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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD F. CARUSO, M.D., P.A. T/A SEASIDE GASTROENTEROLOGY CONSULTANTS, Plaintiff Below, Appellant, v. HEATHER BARTON, M.D., Defendant Below, Appellee.	No. 350,2024 Court Below: Superior Court of the State of Delaware C.A. No. N21C-10-248 EMD

APPELLEE HEATHER BARTON, M.D.'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Defendant Below/Appellee Heather Barton, M.D. ("Barton") was employed as a Gastroenterologist with Plaintiff Below/Appellant Richard F. Caruso, M.D., P.A. T/A Seaside Gastroenterology Consultants (or "Appellant") from 2018 until May 2021.

Barton and Appellant executed an employment agreement (with renewals, the "Employment Agreement").[1] The Employment Agreement provided for various restrictive covenants, including a noncompete provision which contained a liquidated damages clause in the event of a breach.[2]

Barton resigned on February 16, 2021, effective May 28, 2021.[3] Prior to Barton's notice of her resignation, Appellant, through its sole owner, Richard F. Caruso, M.D. ("Caruso"), began negotiations to sell Appellant's assets.[4] On May 12, 2021, Appellant executed a bill of sale conveying all of Appellant's tangible assets to a third party.[5] Thereafter, Appellant stopped operating and Caruso began employment with EHG GI DE, P.C., an entity unaffiliated with Appellant, under an

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1 A16-A30.
2 A23.
3 A57.
4 B05-B11.
5 B01-B04.

employment agreement dated May 12, 2021.[6] Barton's new employment at Beebe Hospital commenced on June 28, 2021.[7] Caruso's new employment commenced July 18, 2021.[8] Pursuant to the noncompete provision of Caruso's employment agreement, he cannot compete with EHG GI DE, P.C.[9]

On October 28, 2021, Appellant filed a Complaint in the Superior Court of the State of Delaware alleging Barton breached the noncompete provision of the Employment Agreement.[10] The parties filed cross-motions for summary judgment regarding whether the liquidated damages provision of the noncompete covenant constituted a penalty and whether enforcement of the liquidated damages was unreasonable given Appellant's previous sale of all its assets and its owner's inability to compete with his new employer.[11]

On July 12, 2024, the Superior Court held oral argument on the cross-motions for summary judgment and reserved decision.[12] On July 24, 2024, the Superior Court issued a bench ruling denying Appellant's Motion for Summary Judgment and

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6 B12-B24.
7 A142 at 3:4.
8 B12.
9 B22.
10 A59-A63.
11 A101-A131.
12 A166.

granting Barton's Cross-Motion for Summary Judgment.[13] The Superior Court determined the liquidated damages clause constituted a penalty because it was not tethered to a reasonable interest and there could be no resulting business loss from Barton's alleged competition with Appellant.[14] The court found this was "a very fact driven situation,"[15] and focused its decision on the fact that it was not possible for Barton to compete with Appellant, as it stopped operating and sold all its assets before Barton's resignation took effect.[16] Accordingly, the court held, it would be inequitable for the court to enforce a noncompete provision when the enforcing entity (Appellant) is no longer in operation.[17]

On August 23, 2024, Appellant filed a Notice of Appeal with this Court, appealing the Superior Court's denial of Appellant's Motion for Summary Judgment and granting of Barton's Cross-Motion for Summary Judgment. Plaintiff Below-Appellant's Second Amended Opening Brief was filed on November 26, 2024. This is Defendant Below-Appellee Heather Barton M.D.'s Answering Brief.

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[13] A167-A184.
[14] A179 at 13:5-12.
[15] A178 at 12:11.
[16] A178 at 12:9-13.
[17] A178 at 12:19-21.

SUMMARY OF ARGUMENT

1. **DENIED**. The Superior Court's decision below should be affirmed because it properly applied well-supported Delaware case law based on the unique facts of this case.

2. **DENIED**. The Superior Court properly determined the liquidated damages provision of the noncompete agreement was unreasonable because it is not reasonably tethered to a legitimate business interest of the party seeking to enforce it.

3. **DENIED**. Substantial evidence supports the Superior Court's determination that enforcement of the liquidated damages provision would constitute a penalty because Barton could not compete with a non-operating entity.

4. **DENIED**. The Superior Court applied the correct legal standard and the Superior Court's decision was the result of an orderly and logical reasoning process.

COUNTERSTATEMENT OF FACTS

A. Barton's Employment With Appellant.

Barton and Appellant executed the Employment Agreement on November 6, 2017 for a term of employment for July 18, 2018 through July 18, 2020.[18] Paragraph 10(b) of the Employment Agreement contained the following non-compete provision:

> For and during the term of the Employment Agreement, and for two (2) years subsequent thereto, Employee shall not compete in any way with Employer directly or indirectly, and will not consult with or have any interest in any business, firm, person, partnership, corporation or other entity, whether as employee, officer, director, agent, security holder, creditor, consultant or otherwise, which engages in the practice of Gastroenterology or provides services to any individual or entity which competes with Employer directly or indirectly, in any aspect of the medical practice of Gastroenterology at any location within ten (10) miles of Employer's office located at 1309 Savannah Road, Lewes, DE.[19]

Paragraph 10(c) of the Employment Agreement contains the liquidated damages provision at issue and states as follows:

> The parties acknowledge and agree that any breach of the foregoing Covenants will cause irreparable damage to Employer, and that the usual amount of damages to which the Employer should be entitled would be difficult to ascertain. Employee therefore agrees that upon the occurrence of a breach of one or more of the foregoing Covenants, she will pay to the Employer as liquidated damages and not as a penalty,

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[18] A16-A30.

[19] A23.

the sum of One Hundred thousand ($100,000.00) dollars.[20]

Appellant employed Barton from July 1, 2018[21] until she resigned effective May 28, 2021.[22] The parties executed two extensions to the Employment Agreement dated September 14, 2020[23] and December 22, 2020,[24] ultimately extending the term of the Employment Agreement until February 28, 2021.[25] On February 16, 2021, Barton provided Appellant with notice of her resignation.[26] Barton's last day of employment was May 28, 2021.[27] Barton commenced employment with her new employer on June 28, 2021.[28]

B. The Sale Of Appellant.

Appellant executed a bill of sale dated May 12, 2021 (the "Bill of Sale") with AmSurg Anesthesia Management Services, LLC ("AmSurg"), conveying all of Appellant's tangible assets.[29] Appellant's operational and management consultant,

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[20] A24.

[21] A16.

[22] A57.

[23] A32.

[24] A33.

[25] *Id.*

[26] A57.

[27] A57; A104.

[28] A114; A124.

[29] B01-B04. The Bill of Sale conveyed "all of the tangible property contained within the office-based medical practice." There is no indication the Employment

Michael T. Fiore ("Fiore") of M.T. Fiore & Associates, LLC, produced emails showing negotiations regarding the sale of Appellant's assets started prior to December 2020, months before Barton gave notice of her resignation.[30]

After Barton's resignation, Caruso began employment with EHG GI DE, P.C., ("EHG") under an employment agreement dated May 12, 2021.[31] The employment agreement provided for Caruso's employment from July 19, 2021 through July 18, 2024.[32] Caruso's new employer is unaffiliated with Appellant and was not a party to the Employment Agreement.[33] Caruso's employment agreement with EHG prohibits engaging in a "Competing Business" or providing "Competitive Services" within twenty-five miles of Lewes, Delaware.[34] "Competing Business" is defined as an organization "engaged in any Competitive Services" and "Competitive Services" is defined as "services in or relating to the field of Gastroenterology services."[35] Meaning, Caruso is prohibited from operating Appellant (which he owns solely) during the term of his employment (July 19, 2021 - July 18, 2024), because it would

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Agreement was included in the sale. If it was, there was no notice of assignment as required by the Employment Agreement.

30 B10.

31 B12-B24.

32 B12.

33 A150 at 11:17-22.

34 B22.

35 *Id.*

be a Competing Business.

At the Pretrial Conference on January 25, 2023, Appellant's counsel acknowledged that Appellant has not operated since Caruso commenced employment with EHG.[36] Obviously, it could not operate after it sold all its assets effective May 12, 2021.

[36] B32 at 8:18-19.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY DETERMINED ENFORCEMENT OF THE LIQUIDATED DAMAGES PROVISION WOULD CONSTITUTE A PENALTY AND IS UNENFORCEABLE.

A. Counterstatement Of Question Presented.

Whether the Superior Court properly determined enforcement of the liquidated damages provision of the noncompete covenant in the Employment Agreement would constitute a penalty.[37]

B. Scope Of Review.

The trial court's findings in this "fact-driven situation"[38] are "entitled to substantial deference unless clearly erroneous or not the product of a logical and deductive reasoning process."[39] When considering an appeal of a decision granting summary judgment, this Court "reviews the entire record to determine whether the [trial court's] findings are clearly supported by the record and whether the conclusions drawn from those findings are the product of an orderly and logical reasoning process."[40] This Court does not "draw its own conclusions with respect to those facts unless the record shows that the trial court's findings are clearly wrong

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[37] A118 at ¶ 20; A119 at ¶ 22.

[38] A178 at 12:10-11.

[39] *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993), decision modified on reargument, 636 A.2d 956 (Del. 1994).

[40] *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 48 (Del. 2006).

and justice so requires."[41] Whether the liquidated damages provision is enforceable is a question of law subject to *de novo* review by this Court.[42]

C. Merits Of Argument.

The Superior Court's decision below correctly determined that there can be no competition from a former employee when the employer does not operate and has sold all of its assets. The Superior Court's analysis of the enforceability of the noncompete provision relied on case law emphasizing the application of liquidated damages clauses in noncompete agreements must be reasonably tethered to a legitimate business interest in order to be enforceable.[43] Appellant could not operate once it sold "all of the tangible property contained within the office-based medical practice" on May 12, 2021,[44] nor could its sole owner do so due to Caruso's own covenants after July 18, 2021.[45] Because Appellant sold its assets to AmSurg prior to Barton's final day of employment with Appellant on May 28, 2021, and Caruso is prohibited from operating Appellant during his employment, Barton never

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41 *Id.*

42 *Cede & Co.*, 634 A.2d at 360.

43 *Tristate Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886, *10 (Del. Ch. Apr. 15, 2004); *see also Faw, Casson & Co., L.L.P. v. Halpen*, 2001 WL 985104, *2 (Del. Super. Ct. Aug. 7, 2001).

44 B01-B04.

45 B22.

competed. Accordingly, enforcement of the liquidated damages provision must be a penalty because it cannot be reasonably tethered to a legitimate business interest.

Delaware "recognizes that the value of contracts is maximized by enforcing them as written."[46] However, this State's contractarian view "has its limits when such enforcement is inimical to public policy," and in certain circumstances, Delaware courts will decline to enforce contractual obligations, "no matter how clear or sincerely intended when entered."[47]

Liquidated damages in contracts are unenforceable where they operate as a penalty or forfeiture.[48] This Court addressed the distinction between a penalty and a valid liquidated damages claim in *Delaware Bay Surgical Services v. Swier*, as follows:

> [A] "penalty" is a sum inserted into a contract that serves as a punishment for default, rather than a measure of compensation for its breach. In other words, it is an agreement to pay a stipulated sum upon breach, irrespective of the damage sustained.[49]

In Delaware, liquidated damages clauses in noncompete provisions are "particularly suspect as potentially unreasonable restraints on competition, and on

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[46] *Lyons Ins. Agency, Inc. v. Wark*, 2020 WL 429114, at *1 (Del. Ch. Jan. 28, 2020).

[47] *Id.*

[48] *Wark*, 2020 WL 429114, at *1.

[49] *Delaware Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 650 (Del. 2006).

ex-employees' interests in earning a living."[50] This Court has recognized the unique considerations a reviewing court must consider when analyzing a restrictive covenant in an employment agreement:

> In the restrictive-covenant context, the former employee is effectively deprived of his livelihood and, correspondingly, exposed to the risk of serious financial hardship. This gives rise to the strong policy interest that justifies the review of unambiguous contract provisions for reasonableness and a balancing of the equities, two exercises typically foreign to judicial review in contract actions.[51]

Delaware courts also recognize that a liquidated damages provision untethered to loss caused by a former employee's competition serves as an *in terrorem* clause that unreasonably limits a former employee's ability to earn a living.[52] Accordingly, while Delaware courts *may* enforce a noncompete provision, in the employment context, they "are not mechanically enforced."[53] Rather, our courts will consider whether the restraint is reasonably tailored to protect a legitimate business interest of the party enforcing the covenant.[54]

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50 *Wark*, 2020 WL 429114, at *1.

51 *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674, 691 (Del. 2024).

52 *Id.*, citing *Halpen*, 2001 WL 985104, at *3.

53 *Delaware Exp. Shuttle, Inc. v. Older*, 2002 WL 31458243, at *11 (Del. Ch. Oct. 23, 2002).

54 *Berryman*, 2004 WL 835886, at *10; *see also Halpen*, 2001 WL 985104, at *2.

i. Appellant's Case Law Is Inapplicable To The Facts Of This Case.

Appellant alleges the legal standard in *Lee Builders*[55] was the proper avenue to consider the parties' cross-motions for summary judgment below.[56] According to Appellant, the court's review of the liquidated damages provision should have been limited to the two-prong analysis applied in *Lee Builders*.[57] That is: (1) whether the calculation of damages was uncertain or difficult to ascertain at the time of contracting; and (2) whether the amount stipulated was a reasonable estimate of damages which could conceivably flow from the breach.[58]

Appellant's reliance on *Lee Builders* is misguided – *Lee Builders* was a case involving a breach of sales contract, not an employment agreement. There was no covenant not to compete involved, rather the case was limited to a mechanical consideration of whether the liquidated damages provision constituted a penalty.[59]

Appellant argues *Delaware Bay Surgical Servs., P.C. v. Swier*[60] is "the most analogous case with the present matter," to support the enforcement of the liquidated

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55 *Lee Builders v. Wells*, 103 A.2d 918 (Del. Ch. 1954).

56 Appellant's Op. Br. at p. 11.

57 *Id.* at pp. 14-15.

58 *Id.*

59 *Lee Builders*, 103 A.2d 918.

60 900 A.2d 646 (Del. 2006).

damages provision.[61] However, while the *Swier* court's definition of "penalty" is applicable here, the underlying facts in *Swier* and the instant matter differ significantly in two dispositive ways. The provision at issue in *Swier* was an early termination penalty and included language for damages related to "the expenses incurred by Employer in employing Employee and introducing Employee to the medical community, and aiding the procurement by Beebe Medical Center, of certain equipment needed by Employee to perform certain procedures at the hospital."[62] In the instant matter, the disputed provision is limited purely to damages arising from competition with Appellant and there is no language addressing damages for other expenses or damages incurred by Appellant.[63] Furthermore, the former employer in *Swier* continued to operate after the employee's departure and was subject to harm from the former employee's actions. Here, there can be no implication of harm to an entity that is no longer operating.

As stated above, Delaware case law is critical of noncompete provisions and corresponding liquidated damages.[64] These provisions are heavily scrutinized for

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61 Appellant's Op. Br. at p. 20.

62 *Swier*, 900 A.2d 646, 649.

63 *See* A23-A24 ("For and during the term of the Employment Agreement, and for two (2) years subsequent thereto, Employee shall not compete in any way with Employer directly or indirectly … at any location within ten (10) miles of Employer's office located at 1309 Savannah Road, Lewes, DE.").

64 *Wark*, 2020 WL 429114, at *1; *see also Cantor Fitzgerald*, 312 A.3d 674, 691.

reasonableness and to ensure the enforcement of such a provision would not constitute a penalty or an unreasonable restraint on trade.[65] Enforcing such a provision when the enforcing party had ceased operating is purely penal.

ii. The Superior Court Properly Applied Delaware Law Regarding Liquidated Damages And Noncompete Provisions In The Employment Contract Context.

While *Lee Builders* considered the enforcement of a liquidated damages provision, the decision does not contemplate the well-established considerations required in the court's analysis of a noncompete provision in an employment agreement. Since the court's decision in *Lee Builders* in 1952, case law regarding the application and interpretation of restrictive covenants in employment agreements and their corresponding liquidated damages provisions has evolved and the Superior Court's ruling below properly relied on two comparable cases: *Lyons Insurance Agency, Inc. v. Wark*[66] and *Faw, Casson & Co., L.L.P. v. Halpen*.[67]

Well-established case law considers whether the enforcement of the liquidated damages provision is reasonably tethered to a legitimate business loss.[68] In *Wark*, the Court of Chancery refused to enforce a noncompete provision because the enforcing party sought to cover business losses unconnected with the former

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[65] *Id.*

[66] 2020 WL 429114 (Del. Ch. Jan. 28, 2020).

[67] 2001 WL 985104 (Del. Super. Ct. Aug. 7, 2001).

[68] *See Older*, 2002 WL 31458243; *see also Wark*, 2020 WL 429114.

employee's actions.[69] There, the employee obligated herself to certain consequences if, within two years of leaving Lyons' employ, she worked for a competitor and any of her Lyons business also moved to that competitor.[70] This provision did not require the employee to cause the business to follow her or otherwise engage in competitive behavior in order to establish a violation of the provision.[71] In its analysis, the *Wark* court found the noncompete provision was valid and focused on whether the employer was entitled to liquidated damages on the facts presented.[72] Ultimately, the court declined to enforce the liquidated damages provision. Like here, the noncompete was unreasonable and served as a penalty for the former employee when seeking new employment.[73] Nothing Barton did or could have done hurt Appellant. It sold its assets and ceased operating before her last day.

Similarly, in *Halpen*, the court considered whether the employer's enforcement of a covenant not to compete was reasonably tied to a legitimate business interest or if the provision constituted an unreasonable restraint on trade.[74] The *Halpen* court determined the indiscriminate application of a noncompete

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[69] *Wark*, 2020 WL 429114, at *8.

[70] *Id.* at *2.

[71] *Id.*

[72] *Id.* at *4.

[73] *Id.* at *8.

[74] *Halpen*, 2001 WL 985104, at *2.

provision could result in an *in terrorem* purpose and effect if not properly restrained by the courts and the court refused to enforce the liquidated damages provision.[75]

Appellant argues *Wark* and *Halpen* are inapplicable to this case because they involved employment agreements for an insurance agent and an accountant.[76] This is an insignificant distinction and ignores the *Wark* and *Halpen* courts' well-reasoned analysis that is applicable to all restrictive covenants. That is, a covenant not to compete is an unreasonable restraint of trade if "the restraint is greater than is needed to protect the [employer's] legitimate interest."[77] Here, there is no legitimate interest for Appellant to protect when Appellant ceased operating before any alleged competition commenced.[78]

In addition to consideration of the employer's legitimate business interest, Delaware courts recognize the importance of considering the unique facts and circumstances regarding the enforcement of a liquidated damages provision.[79] The Court of Chancery explains the basis for this analysis as follows:

> Because the specific enforcement of [non-competition] covenants involves important interests of commercial enterprises and of individuals seeking to support themselves and their families financially, and because, in that setting, the court is asked to exercise its

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[75] *Halpen*, 2001 WL 985104, at *3.

[76] Appellant's Op. Br. at p. 17.

[77] *Halpen*, 2001 WL 985104, at *2.

[78] *See* B01-B04; B11-B24.

[79] *See Older*, 2002 WL 31458243.

> distinctively equitable powers, each such case requires a careful evaluation of the specific facts and circumstances presented.[80]

Here, it would be inequitable and unreasonable to enforce the liquidated damages provision under the facts and circumstances on the record which clearly establish Barton never competed with Appellant. The record establishes that two weeks prior to Barton's resignation Appellant executed a Bill of Sale conveying "all of Seller's interest without limitation in all of the tangible personal property contained within the office-based medical practice premises currently maintained by [Appellant]."[81] Not only did Appellant sell all of its tangible assets, Caruso (Appellant's sole owner/member) signed an employment agreement which prohibited him from operating Appellant.[82] Accordingly, the Superior Court's logic was simple: if there is no operating business, there is no ability to compete and no implication of harm to support the enforcement of the liquidated damages provision.[83]

The Superior Court should be affirmed. It properly determined the liquidated damages provision would constitute a penalty based on the undisputed facts

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[80] *Older*, 2002 WL 31458243, at *11.

[81] B01.

[82] B22.

[83] A179 at 13:5-13.

established on the record below.[84] Barton could not have harmed Appellant by competing when Appellant had sold its assets and stopped operating.[85] And, Appellant has not and cannot operate because Caruso is prohibited from operating Appellant during the term of his third-party employment.[86]

Appellant cannot claim to have suffered any harm, much less "irreparable damage," resulting from Barton's departure and subsequent employment, because Appellant's sale was in process for months before she resigned.[87] The Superior Court's ruling correctly applied the reasoning in *Wark*. That is – it is inequitable and penalizing to enforce a liquidated damages provision where there is no implication of harm to the employer caused by a former employee. Further, this was similar to the *Halpen* court's reasoning that the indiscriminate application of a noncompete provision could result in an *in terrorem* purpose and effect if not properly restrained by the courts.[88]

The Superior Court's ruling rested on the unique facts of this case and concluded the liquidated damages would be a penalty because Barton could not compete with an entity that sold all of its assets before she commenced her new

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[84] A171 at 5:14-19.

[85] B01-B04; B11-B24.

[86] B22.

[87] B10.

[88] *Halpen*, 2001 WL 985104, at *3.

employment.[89] Furthermore, the restrictive covenant is an unnecessary and inequitable restraint on trade and Barton's ability to make a living after Appellant ceased operations.[90] This situation is exactly the "limited circumstance[]" Delaware courts will decline to enforce due to its unreasonable restraint on competition, trade, and an individual's ability to earn a living.[91]

A covenant not to compete is intended to protect an employer's customer base from being used by a former employee to benefit a competing company. However, when an employer does not continue to operate after the former employee's departure, there is no threat of competition or implication of harm to the employer. As such, because it is not possible for Appellant to suffer damage from competition when it was not operating, it was not possible to harm Appellant and the liquidated damages are not reasonably related to actual damages or constitute an unenforceable penalty.

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[89] A174 at 8:6; A178 at 12:9-13; A179 at 13:9-13.

[90] A61.

[91] *Wark*, 2020 WL 429114.

CONCLUSION

The Superior Court correctly determined enforcement of the liquidated damages provision of the Employment Agreement would constitute a penalty under the facts of this case because it was impossible for Barton to compete with an entity that could not operate. Accordingly, Defendant Below-Appellee respectfully requests this Honorable Court issue an order affirming the Superior Court.

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