only Two Months Pre-Trial; the Superior Court Nevertheless Sanctions Dematic for Not Producing Source Code, and Finds for Fortis after Trial.

The ensuing discussion focuses on the events culminating in the Superior Court's imposition of the discovery sanction that singularly drove the result below. Dematic submits that the sanction the trial court was persuaded to enter, as a result of Fortis's aggressive litigation tactics, colored the court's view not only of Dematic's integrity, but also of Dematic's merits position. Dematic acknowledges that some of its discovery responses were found to be insufficient and—with the notable exception of the Superior Court's sanctions order—does not challenge those determinations on appeal. But, as shown below, the discovery record does not support the conclusion that Dematic conducted discovery in bad faith.

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Fortis sued Dematic in December 2018, filing a seven-page complaint for breach of contract. Consistent with its concession when releasing the escrow, Fortis sought to recover only the $10 million in Order Intake—not the $3 million EBITDA amount. A1310-A1316.

    a.   Fortis aggressively pursues discovery, then enlarges the definition of Company Products—and thus the scope of discovery—only two months before trial.

Discovery began in March 2019. Given the centrality that source code played in the Superior Court's contract interpretation and judgment, it is striking that the words "source code" are absent from any pleading, motion, discovery request, or submission to the court during over two years of litigation. Those words were never uttered until Fortis mentioned them in an April 2021 hearing—just two months before trial—after the 30(b)(6) deposition of Dematic engineer Andrew Gill. A2548. Before then, Fortis had consistently argued across multiple discovery disputes that Company Products referred to *functionalities* (not the component building blocks that create functionalities), and that Dematic was defining too-narrowly what documents reflected the integration of that functionality. But contrary to Fortis's suggestion, until the eve of trial, those disputes *never* concerned the scope or definition of the Company Products that the Agreement required to be integrated.

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Fortis filed its first motion to compel in September 2019. In its "October Order," the Superior Court granted that motion, requiring Dematic to produce "documents wherein…engineers…integrate[d] Company Products into [Dematic] products and Services." A1488-A1489. Company Products were defined as in the Agreement, *i.e.*, in terms of functionalities. A1484. Dematic "devoted substantial time, effort, and money" to collect over a million documents from a dozen-plus custodians. A1854-A1855.

Fortis filed its first motion for sanctions on March 12, 2020, claiming Dematic had not complied with the October Order and had failed to produce documents "about each instance when Defendant's engineers integrated Company Products into Dematic products and services." A1843. The parties executed a stipulation, approved by the court, to resolve the dispute. A2295. Again, the stipulation and court order defined Company Products "in the manner ascribed in…the Agreement." A2296. Fortis still did not contend that source code was a Company Product. *See* Op. 47, 49.

On October 16, 2020, Fortis renewed its sanctions motion, claiming Dematic produced an unprepared Rule 30(b)(6) witness. The court denied sanctions, but faulted Dematic for limiting its discovery responses to "contracts that Dematic concedes incorporated Reddwerks' products, rather than all contracts that incorporated *the same functionality* as Reddwerks' product." A2494. The court

"require[d] Dematic to produce the contracts and 'as-installed records' for *all* contracts in effect during the Earn-Out Period that involved the sale of products with the same functionality as Reddwerks' products." *Id*. At this stage, consistent with the Agreement's terms, *everyone's* focus remained upon identifying Dematic products that incorporated Reddwerks *functionality* from the Company Products List, not upon any source code component underlying that functionality. The court's ruling neither contemplated nor ordered Dematic to produce source code records. A2484.

In its third motion for sanctions, Fortis argued that only during Dematic's 30(b)(6) deposition did Fortis learn of the Confluence and Jira systems—software programs that were well-known to Reddwerks—by which Dematic tracked the tasks its engineers were working on with respect to each Dematic product. Confluence and Jira do not record what source code is integrated, only that engineers performed some integration. Gill testified that, in preparation for his deposition, he reviewed those databases to identify what Dematic products would have used Reddwerks code, and, based on that review, commissioned a one-off review—unconnected to Confluence or Jira—of the Reddwerks source code in a Dematic product made under a contract for one of its customers, Under Armour. A2526-A2528; A2535-A2541; A2544.

Fortis omitted from its breathless motion that the reason Gill undertook that review, despite no party having sought evidence of source code integration, was Fortis's last-minute expansion of the deposition topics to encompass far broader discovery than it had ever sought. Fortis's original 30(b)(6) notice to Dematic defined Company Products exactly as did every prior discovery request: with reference to §4.12(h). A2310. But just before the deposition, in its March 12, 2021 revised notice, Fortis suddenly defined Company Products much more expansively, to include "every line of code, every algorithm…every proprietary process" and "any Dematic product or service that included or was derived from any constituent element or function of a Company Product." A2513; A2563-A2564. Dematic objected to Fortis's attempt thereby to enlarge the scope of discovery and change its legal theory, but in the spirit of cooperation prepared a witness on that topic. A2564-A2565. This is why Gill prepared on source code—not because Dematic believed source code was a Company Product or would lead to discoverable evidence.

Until then, Fortis had never claimed that Dematic's treatment of Reddwerks source code was relevant to determining Contingent Consideration.[4] Until Fortis's eleventh-hour expansion of its 30(b)(6) notice, Fortis *never* defined Company

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[4] To the extent the Superior Court suggested otherwise during the May 7, 2021 hearing on Fortis's third motion for sanctions, the court correctly recognized that this belief "may well be a misunderstanding." A2614. The record shows that, until its third sanctions motion, Fortis never claimed that source-code integration was relevant to Contingent Consideration.

Products differently from the Agreement. Nor did Fortis ever seek discovery from Dematic regarding anything other than integration of Company Products. And Fortis *never* took the position that integration of source code, or any other component of a Company Product, constituted integration of a Company Product. Because Company Products were unambiguously defined with reference to functionalities, Dematic responded to Fortis's discovery requests regarding Company Product integration by producing documents addressing the integration of functionality—not integration of source code.

Even so, Fortis moved a third time for sanctions, finally convincing the Superior Court to impose the draconian, damages-dispositive sanctions that Fortis had aggressively been seeking for over a year. A1512; A2335-A2336. Disregarding the record, Fortis claimed that information about merging Reddwerks source code had been what Fortis had always sought. A2607-A2609. The court was persuaded and imposed so-called "conditional evidentiary presumptions" that would apply if the court adopted Fortis's (new) argument that Company Products include source code. In that event, it would be "presumed that the Order Intake Amount achieved by [Dematic-Reddwerks] and/or Dematic during the Earn-Out Period was greater than or equal to $48,000,000…[and] that the Earn-Out Period EBITDA for [Dematic-Reddwerks] during the Earn-Out Period was greater than or equal to $9,300,000." A2489.

In its post-trial decision, the Superior Court allowed Fortis to seek recovery of the $3 million EBITDA payment despite Fortis having conceded Dematic's rights to those funds in the Joint Notice, and the $10 million in Order Intake despite having ignored the Agreement's procedure for contesting that calculation. The court then found that the Agreement's definition of Company Products was ambiguous, so relied on extrinsic evidence "to conclude" that "Reddwerks' source code and products integrating that source code are Company Products." Op. 52. That determination triggered the evidentiary presumptions. As a result, and without requiring Fortis to carry its burden of proof for a cent of damages, the court ruled that "Fortis has satisfied its burden of proving that Dematic breached the Merger Agreement with respect to the calculation and payment of the Contingent Consideration." Op. 62. The court entered judgment awarding Fortis $10 million in Order Intake plus the $3 million EBITDA Amount.[5] The court also dismissed Dematic's counterclaim.

This appeal followed.

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[5] The Superior Court agreed that Dematic was entitled, under the Agreement's indemnification clause, §7.1(a)(iii), to offset these payments by the $1,512,808.10 cost of litigating an appraisal suit challenging the merger. Op. 63, 70-71.

ARGUMENT

I. THE TRIAL COURT REVERSIBLY ERRED BY FINDING THE DEFINITION OF "COMPANY PRODUCTS" TO BE AMBIGUOUS AND CONSTRUING THAT TERM TO INCLUDE SOURCE CODE.[6]

A. Question Presented

Did the Superior Court err by concluding that the Agreement's definition of Company Products was ambiguous and could reasonably be interpreted to include not only the products actually included on the Company Products List, but also any amount of unlisted subcomponents of those products (including software "source code"), plus all Dematic products that integrated any portion of Reddwerks' source code? This issue was preserved. A2711-A2714.

B. Scope of Review

This Court "review[s] questions of contract interpretation *de novo*." *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 760 (Del. 2022).

C. Merits of the Argument

The Superior Court erroneously held that "Company Products" is ambiguous and erroneously construed that term to include "Reddwerks' source code and products integrating that source code." Op. 52. That ruling contravenes the Agreement's plain language.

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[6] If this Court reverses the judgment on the grounds in Argument I, it need not consider the alternative Arguments II and III, but only Argument IV (addressing Dematic's counterclaim).

1. The Unambiguous Definition of "Company Products" Does Not Include Source Code.

Section 4.12(h) of the Agreement defines "Company Products" as follows:

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

A145 (emphasis added.) As defined, a Company Product has three irreducible characteristics. It must be: (1) a "product[]"; (2) "set[] forth" in Part 1 of Section 4.12(h) of the Disclosure Schedules; (3) and "currently"—*i.e.*, as-of the merger—"distributed or offered" by Reddwerks or its subsidiary. Reddwerks' source code does not satisfy any of these requirements.

First, source code is a component of software underlying Reddwerks' product, not the product itself. Just as flour is not bread, tomatoes are not ketchup, and words are not a book—source code is *not* a product. Op. 47, 49 (recognizing source code is a "component" of software products). *Second*, the Company Products List "does not expressly list 'source code.'" Op. 46. *Third*, Reddwerks did not distribute or offer source code to its customers. Indeed, in §4.12(j), Reddwerks represented that "neither the Company nor any Subsidiary thereof has *disclosed, delivered or licensed*, or has a Liability, duty or obligation…to disclose, deliver or license, any Company Products to any third party *in source code form*." A145

(emphasis added.) Having never distributed or offered source code, Reddwerks could not have been "currently" doing so. The Superior Court's analysis should have ended here.[7]

2. The Superior Court Misread the Company Products List to Create an Ambiguity in the Contractual Definition of Company Products.

Given the unambiguous definition of "Company Products," the Superior Court acknowledged that the ambiguity it found did not arise from the definition itself. Instead, the court discovered an "attendant ambiguity" from supposed imprecision in the naming of the products on the Company Products List. Op. 46. From that premise, the court interpreted Company Products to mean not only the actually listed products, but also all underlying components of those listed products—such as source code—and any Dematic product that incorporated any of Reddwerks' source code during the Earn-Out Period. There is no basis for that conclusion either in the Agreement or in Delaware law.

The Superior Court accepted three erroneous arguments, advanced by Fortis, to support this interpretation: (a) the product names on the List were "so general that

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[7] *Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("Delaware adheres to the 'objective' theory of contracts, i.e. a contract's construction should be that which would be understood by an objective, reasonable third party." (cleaned up)); *BLGH Hldgs v. enXco LFG Hldg.*, 41 A.3d 410, 414 (Del. 2012) ("Where a contract's text is 'reasonably susceptible to only one interpretation,' it is facially unambiguous, and must be construed 'in accordance with [its] plain meaning.'").

the parties could not have intended the descriptions to be exhaustive," Op. 46; (b)

Reddwerks *had* "distributed or offered" source code to customers at the time of the

merger because source code is contained within software products, Op. 47; and

(c) Dematic's post-merger obligation to integrate Company Products evidenced the

parties' intention to include both Reddwerks' source code and Dematic's products

integrating such source code as Company Products, Op. 51.   By creating an

ambiguity where none existed, the trial court reversibly erred. *Rhone-Poulenc Basic*

Chems. Co. v. Am. Motorists Ins., 616 A.2d 1192, 1196 (Del. 1992) (when a

"contract is clear and unequivocal, a party will be bound by its plain meaning

because creating an ambiguity where none exists could, in effect, create a new

contract with rights, liabilities and duties to which the parties had not assented");

United Rentals, Inc. v. RAM Hldgs., 937 A.2d 810, 830 (Del. Ch. 2007) ("[E]xtrinsic,

parol evidence cannot be used to manufacture an ambiguity in a context that facially

has only one reasonable meaning.").

a.   The Company Products List Is Exhaustive and Not Subject to Judicial Enlargement.

The definition of Company Products confirms that the parties intended the

Company Products List to be exhaustive. Section 4.12(h) states that the List includes

"***all*** products currently distributed or offered to third parties."   A145 (emphasis

added.) The word "all" demonstrates that the List is exhaustive—not illustrative.

Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342, 377 (Del. Ch. 2004) ("'All'

means 'all'…."). The absence of any reference to Reddwerks' source code (or any indication the List encompasses subcomponents) demonstrates that source code is not a Company Product.

> **(1)** **The Trial Court's Addition of Source Code to the Company Products List Violates Established Canons of Contract Construction.**

The plain language of the Company Products List contradicts the Superior Court's construction. The List does not reference source code or subparts of listed products. The court's construction rewrites the List to add in source code. "[I]t is axiomatic that courts cannot rewrite contracts or supply omitted provisions." *Murfey v. WHC Ventures*, 236 A.3d 337, 355 (Del. 2020). That is particularly true where, as here, "the contract could easily have been drafted to expressly provide for such terms, limitations or conditions." *Id.* at 357.

The parties knew how to refer to source code. Indeed, the Agreement referenced source code at least five times throughout Reddwerks' representations and warranties:

Section 4.11(a)	"Section 4.11(a) of the Disclosure Schedules lists all of the following Contracts to which the Company or any subsidiary thereof is a party and which are currently in effect[:]…(xi) any agreement relating to the escrow of any software in **source code**…."
Section 4.12(a)(iii)	"'IP Agreement' means all…**source code** escrow agreements…."
Section 4.12(h)	"None of the Company Products use, incorporate or are distributed with any Open Source Software…in a manner

	that…would require the Company Product be made generally available in **source code** form."
Section 4.12(j)	"Except confidential disclosure to employees and contractors involved in the creation and development of Company Products…neither the Company nor any Subsidiary thereof has disclosed, delivered or licensed…any Company Products to any third party in **source code** form."
Section 4.12(n)	"No software, object code, source code or other IP Rights…."

The omission of source code from the definition of Company Products and the Company Products List "speaks volumes" about the parties' intent. *Active Asset Recovery, Inc. v. Real Est. Asset Recovery Servs.*, 1999 WL 743479, at *11 (Del. Ch. Sept. 10, 1999); *Fortis Advisors LLC v. Shire US Hldgs.*, 2017 WL 3420751, at *8 (Del. Ch. Aug. 9, 2017) (omission of specific terms is presumptively intentional when other terms are included instead).

The parties also knew how to use terms such as "portion" and "component." A139 (§4.09(b)(iii)) ("Leased Real Property or any **portion** thereof"); A146 (§4.12(n)) (addressing what "constitutes a material **component** of the Company IP Rights") (emphases added). The parties even referred to components of Company Products in the sentence following the definition of Company Products: "Part 2 of Section 4.12(h) of the Disclosure Schedules sets forth a list of all software that is incorporated in or distributed with any Company Products…." A145 (§4.12(h)). The phrase "software that is incorporated in…any Company Products" can only mean software that formed a component of a Company Product. The parties'

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decision not to reference source code or subcomponents when defining Company

Products was intentional and merited judicial respect.

In the proceedings below, Dematic highlighted the absence of these terms in

the Company Products List. The Superior Court, however, adopted Fortis's circular

argument that "[t]he parties' failure to list 'source code'…is simply an example of

the parties failing to expressly list all the necessary components of Reddwerks'

products." Op. 49. That conclusion rests upon the flawed premise that source code

should have been included within the Company Products definition. But it was not,

and Fortis wishing otherwise cannot make it so. The contractual definition calls only

for the inclusion of Products.

(2) The Product Descriptions on the Company Products List Fit the Commercial Context.

The Superior Court broadened the scope of the contract language by adopting

Fortis's argument that the parties' decision to define each listed Company Product

with general descriptions, using only "one or two words," was vague and

"reasonably could be interpreted as intending to encompass all aspects of the

modules named"—including source code. Op. 48. But there is nothing ambiguous

about those descriptions. The court created an ambiguity where there was none.

Reddwerks' saleable software products were listed by the name of the

software functionality they performed. Op. 8-9, 53. Importantly, the names on the

Company Products List were the <u>exact</u> names Reddwerks used in its statements of

work provided to customers. *See* A879-A880; A848; A336; A1243. That is a background commercial fact the court should have, but did not, consider. *See Fox v. Paine*, 2009 WL 147813, at *5-6 (Del. Ch. Jan. 22, 2009), *aff'd*, 981 A.2d 1172 (Del. 2009); *Chi. Bridge & Iron Co. v. Westinghouse Elec. Co.*, 166 A.3d 912, 926-27 (Del. 2017).

The importance of that unconsidered fact is that when identifying the "products" that Reddwerks was "offering or distributing" to clients, the parties used the actual names that Reddwerks used to refer to those products. Reddwerks' own witnesses testified that they considered the names used on the List to be the "best description" of the software products sold by Reddwerks. A2632; A2636. By not considering these significant background commercial facts, the trial court was persuaded to misinterpret the contract language.

b. Reddwerks Never "Offered" or "Distributed" Source Code to Customers.

The Superior Court's erroneous analysis went further. Even if source code could be shoehorned into the Company Products List, to satisfy the operative definition, Company Products must be "distributed or offered to third parties" by Reddwerks at the time of the merger. The court determined that this requirement was satisfied because source code is inherent "within" software products that Reddwerks distributed or offered. Op. 49. No basis exists for this determination. The record confirms that Reddwerks did not offer or distribute its source code and,

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importantly, Reddwerks represented in §4.12(j) that it *had never* distributed its source code to its customers:

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

A145 (emphases added). Except in connection with product development, Reddwerks had never disclosed, delivered, or licensed its source code underlying its Company Products. The Superior Court's contrary conclusion is incompatible with Reddwerks' own contractual promises.

If that plain language were not enough, industry practice shows that Reddwerks would not have distributed its software products via source code. *Chi. Bridge*, 166 A.3d at 926. Because source code is "the key intellectual property for software companies" and susceptible to reverse engineering, such companies "rarely release the source code directly to the end-user." A2822-A2823.

The court's conclusion that source code was "distributed or offered" to customers defies the Agreement's terms and industry practice.[8] That error also requires reversal.

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[8] To the extent this Court finds the Agreement ambiguous, the extrinsic evidence supports Dematic's interpretation. Dematic's client contracts were clear that the licenses granted "do[] not include a license to source code." A418. Similarly,

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c. Dematic's Obligation to Integrate Company Products Does Not Support the Superior Court's Finding That the Parties Intended for Source Code to Be a Company Product.

The final evidence on which the Superior Court relied was Dematic's obligation to integrate Company Products. Op. 52. That misinterpretation is again at odds with the Agreement's unambiguous language.

In §3.1(h)(i), Dematic agreed to "(i) incentivize its sales force to sell Company Products, and (ii) utilize its engineers and the engineers of the Surviving Corporation to integrate Company Products into the Parent's products and services." A124. That is, Dematic agreed to incentivize its sales force to sell Company Products (as opposed to selling them only via Dematic-Reddwerks) and for both companies' engineers to "integrate" Company Products within Dematic's suite of supply chain solutions.

The Superior Court contorted Dematic's agreement to "integrate" Company Products into a finding that the parties intended Company Products to include both Reddwerks' source code and any Dematic product integrating that source code. Op. 52. That conclusion required two illogical leaps unsupported by the Agreement's language. *First*, "integrate" must mean splicing Reddwerks' source code with Dematic's own code. *Second*, source code must itself be a Company Product;

Dematic-Reddwerks' Earn-Out Period client contracts were clear that "[t]he license granted hereunder does not include a license to source code." A503; A940.

otherwise, merely splicing source code would not satisfy the requirement that *Company Products themselves* be integrated into Dematic products.

There is no basis to speculate that "integration" means splicing code. The Agreement contains no provision that instructs (in terms of quality, quantity, or other metric) at what point lines of code contained in a Reddwerks product transform into "source code." Indeed, Reddwerks' witnesses disclaimed that a "single line of code is our intellectual property." A2637. Witnesses for both sides agreed that the Agreement contains no provision, mechanism, or formula for apportioning value to sales of Dematic products that contain some Reddwerks source code. A2634; A2651. The Superior Court found that the Order Intake provision was the key that bridged the parties' valuation gap and that integration of source code was Reddwerks' protection to ensure reaching the Contingent Consideration targets. Op. 50-51, 54. But if that were true, it is implausible that reasonable contracting parties that intended for source-code integration to translate to an Order-Intake dollar amount would have neglected to provide in their Agreement some method to calculate that dollar amount. That no such method exists in the Agreement is (we submit) dispositive.

Instead, the Agreement contains only one provision—§3.1(h)(iv)—that addresses how to apportion the value of bundled products that include Dematic and

Dematic-Reddwerks products. A125. In §3.1(h)(iv), the parties agreed that for sales

of products under Dematic's contracts:

> *only* the dollar amount of (a) any *software product* owned by [Dematic-Reddwerks] *and included in the Company Products*, (b) any services performed by [Dematic-Reddwerks] sold under such Contract, and (c) lights, mobile and handheld devices, and related hardware supplied by [Dematic-Reddwerks], each in connection with such Contract shall be included in the Order Intake Amount.

A125 (emphasis added). That is the only provision in the Agreement that articulates

how Order Intake is allocated in the sale of combined products, and it contains no

carve-out for sales of Dematic products that incorporate Reddwerks' code. Rather,

under the unambiguous language of §3.1(h)(iv), "*only*" the dollar value of

standalone Dematic-Reddwerks software products that are on the Company Products

List are included in Order Intake. When it made such bundled sales, Dematic

properly credited Earn-Out Consideration to Dematic-Reddwerks. A1243; A2646-

A2650; A615; A806. Fortis has identified no contracts where Dematic failed to

allocate credit under §3.1(h)(iv); Fortis's reliance on the absence of credit for source-

code integration fails precisely because nothing in the Agreement provides for it.

The mere fact that the Agreement provides an apportionment mechanism for

such integrated or bundled sales, but omits any apportionment method for sales of

Dematic products spliced with Reddwerks' source code, establishes that the

integration of source code into a product cannot be a contractual basis for deriving

Contingent Consideration from that product's sales. *See MicroStrategy Inc. v.*

Acacia Rsch. Corp., 2010 WL 5550455, *7 (Del. Ch. Dec. 30, 2010). In holding

otherwise, the trial court reversibly erred.

II. ALTERNATIVELY, THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE THE SUPERIOR COURT ABUSED ITS DISCRETION BY IMPOSING AN EVIDENTIARY PRESUMPTION THAT ESTABLISHED $13 MILLION IN DAMAGES WITHOUT REQUIRING ANY PROOF OF DAMAGES.

A. Question Presented

Did the Superior Court abuse its discretion by imposing the evidentiary presumption that Order Intake and EBITDA earnout would be deemed satisfied if Fortis prevailed on its "source code" contract interpretation argument, and without requiring Fortis to establish any evidentiary basis to support the amount of damages awarded? This issue was preserved. A2714-A2716.

B. Scope of Review

This Court reviews a trial court's imposition of a sanction for discovery violations for abuse of discretion. *Genger v. TR Invs.*, 26 A.3d 180, 190 (Del. 2011).

C. Merits of the Argument

1. The Evidentiary Presumptions Were Not Tailored to, and Therefore Were Incapable of Remedying, Any Prejudice to Fortis.

Although courts have wide latitude to fashion appropriate discovery sanctions, sanctions "must be just and reasonable." *Genger*, 26 A.3d at 190. The remedy must be tailored to the culpability of the party opposing discovery and the prejudice, if any, suffered by the complaining party. *In re Rinehardt*, 575 A.2d 1079, 1082 (Del. 1990). And courts must consider the availability of lesser sanctions that would remedy any unfairness to the complaining party yet sufficiently deter similar

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conduct. *Riverside Fund V, L.P. v. Shyamsundar*, 2017 WL 624856, at *1 (Del. Super. Feb. 14, 2017). Fundamentally, any sanction "should always be viewed in light of the proper function which sanctions are intended to serve." *Rinehardt*, 575 A.2d at 1082.

The Superior Court recognized that the function which its sanctions were intended to serve was to remedy the prejudice it found Fortis suffered from Dematic's failure to produce the Confluence and Jira records that might have identified Dematic products that incorporated Reddwerks source code. Op. 59. The court concluded that the discovery violation prevented Fortis from compiling evidence showing how much source code was integrated into Dematic products and, consequently, how much Contingent Consideration was due. To remedy that supposed prejudice, the court imposed the evidentiary presumption: if Fortis prevailed on its contract argument that source code was a Company Product, then the earn-out targets would be deemed satisfied, and Fortis would recover the maximum Contingent Consideration.

Imposing this evidentiary presumption was an abuse of discretion because it was not tailored to any prejudice Fortis suffered. Even if Dematic had furnished records from Confluence and Jira,[9] Fortis could not have used that information to

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[9] In response to Fortis's newfound position that Confluence and Jira were somehow probative of its claims, Dematic offered to produce those records. A2555. Fortis

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translate the Dematic products containing Reddwerks source code that were sold

during the Earn-Out Period into Contingent Consideration, because the Agreement

provided no mechanism for doing that. Any effort to apportion a contract's value

based on the amount of source code integrated into the products sold under the

contract would violate Delaware's prohibition on speculative damages. *See Isr.*

Disc. Bank of N.Y. v. First State Depository Co., 2013 WL 2326875, at *23-25 (Del.

Ch. May 29, 2013). Capriciously, the evidentiary presumptions put Fortis in a

materially better position than it would have occupied had the found discovery

violation never occurred.

a. The Confluence and Jira Records Would Not Have Enabled Fortis to Prove Damages.

Even if source code were a Company Product, the Agreement provides no

method that would have enabled the parties objectively either to value Reddwerks

source code in the first instance, or to allocate a contract's value to any Reddwerks

source code integrated into Dematic's products. Without the evidentiary

presumption, Fortis would have been unable to prove that it was entitled to *any*

Contingent Consideration based on source code integration. Critically, Fortis failed

to introduce an expert damages opinion proposing any contract-based method to

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refused, instead capitalizing on the records' absence to secure the case-dispositive
evidentiary presumption.

determine additional Contingent Consideration, so would not have been entitled to any payment above the amount Dematic calculated.[10]

It is bedrock Delaware law that a plaintiff must adequately prove damages to a reasonable certainty flowing from a defendant's breach. *Henne v. Balick,* 146 A.2d 394, 396 (Del. 1958) ("The burden is upon the plaintiff to furnish…proof [of damages]. If he fails in this respect, the [court] cannot supply the omission by speculation or conjecture."). Damages cannot be based on "speculation or conjecture where a plaintiff fails adequately to prove damages." *Isr. Disc.*, 2013 WL 2326875, at *23-25. Even where the court has concluded that an injury occurred, it cannot award damages where "to assign an amount to that damage [the court] would be only marginally more confident than if [it] randomly picked a number between $0 and [the claim's maximum value]." *Great Hill Equity P'rs v. SIG Growth Equity*, 2020 WL 948513, at *23 (Del. Ch. Feb. 27, 2020).

Absent the evidentiary presumption, any value the Superior Court could have attributed to the Order Intake or EBITDA from source code integration would have been inherently speculative—no better than picking a random number between $0 and $13 million. The contribution of a line of code to the product's value cannot be measured by length. *E.g.*, *Wal-Mart Stores, Inc. v. Cuker Interactive, LLC*, 2017

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[10] Proving economic damages requires expert testimony. *PJ King Enters. v. Ruello*, 2008 WL 4120040, at *3 (Del. Super. July 1, 2008).

WL 11681860, at *4 (W.D. Ark. Jan. 19, 2017); *Finjan, Inc. v. Cisco Sys.*, 2020 WL 13180005, at *10 (N.D. Cal. Apr. 21, 2020) ("The Court is not persuaded that source code line counting, on its own, is an economically sound approach to apportion a revenue base."). And yet, as Fortis made plain in its opening statement at trial, that is precisely what Fortis would have had to accomplish had it not been rescued by the evidentiary presumption. A2625.

In imposing the sanction, the Superior Court misconstrued the significance of the records in Confluence and Jira. The court found that Dematic's failure to produce those records precluded Fortis from "us[ing] that information with their experts." Op. 59. Presumably, that determination was grounded upon the declaration of Fortis's forensic accounting expert—Lorraine Barrick—who disclaimed any ability to render any expert opinion without the Confluence and Jira materials.[11] But Confluence and Jira do not themselves disclose what Reddwerks source code was integrated into Dematic products. They merely detail what tasks Dematic engineers were assigned regarding a given product and so, theoretically, could be used to identify products into which Dematic integrated Reddwerks source

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[11] In an affidavit, Barrick claimed that, without that material, "[g]iven the absence of information required to determine which Dematic products and services contain Company Products or portions thereof, it is impossible to determine which contracts are at issue in this case and therefore impossible to identify the relevant amounts attributable to the sale of Company Products entered into by Dematic during the Earn-Out Period." A2601-A2602.

code. A2531-A2537. Determining the extent of such integration, if any, would require comparison of the source code itself, something not found in Confluence or Jira. A2536-A2537.

Crucially, the Superior Court ignores that Barrick had access to, but failed to utilize, information about "which Dematic products and services contained Company Products or portions thereof." A2601-A2602. Specifically, she and Fortis had information regarding the integration of Company Products in the Under Armour contract. A2617. Indeed, Fortis dedicated several pages in post-trial briefing urging—based on the Under Armour information—that millions more in Order Intake and EBITDA were owed. A2674-A2676. Yet, with the benefit of the same information, Barrick inexplicably refused to opine on that question. That omission—highly material under Fortis's theory of prejudice—reconfirms the importance of the fact that the Agreement lacked any mechanism to "identify the relevant amounts attributable to the sale of Company Products." A2601-A2602. If Fortis's expert declined to do this despite having the Under Armour information, then there is no justification for the court's conclusion that records from Confluence and Jira would have put Fortis in any better position.

Because the Agreement does not instruct the parties how to determine what portion of the value of a source-code-integrated product is "Company-Product value," neither Order Intake nor EBITDA can be calculated in a way reflecting the

parties' objective intent. Any calculation would rest on an arbitrary and legally impermissible choice from conjecture. *Henne*, 146 A.2d at 396; *Great Hill*, 2020 WL 948513, at *23. By putting Fortis in a materially better position than it would have occupied absent the found discovery misconduct, the evidentiary presumption failed to serve the "proper function" that the court "intended [the sanction] to serve," *Rinehardt*, 575 A.2d at 1082, so was neither "just" nor "reasonable," *Genger*, 26 A.3d at 190. This Court should reverse for abuse of discretion.

2. The Superior Court's Sanction Improperly Relieved Fortis from Its Burden to Prove Damages.

Even were this Court to disagree that the sanction was an abuse of discretion, the sanction is reversible for the independent reason that it relieved Fortis of its burden to adduce factual support for its claimed damages.

An adverse inference cannot amount to substantive proof or substitute for actual proof of a fact necessary to the benefitted party's case. *Collins v. Throckmorton*, 425 A.2d 146, 150 (Del. 1980); *Beard Rsch. v. Kates*, 981 A.2d 1175, 1193 (Del. Ch. 2009) ("[A]n adverse inference is exactly that—an inference and not substantive proof."). Even when imposing an adverse inference, courts cannot

determine damages without *any* substantive proof underlying that finding. *Acierno v. Goldstein*, 2005 WL 3111993, at *6 (Del. Ch. Nov. 16, 2005).[12]

The Superior Court's evidentiary presumption did just that. It conclusively established the damages element of Fortis's breach of contract claim, thereby perfecting Fortis's claim and entitling Fortis to the full Contingent Consideration. The presumption was triggered not by any evidentiary showing related to damages— Fortis made none—but by the adjudication of a contract interpretation dispute over the meaning of Company Products. Op. 29. That clear error of law was a reversible abuse of discretion.

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[12] 29 Am. Jur. 2d Evidence § 253 ("The presumption or inference arising from the failure of a party to produce available evidence does not amount to substantive proof and does not take the place of proof of a fact necessary to the other party's case. It will not supply a missing link in an adversary's case and cannot be treated as independent evidence of a fact otherwise unproved."); 2 McCormick on Evidence § 265 (8th ed.) (similar).

III. ALTERNATIVELY, THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE THE SUPERIOR COURT ERRED BY PERMITTING FORTIS TO RECOVER ESCROWED EBITDA AMOUNTS THAT FORTIS HAD VOLUNTARILY RELEASED AND ORDER INTAKE AMOUNTS THAT FORTIS FAILED TO CHALLENGE UNDER THE CONTRACTUALLY-AGREED PROCEDURE.

A.   Question Presented

Is Fortis precluded from seeking to recover (a) the $3 million EBITDA payment after conceding Dematic's entitlement to, and consenting to the release of, that money; and (b) the $10 million Order Intake payment after failing to challenge Dematic's Order Intake calculation via the procedure mandated by the Agreement? This issue was preserved. A2626-A2627; A2707-A2709.

B.   Scope of Review

Questions of contract are reviewed de novo. *Cox*, 273 A.3d at 760. Findings of fact are reviewed for clear error. *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

C.   Merits of the Argument

1. EBITDA

The Superior Court erred by permitting Fortis to challenge Dematic's retention of the $3 million EBITDA Adjustment. Dematic obtained that payment after Fortis joined Dematic in releasing that "Undisputed Amount" as "owed in full to [Dematic]." A1272. Having done that, Fortis forfeited any right later to sue

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Dematic to recover that amount. In concluding otherwise, the trial court erred as a matter of law.

Both the Agreement and the Escrow Agreement specified how to challenge the EBITDA calculation. Section 3.1(h)(ii) of the Agreement established the procedures for disputing the calculations, and §3.3(c) established that, upon a dispute's resolution, "an amount equal to the EBITDA Adjustment shall be delivered to [Dematic] in accordance with the terms of the Escrow Agreement." A124-A125; A128. Under §1.4 of the Escrow Agreement, after Dematic sends a written notice "specifying…the amount of the EBITDA Adjustment to which [Dematic] is entitled" (the "Claimed Amount"), A198 (§1.4(a)), and Fortis "has conceded liability…of the Claimed Amount," *then* Dematic and Fortis "shall deliver a Joint Direction…instructing the Escrow Agent to promptly pay to Parent the Undisputed Amount," A199 (§1.4(c)).

This is what occurred here. After disputing the EBITDA calculation, Fortis joined Dematic "pursuant to Section 1.4(c) of the Escrow Agreement" in submitting the "Undisputed Amount Notice" (the Joint Notice) "certify[ing] that the amount of $3,000,000.00…is owed in full to [Dematic]." A1272. By signing this Joint Notice under §1.4, Fortis necessarily "conceded liability" for the $3 million "Undisputed Amount," that the amount was "owed in full" to Dematic, and that it was the "final determination" under §3.3(c) of the Agreement such that Fortis "shall not be entitled

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to dispute the amount thereof or the right of [Dematic] to receive such amount." A199 (§1.4(b)).

Given these provisions and Fortis's signing of the Joint Notice, Fortis cannot legitimately claim rights to the escrowed funds it released. The Superior Court reached the opposite result by misconstruing the record, concluding that Fortis had "reserved its right to challenge the amount of Contingent Consideration" and that "Dematic agreed to a reservation of rights." Op. 17, 42. This determination allowed the court to hold that "Dematic either waived or is estopped from arguing that Fortis's agreement to permit the Escrow to be paid out now bars Fortis's right to challenge it." Op. 43. This conclusion—the entirety of the court's reasoning on Dematic's challenge to Fortis's EBITDA claim—misstates the record and the law.

Dematic expressly *rejected* the specific reservation that Fortis attempted to assert regarding the EBITDA calculation. The Superior Court cited JX0676 to support its view of the record, but that document shows just the opposite. After agreeing to the Joint Notice, Fortis on July 6, 2017 purported to "reserve[] all of the rights, remedies and applicable limitations they may have under the Merger Agreement and/or ancillary documents related thereto, applicable law or otherwise." A1279. But under the text of the Agreement and Joint Notice conceding liability, Fortis had waived any right it had to challenge the calculation. Fortis's "reservation" was a legal nullity that could not reserve rights it surrendered. "A reservation of

rights does not preserve or revitalize rights that are illusory" or "create rights where none existed." *In re LTC Hldgs.*, 2020 WL 5576850, at *9 (D. Del. Sept. 17, 2020), *aff'd*, 10 F.4th 177 (3d Cir. 2021). "Consequently, a reservation of rights or performance under protest has no effect when the person making the reservation has no rights to reserve." Anderson on U.C.C. §1-308:13.

The parties' communications reflect that Fortis's "reservation" did not reserve its right to challenge the EBITDA calculation. After its July 6 reservation of any rights it <u>actually</u> retained under the Agreement, Fortis, on July 11, insisted that its earlier reservation *also* included the (non-existent) right to challenge "the calculation of the Earn-Out Period EBITDA." A1276. Dematic replied with language that "more appropriately set[] forth both parties' intent": that the Joint Notice "fully and finally resolves any dispute related to the *calculation* of the Earn Out Period EBITDA" and that the parties "acknowledge that Fortis is reserving its rights, with the exception of the right to challenge the Earn-Out Period EBITDA, which the parties have agreed is conclusive." A1275.

Fortis rejected that proposal, but Dematic reiterated its position that the Joint Notice "fully and finally resolves any dispute related to the <u>calculation</u> of the Earn Out Period EBITDA." A1274. Fortis replied it "[did] not share [Dematic's] understanding…and continue[d] with our reservation of rights (including those related to the calculation of the Earn-Out Period EBITDA)." *Id*. Nevertheless,

Fortis executed the letter releasing the funds to Dematic and conceding Dematic's entitlement to those funds. This record negates the Superior Court's conclusion that Dematic consented to Fortis's reservation of rights to challenge the EBITDA calculation. *Lopez-Vazquez v. State*, 956 A.2d 1280, 1290-91 (Del. 2008) (reversing and concluding that court's "findings are clearly erroneous" where contradicted by the record).

2. Order Intake

The Superior Court further erred by permitting Fortis to pursue the $10 million Order Intake payments despite having failed to appoint an accountant to resolve the calculation dispute, as mandated by §3.1(h)(ii). A124-A125.

First, the court accepted Fortis's litigation position that because its disputes *were* not calculation-based, but rather matters of contract interpretation regarding the meaning of Company Products, it did not have to comply with §3.1(h)(ii). Op. 40-41. But, as explained, Fortis contemporaneously asserted in its "reservation of rights" that it did have a calculation dispute.

Second, the court relieved Fortis of its obligation to appoint an accountant because Dematic also failed to. Op. 41. But the court misread the Agreement. The proviso that if the parties "are unable to agree upon the calculation they shall retain" an accountant requires that any accountant be jointly chosen, A124-A125 (§3.1(h)(ii)), *not* that Dematic had an independent obligation to appoint one. The

court's conclusion perversely requires that, to lock-in Fortis's calculation-challenge forfeiture, Dematic had to audit its own calculations. Regardless, the court provided no legal basis to relieve Fortis of its contractual obligation to resolve disputes through an accountant merely because Dematic also failed to appoint one. If anything, the remedy is that *both* are precluded from litigating those forfeited claims, not that neither is: absent appointment of an accountant, Dematic's calculations are "conclusive and binding" on everyone. *Id.*

Third, the court held that Dematic's failure to treat source code as a Company Product was "manifest error," A125 (§3.1(h)(ii)), relieving Fortis from compliance with §3.1(h)(ii). Op. 39. As explained, that interpretation of Company Products is incorrect, and so cannot un-ring Fortis's forfeiture.

Finally, misconstruing Dematic as arguing that the court lacked jurisdiction, the court held Dematic waived any alternative forum by litigating. Op. 40-42. But Dematic is not asking that Fortis be compelled to resolve the dispute with an accountant rather than in court. Dematic argues that Fortis has no rights to challenge the calculations anywhere because it failed to challenge them in the prescribed manner.

IV. THE SUPERIOR COURT ERRONEOUSLY REJECTED DEMATIC'S COUNTERCLAIM.

A. Question Presented

Did the Superior Court err in denying Dematic's counterclaim on the basis that Dematic did not present evidence of Fortis's *actual* knowledge of the PTL defect, where the Agreement only requires showing that Reddwerks reasonably should have known about the defect? This issue was preserved. A2729-A2730.

B. Scope of Review

Issues of contract interpretation are reviewed de novo. *Cox*, 273 A.3d at 760.

C. Merits of the Argument

Within weeks of the merger's completion, Dematic engineers identified a significant design flaw related to current flow through the PTL system's wiring that could cause fires and serious damage, injury, or death. A2640-A2643. After confirming with independent experts that Reddwerks' PTL design was defective, A2641, Dematic alerted Fortis to the issue, A2730; A1244-A1245, and initiated a retrofit for all customer sites. A2738; A1254. After Fortis sued, Dematic counterclaimed to recover the costs of that retrofit, for which it was entitled to indemnification.

Dematic's evidence established that had Reddwerks undertaken the reasonable diligence that led Dematic to identify the defect in just weeks, Reddwerks, too, would have found the defect. This is all Dematic needed to prove

to establish Reddwerks' "Knowledge," meaning "the *actual knowledge after reasonable inquiry* of the officers of the Company listed in Section 1.1(xx)(i) of the Disclosure Schedules." A110 (§1.1(xx)) (emphasis added). "Knowledge" under the Agreement is determined by assessing what specific officers would actually have learned "*after reasonable inquiry*," had they bothered to do it.

Reddwerks' officers never made that inquiry, but it is against this <u>imputed</u> Knowledge definition that the Superior Court should have assessed Reddwerks' representation that it lacked Knowledge of any "basis for any present or future…claim…giving rise to any Liability[] for replacement or repair of any Company Product." A156 (§4.28). Had the court done so, it would have concluded that (1) Reddwerks should have known about the PTL defect, (2) therefore had "Knowledge" that this defect could constitute a "basis for" a "future…claim," and so (3) breached §4.28's representation by denying such Knowledge. *Id*. Dematic would then be entitled to recover the $5 million it expended on PTL repairs under the indemnification provision for any "loss…or expense" Dematic "incurs…as a result of…any breach or inaccuracy of any representation or warranty of the Company." A163 (§7.1(a)).

Based on its incorrect conclusion that Dematic needed, but "failed[,] to prove that Reddwerks was aware of the alleged safety defect at the time the representations were made," the Superior Court rejected Dematic's counterclaim. Op. 66. The court

apparently conjured this "actual awareness" standard from thin air; the opinion nowhere refers to §1.1(xx)'s definition of Knowledge.

Independent of the Court's determinations of Questions I-III, the Court should reverse the dismissal of Dematic's counterclaim and enter judgment for Dematic.

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Dated: August 23, 2023

CERTIFICATE OF SERVICE

I, Lakshmi A. Muthu, Esquire, hereby certify that on August 23, 2023

a copy of the foregoing document was served on the following counsel in the

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