IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

FORTIS ADVISORS, LLC,	)	
	)	
Plaintiff,	)	**C.A. No. N18C-12-104 AML CCLD**
	)	
v.	)	
	)	
DEMATIC CORP.,	)	
	)	
Defendant.	)	

Submitted: September 13, 2022
Decided: December 29, 2022

POST-TRIAL MEMORANDUM OPINION

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LeGrow, J.

The parties to this action entered into a merger agreement that contained an earn-out provision requiring the buyer to pay additional consideration to the selling stockholders if sales of company products satisfied contractual revenue and EBITDA targets in the fourteen months after closing. In what is an all-too-predictable pattern in these transactions, the parties later became embroiled in a seeming intractable dispute regarding whether the earn-out targets were satisfied. The parties spent five trial days presenting testimony and evidence in support of their respective positions on this issue. The parties' disagreement primarily arises from their divergent interpretations of the contract they drafted and signed, with the buyer taking the position that the earn-out targets were to be based on a much narrower set of product sales than the selling stockholders believed the agreement encompassed.

Unfortunately, the trial and the case as a whole became further complicated by numerous discovery disputes and delays. The discovery missteps largely were attributable to the buyer's obfuscating discovery responses and failure to produce all responsive documents on certain core issues, even in the face of court orders requiring that production. That discovery misconduct culminated shortly before trial in the unearthing of the buyer's failure to produce key records directly responsive to early discovery requests. The Court ultimately entered a set of evidentiary presumptions that would apply if the seller proved at trial that the earn-out

calculation was to be based on the broader definition of product sales advocated by the seller.

The seller met this burden at trial. That is, although the merger agreement's definition of "Company Products" is ambiguous, the Court finds that the most reasonable interpretation of that term is the broader interpretation the seller advances. Accordingly, the Court adopts that term, applies the conditional evidentiary presumptions, and finds that the revenue and EBITDA targets were achieved. The seller therefore prevails in its breach of contract claim, although its recovery is reduced by the setoff the buyer properly claimed for indemnification relating to settlement costs and attorneys' fees incurred in an appraisal proceeding arising from the merger. As to the buyer's counterclaim, which sought indemnification for alleged design defects in one of the seller's products, the buyer failed to establish that those design defects breached any of the seller's representations and warranties in the merger agreement. The Court therefore will enter judgment in the seller's favor.

I. BACKGROUND

Trial took place in this action over the course of five days. Ten fact witnesses and two expert witnesses testified virtually, and the parties submitted extensive post-trial briefs addressing factual, legal, and evidentiary issues. These are the facts as

the Court finds them after assessing the witnesses' credibility and weighing the evidence.[1]

A. Parties

Plaintiff Fortis Advisors, LLC ("Fortis") filed this action solely in its capacity as the Seller Representative of the former securityholders of Reddwerks Corporation ("Reddwerks").[2] Reddwerks was a Delaware corporation in the business of manufacturing, installing, and servicing "pick-to-light" hardware and software solutions to support supply chain logistics and distribution systems.[3] On December 11, 2015, Reddwerks became a wholly owned subsidiary of Defendant Dematic Corporation ("Dematic") as a result of the merger at issue in this case. Reddwerks was renamed Dematic Reddwerks Corporation ("Dematic Reddwerks"). On December 31, 2016, Dematic Reddwerks was further merged into Dematic and ceased to exist as a separate subsidiary. Dematic is a large multinational provider of engineering and supply-chain solutions.[4]

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[1] The factual background in this post-trial decision cites: C.A. No. 18C-12-104 AML CCLD docket entries (by "D.I." number); trial exhibits (by "JX" number); the trial transcript ("Trial Tr." by day "I-V"); Deposition transcripts lodged by the parties (by "witness last name"), and stipulated facts set forth in the parties' Joint Pre-Trial Order ("PTO").
[2] PTO § II(A)(3), (B)(1). The non-party securityholders are Reddwerks' stockholders, option holders, and warrant holders. PTO § II(B)(3).
[3] Compl. at 3; Trial Tr. II at 18 (Rogers); Trial Tr. III at 230 (Attebury); PTO § III(A)(4). To the extent not otherwise identified in this Memorandum Opinion, D.I. 224 contains a list of each witness's position within the relevant companies during the earn-out period and at the time of trial.
[4] Def.'s Post-Trial Opening Br. at 1; PTO § III(A)(5), (7).

B. Dematic acquires Reddwerks

In 2014, Reddwerks' Board of Directors decided to sell the company and entered into negotiations with Dematic as a potential buyer.[5] Dematic was interested in Reddwerks primarily for the software products Reddwerks offered. Those software products would help Dematic portray itself as a leader in the software market, which in turn would increase Dematic's valuation if Dematic became a publicly traded company.[6] The parties executed an Agreement and Plan of Merger (the "Merger Agreement") on November 18, 2015.[7] Under the Merger Agreement's terms, Dematic agreed to pay approximately $45 million in up-front merger consideration, less certain obligations and expenses (the "Aggregate Closing Consideration").[8]

During negotiations, Reddwerks' asking price proved to be significantly more than the $45 million Dematic was willing to pay.[9] Dematic's reluctance to pay more was understandable; Reddwerks generated $22 million in revenue in fiscal year 2015 and was projecting $28 million in revenue in fiscal year 2016.[10] The parties addressed this value gap by agreeing upon a structure that would require Dematic to

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[5] Trial Tr. II at 28-29 (Rogers).

[6] Contemporaneous with the merger, Dematic's board and management were exploring whether to take the company public. Trial Tr. II at 39-40 (Rogers); Trial Tr. III at 106 (Easson); Trial Tr. III at 56 (Gill).

[7] JX 6.

[8] *Id.* at 2-3, 6, 8.

[9] Trial Tr. V at 124-125 (Carlson).

[10] Trial Tr. II at 40, 50-51 (Rogers); Trial Tr. III at 110, 116-17 (Easson).

pay additional consideration to the "Company Holders"[11] if the acquired company achieved certain performance and product sales targets after the merger (the "Contingent Consideration"). The Contingent Consideration would be calculated based on revenue and EBITDA during the fourteen-month period beginning November 1, 2015 and concluding December 31, 2016 (the "Earn-Out Period").[12]

C. The Merger Agreement's earn-out provisions

The Contingent Consideration was comprised of two elements: (1) the "Earn-Out Merger Consideration," and (2) the "EBITDA Adjustment."[13] The Earn-Out Merger Consideration was the parties' primary focus and the potentially more lucrative element. The Merger Agreement provided that "the Company Holders may be entitled to additional contingent merger consideration" of up to $10 million "based upon the Order Intake Amount achieved during the 14-month period commencing November 1, 2015 and ending December 31, 2016."[14] The Company Holders would not be entitled to any Earn-Out Merger Consideration if the Order Intake Amount during the Earn-Out Period was less than $36 million; for the Company Holders to earn the entire $10 million of Earn-Out Merger Consideration, the Order Intake Amount needed to be at least $48 million.[15] If the Order Intake

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[11] The Company Holders were Reddwerks' stockholders, option holders, and warrant holders. JX 6, § 1.1(t).
[12] *Id.* § 3.1(g).
[13] *Id.* §§ 1.1(bb)(hh), 3.1.
[14] *Id.* § 3.1(g).
[15] *Id.* § 3.1(g)(ii).

Amount was more than $36 million but less than $48 million, the Company Holders would receive Earn-Out Merger Consideration in "straight line pro-ration between $0 and $10,000,000."[16]

The Merger Agreement defined "Order Intake Amount" as the sales of Company Products by Dematic Reddwerks or Dematic during the Earn-Out Period. Specifically, Order Intake Amount meant:

> the aggregate dollar amount to be paid to [Dematic Reddwerks] or [Dematic] for all Company Products to be sold under binding written agreements between [Dematic Reddwerks] or [Dematic] and customers of the Business which are first entered into during the Earn-Out Period and which (i) provide commitments for the purchase of Company Products and (ii) are not cancelled during the Earn-Out Period.[17]

Accordingly, Order Intake Amount turned on the sale of Company Products. The Merger Agreement defined "Company Products" very generally, referring to a disclosure schedule in the Merger Agreement that listed the products sold by Reddwerks before the merger:

> 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").[18]

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[16] *Id.*
[17] *Id.* § 1.1(jjj).
[18] *Id.* § 4.12(h).

In other words, the Disclosure Schedule listed the Reddwerks products that were "currently distributed or offered to third parties." The contents of that list were the Company Products relevant to calculating the Order Intake Amount.

The list of Company Products contained in Schedule 4.12(h), Part 1 consisted of four categories of software "modules" and the Reddwerks pick-to-light and third-party hardware.[19] The four software module categories were (1) Core Software Modules; (2) Optimization Software Modules; (3) Warehouse Control Software Modules; and (4) Workflow Software Modules.[20] Within each category was a further list of software that Reddwerks distributed or offered for that module. The lists were not detailed. To the contrary, the lists contained one or two-word names of software "functionalities," that is, various functions that Reddwerks' software accomplished.

Dematic's trial witnesses confirmed that, with the exception of the pick-to-light hardware and the Device Space product, Reddwerks' Company Products were intangible "functionalities." Andrew Gill, Dematic's senior engineer and manager, acted as Dematic's application engineering lead during the due diligence period and its engineering lead for Reddwerks integration during the Earn-Out Period. Mr. Gill confirmed that "the list of [C]ompany Products. . . composed a number of different

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[19] JX 7, DMTC0284469 (hereinafter cited as "Schedule 4.12(h)").
[20] *Id.*

functions or . . . functionalities."[21] Each functionality was provided by different lines of source code that "a computer reads to provide the functionality."[22] The nature of these functionalities, and the fact that they derive from source code, was known to Dematic and Reddwerks during the negotiation process.[23] And so, in drafting the Merger Agreement, the parties elected to refer to the functionalities by their short-hand name rather than supplying a more technical definition.

In addition to Earn-Out Merger Consideration, the second element of Contingent Consideration was the EBITDA Adjustment. The "EBITDA Adjustment" was "a dollar-for-dollar reduction, up to a maximum of $3,000,000, to the Contingent Consideration to the extent the Earn-Out Period EBITDA is less than $9,300,000 . . . ."[24] Earn-Out Period EBITDA was defined as Dematic Reddwerks' net income during the Earn-Out Period with additions and deductions as specified in the Merger Agreement.[25]

The EBITDA Adjustment only could be offset from a $3 million Escrow Account established at closing.[26] If any money remained in the Escrow Account

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[21] Trial Tr. III at 52 (Gill).
[22] *Id.* at 53.
[23] *See, e.g.,* JX 6, § 4.12(h) (referring to Open Source Software license terms and whether those terms would require the Company Products to "be made generally available in source code form."); Trial Tr. III at 62-63 (Gill) (in order to import or integrate Reddwerks' functions into Dematic products, engineers would import source code).
[24] JX 6, § 1.1(hh).
[25] *Id.* § 1.1(gg).
[26] *Id.*; *see also id.* § 1.1(oo).

after payment for indemnity and/or the EBITDA Adjustment, that remaining amount was to be paid to the Company Holders and the Management Bonus Pool.[27]

D. Dematic's representations regarding the sale of Company Products

The targets needed to earn the Contingent Consideration were substantially higher than the revenue Reddwerks earned in the years leading up to the merger. Nevertheless, the Company Holders concluded the targets were achievable, based in large part on the written representations Dematic made in the Merger Agreement.[28] Although it did not commit to generate a specific Order Intake Amount, Dematic stated in writing that (i) its strategic plan during the Earn-Out Period would include targets for the sale of Company Products above the Earn-Out Merger Consideration threshold; and (ii) it would incentivize its sales force to sell Company Products and utilize its engineers to integrate Company Products into Dematic's products and services. Those commitments were contained in Section 3.1(h)(i) of the Merger Agreement, which read as follows:

> [Dematic] and [Reddwerks] have discussed [Dematic's] intent regarding the operations of [Dematic Reddwerks] after the Closing. It is the desire of both [Dematic] and [Reddwerks] that the operations of [Dematic Reddwerks] present order intake opportunities in the near term, which are intended to lead to the achievement of the Earn-Out Merger Consideration threshold. [Dematic] acknowledges that its strategic plan for fiscal 2016–2018 includes, and its plan for the Earn-Out Period will include, target orders for the sale of Company Products in excess of the thresholds needed to achieve the Earn-Out Merger

[27] *Id.* at § 3.1(h)(ii).
[28] Trial Tr. II at 50-52 (Rogers); Trial Tr. III at 111-13 (Easson).

> Consideration as set forth herein. [Dematic] agrees that after the Effective Time and during the remainder of the Earn-Out Period it will (1) 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. None of [Dematic], [Dematic Reddwerks] or any of their respective Affiliates shall be liable for any Loss or any other claims or actions based upon or related to the strategy, operations or methods used or not used by [Dematic], [Dematic Reddwerks] or their respective Affiliates or any of their representatives after the Closing. Except for the covenants set forth above in this subsection 3.1(h)(i), neither [Dematic], [Dematic Reddwerks] nor any of their representatives makes or has made any covenants related to the operations of [Dematic], [Dematic Reddwerks] after the Closing.[29]

Dematic disclaimed any liability for any claim based on the methods or strategies Dematic or Dematic Reddwerks used or did not use after closing. Dematic agreed, however, to maintain separate or identifiable records of the sale of Company Products to permit the calculation of the Order Intake Amount and the Earn-Out Period EBITDA at the conclusion of the Earn-Out Period.[30]

In order to facilitate the calculation of the Contingent Consideration, particularly the Earn-Out Period EBITDA, the parties agreed that after the merger Reddwerks would function as a stand-alone subsidiary of Dematic during the 14-month Earn-Out Period.[31] That separate operation was less significant for purposes

[29] JX 6, § 3.1(h)(i).
[30] *Id.* § 3.1(k)(i) ("Dematic shall use its commercially reasonable efforts to undertake the following actions: (i) maintain or cause to be maintained separate or otherwise identifiable, in its accounting system, books and records for the sale of all Company Products, in a manner reasonably necessary to permit the calculation of the Order Intake Amount and the Earn-Out Period EBITDA.").
[31] *Id.* § 3.1(h)(i).

of calculating the Earn-Out Merger Consideration because the Merger Agreement left no doubt that the Order Intake Amount included the sale of Company Products by either Dematic or Dematic Reddwerks.[32]

Despite its representations to Reddwerks about incentivizing its sales force to sell Company Products, Dematic acted almost immediately to do the opposite. Having evaluated the trial exhibits and the witnesses' credibility at trial, it is clear that Dematic took steps to curtail its sales force's efforts to sell Company Products and to obfuscate Dematic's integration of Reddwerks' software functionalities into Dematic's products. For example, contemporaneous with the parties completing their negotiations and Fortis signing the Merger Agreement, Dematic North America President John Baysore sent an email to Dematic's sales force leaders regarding "Blue," which was Dematic's code name for Reddwerks:

> I assume you were very clear to your sales guys. We will not be selling blue software to our existing customers for quite some time. As we add capacity to execute their software, we (Khodl, you and I) will strategically select the oppy's we go after. Sales guys absolutely should not sell Blue to any given customer without approval. Some of the guys are already calling Alex. You need to stand them down and be clear on these points.[33]

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[32] *Id.* § 1.1 (jjj).
[33] JX 506.

In response to the email, sales manager Mike Kotecki wrote, "Those were the exact words that both [Scott] Hinke and I said in the meeting with all sales management right after your Town Hall."[34]

Moreover, Dematic admitted during discovery that it did not have or develop a strategic plan during the Earn-Out Period, despite its representation that its plan would include target sales above the Earn-Out Merger Consideration threshold.[35] Dematic did, however, institute a filtering process, called "Zebra" that limited Dematic's sales force's ability to propose Reddwerks' software functionality to customers.[36] Under that filtering process, solution development would determine what Reddwerks software would be utilized for projects during the Earn-Out Period.[37]

And, notwithstanding Dematic's statement in the Merger Agreement that it would utilize its engineers to integrate Company Products into Dematic's products and services, Dematic did not treat any integrated product, or portion of any integrated product, as "Company Products" for purposes of calculating Order Intake Amount or Earn-Out Period EBITDA. Dematic's Director of Accounting testified at trial that sales of "integrated" software were not treated as sales of "Company

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[34] *Id.*
[35] *See* Pl.'s Post-Trial Opening Br. at 6, n. 7.
[36] *See id.* at 8, n.10. Although Fortis cites JX 651 as the source for this filtering process, that exhibit was not included in the binders of trial exhibits provided to the Court. Dematic, however, does not dispute its existence or admissibility in the post-trial briefs Dematic submitted.
[37] *Id.*

Products" in Dematic's calculation of the Contingent Consideration.[38] Dematic's decision not to treat integrated products as "Company Products" had real implications. For example, during the Earn-Out Period, Dematic entered into a contract with Under Armour that included "elements of software" from both Reddwerks and Dematic.[39] The contract referenced Reddwerks' software functionalities by name numerous times, but Dematic took the position that those functionalities were not Company Products because they had been integrated with Dematic products or services before being sold to Under Armour.[40] Accordingly, the Under Armour sales were not included in Dematic's calculation of the Contingent Consideration.

E. The conclusion of the Earn-Out Period and the beginning of the parties' dispute

Not surprisingly, Dematic's interpretation of the meaning of Company Products worked in its favor when the time came to calculate the Contingent Consideration. The Merger Agreement required Dematic to provide Fortis with a calculation of the Contingent Consideration at the conclusion of the Earn-Out Period. The Merger Agreement provided:

> On or before March 31, 2017, the Parent shall provide to the Seller Representative, a certificate signed by an executive officer of the Parent showing its good faith calculation of (1) the Order Intake Amount for

[38] Trial Tr. V at 225-28 (Carlson); *see also* Def.'s Br. in Opp. to Pl.'s Post-Trial Br. ("Def.'s Post-Trial Opening Br.") at 27-28.
[39] Trial Tr. V at 226 (Carlson); *see also* Trial Tr. III at 89 (Gill); Trial Tr. IV at 151-52 (Khodl).
[40] *See* Def.'s Post-Trial Opp. Br. at 27-28.

> the Earn-Out Period and (2) the Earn-Out Period EBITDA in reasonable detail (the "Earn-Out Notice). The Surviving Corporation shall provide the Seller Representative reasonable access to the books, records, working papers and other information supporting such calculation of the Order Intake Amount and Earn-Out Period EBITDA. The Parent's calculation of the Order Intake Amount and Earn-Out Period EBITDA shall be conclusive and binding on the parties absent manifest error unless the Seller Representative delivers a notice as specified below objecting to such calculation. If the Seller Representative disagrees with Parent's calculation of the Order Intake Amount or the Earn-Out Period EBITDA it may within twenty (20) Business Days of its receipt of the Earn-Out Notice deliver a notice to the Parents disagreeing with such calculation and setting forth in reasonable detail its good faith basis for such disagreement.[41]

On March 9, 2017, Dematic notified Fortis that the Order Intake Amount was $37,873,474 and the Earn-Out Period EBITDA was $4,352,449.[42] That certificate contained a "summary chart" of the month-by-month Order Intake Amount calculation, a customer-by-customer Order Intake Amount calculation with customer names removed, and a summary calculation of the Earn-Out Period EBITDA. Although the Order Intake Amount was sufficient to generate Earn-Out Merger Consideration of $1,561,228, Dematic informed Fortis that it had set off the entire amount "to cover its Losses which are subject to indemnification under the Merger Agreement."[43] Furthermore, because the Earn-Out Period EBITDA was $4,947,551 less than the EBITDA Adjustment threshold of $9.3 million, Dematic

[41] JX 6, § 3.1(h)(ii).
[42] JX 21; Trial Tr. II at 88-89 (Rogers).
[43] JX 21.

made demand for payment from the Escrow Amount of an EBITDA Adjustment in the amount of $3 million (*i.e.*, 100% of the Escrow Amount).

The losses Dematic claimed were subject to indemnification and set-off included amounts incurred in connection with Dematic's defense and ultimate settlement of an appraisal rights case that was filed after the Merger. That appraisal action, which the parties call the "D'Angela Litigation," was settled in 2017.[44] Dematic incurred $236,217.40 in attorneys' fees and expenses to litigate and settle that matter, and Dematic paid the dissenting stockholders approximately $0.37 per share, which amounted to $1,276,590.72.[45] The Merger Agreement gave Dematic the option to recover those losses from the Escrow Account or set them off against the Earn-Out Merger Consideration earned by the Company Holders.[46] Fortis took the position at trial that these losses were not reasonable because the dissenting stockholders received more for their interests than the Company Holders will receive if they prevail entirely on their claims in this case.[47]

The Merger Agreement permitted Fortis to object to Dematic's calculation of the Order Intake Amount and the Earn-Out Period EBITDA.[48] On March 31, 2017, Fortis "formally objected" to Dematic's calculation and exercise of the set-off, and

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[44] JX 37.
[45] *Id.*; Ltr. to Court dated Dec. 15, 2022 from K. Mangan, Esq.
[46] JX 6, § 7.1(a). *See also id.* § 3.1(j).
[47] Trial Tr. II at 196-97 (Rogers).
[48] JX 6, §3.1(h)(ii).

on April 7, 2017, Fortis objected to Dematic's calculations on the grounds that Dematic had not fulfilled its obligation to provide "reasonable access to the books, records, working papers and other information supporting such calculation . . . ."[49] Dematic responded by producing some, but not all, of the documentation Fortis requested.[50] Based on that production, Fortis was able to determine that 100% of the reported Order Intake Amount and Earn-Out Period EBITDA had been generated by Dematic Reddwerks alone. Fortis therefore concluded that Dematic had either (i) failed to satisfy its promise in the Merger Agreement to integrate Company Product and incentivize its sales force; or (ii) failed to track and account for Company Products integrated into and sold as a part of Dematic's products and services.[51]

The Merger Agreement contained a provision requiring the parties to retain an independent accounting firm to resolve disputes regarding Dematic's calculation of the Contingent Consideration. That dispute resolution provision stated:

> "[i]f the parties are unable to agree upon the calculation [of the Order Intake Amount or the Earn-Out Period EBITDA] they shall retain a nationally or regionally recognized independent accounting firm

[49] JX 27; Trial Tr. I at 114-15, 117-18 (Fink); Trial Tr. II at 90-99 (Rogers).
[50] Trial Tr. I at 114 (Fink).
[51] Pl.'s Post-Trial Opening Br. at 10.

> mutually agreeable to [Dematic] and [Fortis] (the "Review Firm") to review the calculation."[52]

Fortis, however, did not dispute Dematic's calculations *per se*. Rather, Fortis believed Dematic had breached its contractual obligations to integrate Company Products, incentivize its sales force to sell Company Products, and maintain books and records reflecting those sales, including the sale of integrated products. In other words, Fortis's dispute was not one suited for resolution by an accounting firm. And, although Fortis continued to object to Dematic's calculations, neither party sought to retain an accounting firm. Instead, Fortis reserved its right to challenge the amount of Contingent Consideration to which it was entitled.[53] On July 13, 2017, Fortis and Dematic issued a Joint Direction to the Escrow Agent to distribute the full Escrow Amount to Dematic.[54] Fortis later initiated this breach of contract action on behalf of the Company Holders challenging the amount of the Contingent Consideration to which the Company Holders are entitled.

F. Dematic investigates alleged safety defects

Separate from the parties' dispute regarding the Contingent Consideration, issues arose after the Merger regarding Reddwerks' hardware called the Pick-to-Light Solution ("PTL Solution"). The PTL Solution is an automated order picking system in which light displays direct human operators to select products for orders.

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[52] JX 6, § 3.1(h)(ii).
[53] Trial Tr. I at 168-74 (Fink); JX 2119.
[54] JX 2070.

It typically is used in industrial warehouse facilities for the supply of parts for manufacturers and goods for retailers and distributors.[55] When the Merger Agreement was executed, the PTL Solution had been installed in approximately 70 customer sites.[56]

After the Merger Agreement was completed, Dematic claims it discovered the PTL Solution contained a defect: occasionally, the PTL Solution could direct too much current through the wiring, risking overheating, melting, and fire.[57] Dematic initiated an investigation during which Dematic employees at the Reddwerks facility in Austin examined returned parts purportedly damaged from overheating.[58]

Through its internal investigation, Dematic determined the defect in the PTL Solution was the amount of electrical current that various systems could bear and their response when too much current is drawn or attempted to be drawn through them.[59] The components affected by the defect included "RJ45 connectors used to connect the display elements to each other and the line controller; [t]he cables used to connect the display elements to each other and the line controller; [and t]he traces on the printed circuit boards within the display elements that allow for daisy chaining."[60] Reddwerks designed the PTL Solution to include a single protection

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[55] JX 1808 at 1.
[56] Def.'s Post-Trial Opening Br. at 33 (internal citations omitted).
[57] JX 1808, 2041, 2042, 1735.
[58] JX 2041, 2042.
[59] JX 1808.
[60] *Id.*

scheme wherein a 7-amp breaker within the line controller was intended to trip when too much current was drawn across all connected devices on all 24 RJ45 ports. This did not, however, offer protection for each individual port and the components attached to it. As a result, individual ports could draw more current than the port and its associated components were designed to support, causing thermal damage.[61]

In March 2016, Dematic retained an independent engineering firm called Safety Engineering Laboratories, Inc. ("SEL") as a consultant.[62] SEL specializes in engineering and safety services for electrical and mechanical products and systems. Dematic provided SEL with a mock-up of the PTL Solution and asked SEL to analyze the system.[63] SEL concluded that the PTL Solution did not properly control the flow of electrical power and, in extreme circumstances, could result in significant overheating and even fire.[64]

Dematic's expert witness at trial regarding the PTL Solution was Dr. John Martens. Dr. Martens testified that the original design of the PTL Solution was "contrary to good engineering design as it did not protect each individual chain of displays and their associated circuit elements from carrying more current than they are designed to carry."[65] Additionally, Dr. Martens opined that Dematic's proposed

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[61] JX 1747, 1760.
[62] JX 1696.
[63] JX 1735.
[64] JX 1808.
[65] Trial Tr. IV at 204-05, 208-12 (Martens).

retrofit of the PTL Solution addressed the original design defect "by applying overcurrent protection to each individual chain of displays that limit[ed] the total current through a single chain to an appropriate level."[66] Dr. Martens opined that the retrofit was necessary to protect the safety of Dematic's customers and to make the PTL Solution consistent with good engineering practice.[67]

Dematic notified Reddwerks' customers that a retrofit to the PTL Solution was required and began the retrofit process.[68] During trial, Dematic witness Melissa Vanderwiel testified that Dematic's cost as of June 2021 for retrofitting the PTL Solution was $5,377,619.94 and that the retrofitting process remained ongoing.[69]

G. Litigation ensues

Fortis sued Dematic in December 2018. Fortis's sole cause of action alleged Dematic breached the Merger Agreement by (1) failing to incentivize its sales force to sell Company Products and failing to utilize its engineers to integrate Company Products into Dematic products and services; or (2) failing to assign EBITDA credit and Order Intake Amount credit to integrated Company Products delivered by Dematic during the Earn-Out Period.[70]

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[66] *Id.*
[67] *Id.* at 212 (Martens).
[68] JX 2109.
[69] JX 2257; Trial Tr. V at 78 (Vanderwiel).
[70] PTO § I(A)(1)-(3).

Dematic filed two counterclaims. First, Dematic alleged it was entitled to indemnification "for all Losses caused by Reddwerks' breaches of the Merger Agreement and of the representations and warranties contained therein."[71] Dematic identified its indemnifiable losses as the costs it incurred in the D'Angela Litigation and in discovering and retrofitting the defects in the PTL Solution.[72] Second, Dematic sought a declaration that "all Losses stemming from the PTL retrofit are Losses for which Dematic is owed indemnification pursuant to the Merger Agreement and that it owes no further compensation to Fortis for amounts claimed under the Merger Agreement related to earn-out, set-off, or otherwise."[73] Dematic also asserted an affirmative defense for setoff.

H. Dematic's discovery misconduct

Fortis's breach of contract claim was based on two alternative theories that were known to the parties from the earliest stages of the litigation. Fortis took the position that Dematic breached the contract in one of two ways. Either Dematic (1) failed to incentivize its sales force and comply with its contractual obligation to integrate Reddwerks' products into Dematic's products; or (2) integrated Reddwerks' products and services, but failed to properly credit the sale of integrated

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[71] Def.'s Countercl. at ¶ 27 (D.I. 11).
[72] *See id.* at ¶¶ 15–23. Dematic acknowledged that it had "already offset [the D'Angela Litigation] amounts against obligations to Fortis" and it therefore only sought a declaration "that such set-off was proper in the event Fortis was contesting it." *Id.* at 11, n.1.
[73] *Id.* at ¶ 32.

products when calculating the Order Intake Amount or the Earn-Out Period EBITDA. From the beginning of discovery, however, Dematic adopted a narrow interpretation of its obligations under the Merger Agreement as well as its obligations in the litigation itself. Dematic's discovery positions led to several motions to compel, orders compelling discovery, and ultimately Fortis's requests for various sanctions.

The Court's November 18, 2020 letter opinion and order (the "November Order") summarized some of the key discovery disputes as follows:

> Fortis filed its first discovery motion in September 2019, seeking to compel Dematic's response to various interrogatories and document requests. By order dated October 17, 2019, the Court granted Fortis's motion in part and required Dematic to supplement its interrogatory responses and document production (the "October Order"). On March 12, 2020, Fortis filed a motion for sanctions, arguing Dematic had not fully complied with the October Order. Fortis also filed additional motions to compel relating to Dematic's responses to Fortis's third set of interrogatories and third requests for production. On the eve of a hearing on those motions, the parties entered a stipulation temporarily resolving their disputes. The Court entered that stipulation as an order on May 26, 2020 (the "May Order"). In the May Order, Dematic agreed to provide specific, supplemental discovery responses on or before June 30, 2020. The parties agreed that Fortis could renew its motions if Dematic failed to comply with the May Order.[74]

Among other things, the May Order required Dematic to provide a narrative response describing its engineers' integration of Company Products into Dematic

[74] *Fortis Advisors, LLC v. Dematic Corp.*, 2020 WL 6784129, at *1 (Del. Super. Nov. 18, 2020) (internal quotations and citations omitted).

products and services.[75] Dematic produced a lengthy response listing its engineers' efforts to integrate "Reddwerks functionality" into "Dematic iQ," which was a Dematic product. The response was silent on several key topics Dematic was ordered to address, including which Company Products were integrated, when the integration occurred, the individuals who participated in the integration, or the business purpose of the integration.[76]

Fortis then noticed a Rule 30(b)(6) deposition, and Dematic agreed to produce witnesses to testify on Dematic's behalf regarding the negotiated list of deposition topics. When it came time for those witnesses to testify, however, it quickly was apparent that they were not adequately prepared to testify regarding the sales of Company Products during the Earn-Out Period.[77] The parties therefore agreed to briefly adjourn the deposition and reconvene once the witnesses were prepared properly. Dematic also agreed to pay Fortis's costs and fees associated with the aborted deposition.[78]

That agreement was short-lived. Within days, the parties reached an impasse regarding the amount of attorneys' fees to be reimbursed and about whether Dematic properly responded to certain written discovery requests, prompting yet another

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[75] D.I. 74, ¶ 2.
[76] *See id.,* Ex. A(e) (defining "identify"). Dematic agreed to this definition when it entered into the May 26, 2020 stipulation and order.
[77] *Fortis Advisors, LLC v. Dematic Corp.*, 2020 WL 6784129, at *2.
[78] *Id.* at *2.

motion to compel and a motion for sanctions. After considering that motion, the Court denied without prejudice Fortis's request that the Court impose certain evidentiary presumptions at trial. The Court nevertheless found that "Dematic failed to produce a satisfactory 30(b)(6) witness, and that other, targeted discovery materials must be produced."[79] The Court therefore awarded more limited sanctions (the "November Order"). The November Order required Dematic to (1) produce one or more witnesses properly prepared to testify about all noticed 30(b)(6) topics; (2) pay Fortis's reasonable attorneys' fees and expenses for the previous deposition and the motion for sanctions; (3) produce additional documents regarding the sale of Company Products.[80]

As to the third sanction, the Court held as follows:

> [I]t appears Dematic narrowly is defining the documents it is producing by limiting production to those contracts that Dematic concedes incorporated Reddwerks' products, rather than all contracts that incorporated the same functionality as Reddwerks' products. But, Dematic incorporated Reddwerks' software in various ways, and apparently sold products after the merger with functionality identical to the functionality Reddwerks' products offered. Under the circumstances of this case, it is reasonable to require 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. This will allow

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[79] *Id.* at *4.
[80] *Id.* at *4-5.

> Reddwerks to explore whether those products did, in fact, incorporate Reddwerks' software.
>
> That additional production, combined with the 30(b)(6) depositions Fortis shortly will take, should allow it to assess the scope of any continuing discovery failures. If necessary, Fortis may add topics to the 30(b)(6) notice to further address its discovery concerns. At this stage, a deposition probably is the most efficient way to explore whether and to what extent there are gaps in Dematic's production. The Court anticipates Dematic will accommodate those additional topics in an effort to demonstrate that it has, in fact, fully complied with its discovery obligations.[81]

The Court further reminded Dematic that the discovery rules "demand candor and fair-dealing" and held that Fortis could renew its request for further sanctions once it obtained the additional court-ordered discovery and evaluated the scope and nature of Dematic's failure to produce discovery up to that point.[82]

The discovery delays also required the Court to postpone trial. The original July 2020 trial was rescheduled for June 2021. The parties continued to conduct discovery through the spring of 2021. In April 2021, the parties advised the Court that ongoing discovery delays had caused them to miss several pre-trial deadlines, including expert and fact discovery deadlines. Dematic moved to continue the trial, but the Court denied that motion.

In March 2021, during the deposition of one of Dematic's employees, Andrew Gill, Fortis learned that Mr. Gill had used Dematic's project management software

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[81] *Id.* at *5.
[82] *Id.* at *4.

system called "Confluence," and its associated task management software system, "Jira," to prepare for his deposition.[83] Upon further questioning, Fortis learned that the Confluence System laid out a "higher-level plan" for specific software development projects, while Jira provided a more granular view of each task associated with that project.[84] The Jira system showed each task that was assigned to each engineer for a particular project and when those tasks were completed.[85] Mr. Gill confirmed that Confluence and Jira were keyword searchable and that the systems would permit a comparison between the Dematic source code and the Reddwerks source code used in an integrated product.[86] In fact, Mr. Gill had commissioned just such a comparison and was able to testify at his deposition regarding the percentage of Reddwerks source code integrated into a particular version of the Dematic iQ software.[87]

Significantly, Mr. Gill confirmed that, to his knowledge, Dematic never produced in the litigation any Confluence or Jira records, including records relating to Dematic's integration of Company Products into Dematic products or services.[88] That revelation, less than three months before the trial date, was remarkable because

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[83] Appendix to Pl.'s Opening Br. in Supp. of Third Mot. for Sanctions, Deposition of Andrew Gill, (hereinafter "Gill Dep"), PA 262 at 38-40.
[84] Gill Dep. at 40, 45-52.
[85] *Id.* at 45-46.
[86] *Id.* at 84-85, 89-91.
[87] *Id.* at 92-95.
[88] *Id.* at 117-20.

those records were directly responsive to discovery Fortis expressly requested early in the discovery period, including requests for documents as well as the interrogatory response the Court ordered Dematic to supplement in the May 2020 Order.[89] Dematic represented on several occasions that it had produced all responsive material, and Fortis, taking Dematic at its word, did not further press the issue.[90] Instead, Fortis pursued other, less direct means to attempt to discover the degree to which Dematic integrated Reddwerks products during the Earn-Out Period. That discovery included the "as-installed" contract records the Court ordered Dematic to produce in the November 2020 Order.

When Fortis discovered that the Confluence and Jira systems contained directly responsive discovery material that had not been produced, it filed its third motion for sanctions. After hearing argument on the motion, the Court issued a lengthy bench ruling granting the motion in part and entered an order memorializing the sanctions awarded.[91] Given the press of time, and the numerous other motions

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[89] Appendix to Pl.'s Opening Br. in Supp. of Third Mot. for Sanctions, Fortis's Request for Production 5, PA025 ("Produce any and all, each and every document that relates or refers to your contention that after the Effective Time and during the remaining Earn-Out Period you utilized your engineers and the engineers of [Dematic Reddwerks] to integrate Company Products into your products and Services [], including . . . (ii) documents wherein your engineers and the engineers of [Dematic Reddwerks] integrated Company Product into your products and Services.").

[90] Appendix to Pl.'s Opening Br. in Supp. of Third Mot. for Sanctions, Dematic's Second Am. Objections and Responses to Pl.'s First Requests for Production, PA 061-62 (representing that Dematic used "reasonable search terms in gathering the production and that *all* non-privileged documents responsive to such search terms have been made available" in response to Plaintiff's Request for Production No. 5).

[91] *See* D.I. 148.

that required resolution before trial, the Court did not publish a written opinion memorializing its bench ruling. Instead, as promised, the Court's analysis and reasoning in support of the sanctions is summarized in this post-trial opinion.[92] As sanctions for Dematic's repeated discovery failures, the Court precluded Dematic from introducing at trial any testimony or exhibits derived from the Confluence or Jira systems.[93] The Court also awarded Fortis its reasonable attorneys' fees and expenses in connection with filing and arguing the motion and ordered, in relevant part, that:

> The following presumptions shall govern trial in this action: (A) If the Court adopts [Fortis's] interpretation of the term 'Company Product[s],' it is 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 million. (B) If the Court adopts [Fortis's] interpretation of the term 'Company Product[s],' it is presumed that the Earn-Out Period EBITDA for [Dematic Reddwerks] was greater than or equal to $9.3 million.[94]

As explained below,[95] after hearing the evidence and the parties' arguments at trial, the Court has adopted Fortis's interpretation of the term "Company Products" and the evidentiary presumptions therefore apply.

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[92] *See* D.I. 185 (Order Denying Application for Interloc. Appeal) ¶ 15. The Court expressly incorporates its May 11, 2021 bench ruling and June 3, 2021 order denying Dematic's application to certify an interlocutory appeal, which collectively provide an equally if not more detailed explanation for the sanctions imposed.

[93] Order on Pl.'s Third Mot. for Sanctions (D.I. 148).

[94] *Id.*

[95] *See infra* § II.B.

I. Procedural history and the parties' contentions

The Court held a five-day bench trial that began on June 7, 2021.[96] In the weeks leading up to trial, the Court denied Dematic's repeated requests to postpone trial and Dematic's application to certify an interlocutory appeal relating to the Court's sanctions ruling.[97] After trial, the parties filed post-trial briefs addressing the merits of their legal claims and the evidentiary issues that were not resolved during trial. In light of the Court's ruling, most of those evidentiary issues are moot because the Court has not relied in any significant or dispositive sense on any of the challenged exhibits. More specifically, the exhibits Dematic challenged as inadmissible are irrelevant based on the Court's ruling below that the conditional evidentiary presumptions apply.[98]

1. The parties' contentions regarding the breach of contract claim

The parties' post-trial briefs set forth their arguments regarding the breach of contract claim and the indemnification counterclaim. Fortis contends the Court should enter judgment in its favor in the amount of $13,000,000, along with interest, attorneys' fees, and costs because the evidence at trial demonstrated that "(i) the Order Intake Amount achieved during the Earn-Out Period was greater than or equal

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[96] *See* Trial Trs. (D.I. 198–203).
[97] *See* D.I. 145 at 15-18 (Apr. 14, 2021) (Dematic making oral motion to postpone trial); D.I. 156 at 7 (May 12, 2021) (Dematic indicating in pre-trial stipulation that trial date was unreasonable); D.I. 163-164 (May 19, 2021) (Dematic motion to stay proceedings pending appeal); D.I. 176 (May 27, 2021) (Dematic motion to adjourn trial).
[98] *See* Def.'s Post-Trial Opening Br. at 46-47.

to $48 million; and (ii) the Earn-Out Period EBITDA achieved was greater than or equal to $9.3 million."[99] Fortis argues the Court could find in its favor in one of two ways. First, Fortis asserts it is entitled to the presumptions the Court ordered would govern at trial: If the Court adopts Fortis's interpretation of the term "Company Products," it is presumed that the Order Intake Amount achieved during the Earn-Out Period was at least $48 million and that the Earn-Out Period EBITDA was greater than or equal to $9.3 million.

Second, Fortis contends that even if the conditional evidentiary presumptions do not apply, it nevertheless is entitled to judgment in its favor based on the evidence presented at trial. As a threshold matter, Fortis asserts Dematic breached its obligation under the Merger Agreement to "use its commercially reasonable efforts" to maintain "separate or otherwise identifiable, in [Dematic's] accounting system, books and records for the sale of all Company Products, in a manner reasonably necessary to permit the calculation of the Order Intake Amount and the Earn-Out Period EBITDA."[100] According to Fortis, Dematic never even created the requisite books and records in its accounting system. Fortis argues Dematic's omission frustrated Fortis's efforts to identify the Earn-Out Period sales of Company Products and the Order Intake Amount and EBITDA attributable to such sales.[101]

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[99] Pl.'s Post-Trial Opening Br. at 17.
[100] Pl.'s Post-Trial Opening Br. at 18–20.
[101] *Id.* at 19.

From the evidence available to it, Fortis first argues Dematic failed to credit several of Dematic's contracts to the Order Intake Amount and the Earn-Out Period EBITDA.[102] Second, Fortis contends Dematic failed to properly calculate Earn-Out Period EBITDA because Dematic did not comply with the formula set out in the Merger Agreement.[103] Third, Fortis maintains Dematic was not entitled to offset the D'Angela Litigation costs from the Earn-Out Merger Consideration because Dematic did not prove the settlement costs were reasonable.[104] After re-calculating to account for these inputs, Fortis concludes the correct Order Intake Amount was greater than or equal to $48 million and the Earn-Out Period EBITDA was greater than or equal to $9.3 million.[105]

In opposition, Dematic first challenges Fortis's right to dispute the calculations contained in the notice Dematic provided Fortis on March 9, 2017.[106] The Merger Agreement required Dematic, "[o]n or before March 31, 2017," to provide Fortis a certificate showing Dematic's calculation of the Order Intake Amount and Earn-Out Period EBITDA.[107] Dematic's calculations were "conclusive and binding on the parties absent manifest error unless [Fortis] deliver[ed] a notice

[102] *Id.* at 19–27.
[103] *Id.* at 27–29.
[104] *Id.* at 30.
[105] *Id.* at 31.
[106] Def.'s Post-Trial Opening Br. at 8–13.
[107] *Id.* at 10–11 (internal citations omitted).

as specified [in the Merger Agreement] objecting to such calculation."[108] The deadline for Fortis to deliver a dispute notice was twenty business days after Fortis received the certificate from Dematic.[109] In the event the parties could not agree upon the calculation, the Merger Agreement required them to retain an independent accounting firm to resolve the dispute.[110] Similarly, the parties' Escrow Agreement provided an equivalent 20-day window for Fortis to object to Dematic's claims against the $3 million Escrow; absent compliance, the Escrow Agreement stated Fortis "shall be deemed to have agreed to pay the Claimed Amount in full."[111] Dematic contends Fortis did not dispute Dematic's calculations or claims using the procedures in the Merger Agreement or the Escrow Agreement.[112] Consequently, Dematic argues its calculations are conclusive and binding.

Furthermore, Dematic disputes Fortis's claim that Dematic failed to maintain the required books and records.[113] Dematic argues the evidence at trial established that its accounting practices were the result of an "operational decision, which timely accounted for the $37 million in order intake that Fortis has not disputed."[114] Dematic asserts this "operational decision" fell within its discretion under the

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[108] JX 6, § 3.1(h)(ii).
[109] Def.'s Post-Trial Opening Br. at 10-11.
[110] *Id.* at 10-11.
[111] *Id.* at 11–12.
[112] *Id.* at 12–13.
[113] *Id.* at 20–21.
[114] *Id.*

Merger Agreement, which provided Dematic would not "be liable for any Loss or any other claims or actions based upon or related to the strategy, operations or methods used or not used by [Dematic] . . . after the Closing."[115] Moreover, Dematic disputes each of the miscalculations Fortis claims to have identified in the disputed transactions.

In addition, Dematic argues the Merger Agreement bars Fortis's attempt to recalculate the Earn-Out Period EBITDA.[116] First, Dematic says Fortis's calculation "is only supportive of a challenge to the repayment to Dematic" of the $3 million Escrow Amount; however, the Escrow Agreement deems Fortis "to have agreed to pay the Claimed Amount in full" by failing to timely challenge Dematic's escrow calculation. Second, Dematic contends Fortis has not produced any admissible evidence supporting its calculation. Third, Dematic maintains its calculation is conclusive and binding because Fortis did not utilize the Merger Agreement's dispute resolution procedure to challenge it.

Apart from those procedural challenges to Fortis's claim, Dematic argues Fortis has not met its burden of proof on the merits of its breach of contract claim. First, Dematic argues Company Products as used in the Merger Agreement means only those products listed on Schedule 4.12(h) and offered or distributed to third

[115] *Id.*
[116] *Id.* at 28–31.

parties at the time the Merger Agreement was signed. Dematic resists any notion that new software combining or integrating Dematic and Reddwerks software qualified as Company Products and counted toward the Order Intake Amount or Earn-Out Period EBITDA. Dematic therefore argues the conditional presumptions do not apply. Dematic further argues that, without those presumptions, Fortis did not prove that Dematic's calculation of the Contingent Consideration was incorrect. Dematic argues Fortis failed to present any expert witness to challenge Dematic's monthly sales data, EBITDA tracking reports, or final calculations at the end of the Earn-Out Period. According to Dematic, Fortis offered nothing more than its counsel's speculative calculations of how much Order Intake or EBITDA credit Dematic should have allocated.

2. The parties' contentions regarding Dematic's counterclaims

Regardless of the Court's ruling on Fortis's breach of contract claim, Dematic contends Fortis is obligated to indemnify Dematic for the costs it incurred due to the PTL Solution's safety defect and Dematic's retrofit efforts. Dematic's counterclaim seeks indemnification under Sections 7.1(a)(vii) and 7.1(a)(i) of the Merger Agreement.[117] Under Section 7.1(a)(vii), the Company Holders agreed to indemnify Dematic for Losses as a result of "any events relating to or arising from the ownership or operation of the assets or business of [Reddwerks] occurring prior to

[117] Def.'s Countercl. at 8–9.

or at the Closing." Under Section 7.1(a)(i), the Company Holders agreed to indemnify Dematic for Losses as a result of "any breach or inaccuracy of any representation of the Company or Company Holder contained in this Agreement." In post-trial briefing, Dematic only relied on Section 7.1(a)(i); it did not, however, identify the specific representations that allegedly were breached under that Section. Dematic's lack of precision makes its argument difficult to follow or credit.

In any case, Dematic argues the PTL Solution contained a safety defect that Reddwerks did not disclose in connection with the Merger Agreement. Dematic cites the findings of its internal investigation, SEL's independent analysis, and Dematic's expert testimony at trial. Dematic insists its retrofit of the PTL Solution was necessary to protect the safety of its customers who currently use the product.

In opposition, Fortis first argues there is no evidence that the PTL Solution is defective.[118] Fortis contends the study performed by SEL is unreliable because Dematic did not provide SEL with a complete PTL Solution to study; instead, Dematic gave SEL a portion of the system hardware and none of the system software or manuals. Fortis notes that SEL "found no evidence of PTL system failures; no evidence of PTL system warranty claim; and no evidence of litigation involving the PTL system."[119] Furthermore, an SEL engineer testified that SEL "did not form the

[118] Pl.'s Post-Trial Reply Br. at 19–34.
[119] *Id.*

opinion that the PTL system was defective (generally) or that it was defectively designed (specifically)."[120] According to Fortis, SEL simply recommended that Dematic perform a site-by-site inspection of the facilities where customers operated the PTL Solution, which Dematic never did.[121] More generally, Fortis criticizes Dematic for carrying out the retrofit process despite acknowledging, in its notice to customers, that "Dematic Reddwerks is not aware of any actual occurrences in any [PTL] systems."[122] Fortis emphasizes that there are no known instances of the PTL Solution failing as a result of the supposed defect and that the alleged defects and the probability of harm were entirely theoretical.

In addition, Fortis argues Dematic has not established it is entitled to indemnification because it has not identified how any of the alleged defects in the PTL Solution breached any of the representations contained in the Merger Agreement, a necessary prerequisite to indemnification under Section 7.1(a)(i). Finally, Fortis argues Dematic's counterclaim is barred under the plain language of the Merger Agreement because it was not brought against the correct parties.[123] Section 7.6 of the Merger Agreement provides:

> Satisfaction of Indemnification Obligations. In order to satisfy any claims for indemnification pursuant to this ARTICLE VII, the Parent Indemnities shall first pursue recovery of Losses through their right to

[120] *Id.* at 22.
[121] *Id.* at 22–23.
[122] *Id.* at 23–25.
[123] *Id.* at 43–47.

> set off against the Earn-Out Merger Consideration pursuant to Section 3.1(j), and if such amount are insufficient, the Parent Indemnities may then pursue recovery of Losses directly against the Company Indemnifying Parties.

"Parent Indemnities" is defined to include Dematic. "Company Indemnifying Parties" is defined as "the Company Holders," which is defined in turn as "the Company Stockholders, the Company Option Holders, and the Company Warrant Holders."[124] The Seller Representative (*i.e.*, Fortis) is not a Company Holder or a Company Indemnifying Party. Fortis therefore claims the Merger Agreement neither permits Dematic to bring a claim for indemnification against Fortis nor provides a basis for Fortis to be held personally liable for breaches of representations and warranties.

II. ANALYSIS

With those factual findings and the parties' contentions in mind, the Court turns to resolving the ultimate claims in this case. Because Dematic disputes Fortis's ability to even challenge the calculation of the Contingent Consideration, the Court addresses those jurisdictional arguments first. After concluding that Fortis may pursue its breach of contract claim here, the Court next turns to the meaning of Company Products and the application of the evidentiary presumptions. The Court then addresses Fortis's breach of contract claim and Dematic's right to offset the

[124] *Id.* at 44–45 (internal citations omitted).

D'Angela Litigation costs against Fortis's recovery. Finally, the Court resolves Dematic's counterclaim relating to the PTL Solution.

A. The Merger Agreement and Escrow Agreement do not bar Fortis's breach of contract claims relating to the Contingent Consideration.

Before challenging the merits of Fortis's breach of contract claim, Dematic first raises certain procedural defenses to that claim, namely that this dispute is not properly before this Court because Fortis did not correctly challenge Dematic's calculation of the Contingent Consideration or follow the dispute resolution procedure required in the Merger Agreement. As a threshold matter, Dematic argues Fortis cannot modify Dematic's calculations of Order Intake Amount and EBITDA because those calculations are "conclusive and binding" under the Merger Agreement. Dematic is wrong. The Merger Agreement said:

> On or before March 31, 2017, the Parent shall provide to the Seller Representative, a certificate signed by an executive officer of the Parent showing 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 (the "Earn-Out Notice). The Surviving Corporation shall provide the Seller Representative reasonable access to the books, records, working papers and other information supporting such calculation of the Order Intake Amount and Earn-Out Period EBITDA. The Parent's calculation of the Order Intake Amount and Earn-Out Period EBITDA shall be conclusive and binding on the parties absent manifest error unless the Seller Representative delivers a notice as specified below objecting to such calculation. If the Seller Representative disagrees with Parent's calculation of the Order Intake Amount or the Earn-Out Period EBITDA it may within twenty (20) Business Days of its receipt of the Earn-Out Notice deliver a notice to

> the Parents disagreeing with such calculation and setting forth in reasonable detail its good faith basis for such disagreement.[125]

Similarly, the Escrow Agreement provided that Fortis would submit a "reasonably detailed description and supporting documentation" outlining Fortis's good faith basis for objecting to Dematic's claims against the Escrow.[126] If Fortis failed to object within that timeframe, Fortis would be "deemed to have agreed to pay the Claimed Amount in full."[127]

Dematic first contends that these provisions bar Fortis from challenging the calculation of the Order Intake Amount or the Earn-Out Period EBITDA in this case. Dematic argues Fortis's notices objecting to the calculations did not "set forth in reasonable detail its good faith basis" for challenging the calculations. This argument is unpersuasive for two reasons. First, Dematic's calculations were the product of a "manifest error," namely Dematic's erroneous interpretation of the Merger Agreement and the meaning of Company Products. As set forth below, Dematic's calculations incorrectly were based on its position that any integrated product, whether at the source code level or at the "functionality" level, was not included within Order Intake Amount or Earn-Out Period EBITDA.

Second, Fortis did in fact send a timely written notice "setting forth in reasonable detail its good faith basis for such disagreement." Fortis's notice to

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[125] JX 6, § 3.1(h)(ii) (emphasis added).
[126] *Id.* Ex. B § 1.4(b).
[127] *Id.*

Dematic explained that Fortis did not understand why Dematic had contributed $0 to the Order Intake Amount and demanded that Dematic meet its obligation to produce documentation verifying the calculation.[128] Fortis's notice to Dematic explained Fortis's objection in as much detail as possible, given the information Dematic had and had not provided. In fact, in light of Dematic's failure to provide information regarding product integration and integrated product sales even during discovery, it would be disingenuous for the Court to conclude that Dematic's calculations were "conclusive and binding" because Fortis could not explain its objections in greater detail.

Dematic alternatively argues that the Merger Agreement contemplated that Fortis and Dematic would retain an independent accounting firm to resolve any calculation dispute. The provision at issue pertinently provided "[i]f the parties are unable to agree upon the calculation [of the Order Intake Amount or the Earn-Out Period EBITDA] they shall retain a nationally or regionally recognized independent accounting firm mutually agreeable to [Dematic] and [Fortis] (the "Review Firm") to review the calculation."[129]

Without ever employing the argument directly, Dematic seems to contend that this Court lacks subject matter jurisdiction to resolve Fortis's breach of contract

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[128] *See* JX 27-28.
[129] JX 6, § 3.1(h)(ii).

claim because the Merger Agreement required the parties to retain an independent accountant and engage in an alternative dispute resolution process. Again, Dematic is wrong for several reasons. First, the Review Firm dispute resolution process was to apply if the parties "are unable to agree upon the calculation." But the dispute between Fortis and Dematic is one of contract interpretation, specifically the meaning of "Company Products" under the Merger Agreement. Because the dispute was about not about a "calculation" that an accounting firm would be equipped to resolve, the Merger Agreement did not require an independent accounting firm to resolve it.

Second, even if Fortis's breach of contract claim fell within the dispute resolution provision, Dematic is equally at fault for the parties' failure to retain an accounting firm. The Merger Agreement did not place the responsibility for retaining an independent accounting firm on Fortis alone. Instead, the Merger Agreement charged both parties with the responsibility for retaining the independent accounting firm. Fortis correctly points out that Dematic never attempted to utilize the dispute resolution process.[130]

Third, not only did Dematic not comply with the purported obligation to retain an accountant, it waived its argument by participating in this litigation. Dematic never moved to compel the parties to engage in the dispute resolution process it now

[130] Pl.'s Post-Trial Reply Br. at 6–7.

contends was mandatory. Instead, Dematic participated in this litigation at every turn until a few months before trial, at which point Dematic seized upon this jurisdictional challenge for the first time. Accordingly, Dematic effectively waived this argument by failing to raise it until trial arrived.[131] Relatedly, there is no merit to Dematic's eleventh-hour application to amend its counterclaim to include a claim that Fortis breached the Merger Agreement's dispute resolution procedure and therefore must pay Dematic's fees and expenses in defending this litigation.[132] In addition to coming far too late procedurally, Dematic waived application of the alternative dispute resolution provision by behaving inconsistently with its purported rights under that provision.

Finally, Dematic contends Fortis cannot challenge Dematic's claim for the entire Escrow Amount because Fortis agreed to distribute the funds to Dematic. That argument ignores the record evidence. In consideration of Fortis's agreement to execute the Undisputed Amount Notice, Dematic agreed to a reservation of rights.[133] The evidence at trial showed that both parties understood that Fortis intended to

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[131] *See, e.g. Specialty DX Holdings, LLC v. Laboratory Corp. of Am. Hldgs*, 2020 WL 4581007, at *3 (Del. Super. July 27, 2020) (holding "[a]n individual or organization 'may waive its right to arbitration by . . . actively participating in litigation as to an arbitrable claim, or otherwise taking action inconsistent with [the] right to arbitration.'"); *Russykevicz v. State Farm Mut. Auto. Ins. Co.*, 1994 WL 369519, at *4 (Del. Ch. Jun. 29, 1994) (plaintiff waived contractual right to arbitration by filing suit and participating in litigation for five months before making a written demand for arbitration).

[132] Def.'s Post-Trial Op. Br. at 45-46.

[133] *See* JX 676.

challenge Dematic's claims and calculations. Thus, 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.

B. "Company Products," as that term is used in the Merger Agreement, encompasses Reddwerks' source code, including source code integrated into Dematic's products.

As set forth above, the Court held Fortis was entitled to certain evidentiary presumptions if the Court adopted Fortis's interpretation of the term "Company Products." To reiterate, the only definitional parameters the parties ascribed to the term "Company Products" in the Merger Agreement was 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 (collectively, the "Company Products").[134]

Part 1 of Schedule 4.12(h) is titled "Reddwerks Product List." The list describes Reddwerks' products in extremely general terms, typically limited to one or two words with no definitions provided. For example, a sub-list titled "Core Software Modules" includes the items "Platform," "Business Intelligence," and "Inventory Management;" another sub-list, titled "Warehouse Control Software Modules," includes items like "Sorters," "Mergers," and "Presorts."

[134] JX 6, § 4.12(h).

Fortis argues the evidence overwhelmingly establishes that its source code fell within the term "Company Products" in the Merger Agreement. Fortis contends the Company Products listed in Schedule 4.12(h) include software functionalities and some hardware. Those software functionalities, Fortis argues, are a product of source code, and software cannot operate or be distributed without source code. The integration of Reddwerks' software functionalities into Dematic's platforms required the importation and integration of source code. For example, the integration of Reddwerks' Warehouse Execution System ("WES") into Dematic's DC Director ("DCD") involved copying or "stitching" WES's functions and objects into DCD, often at the source code level.[135] Relatedly, some of the functionalities that were delivered by Dematic under the Under Armour contract were "derived directly or indirectly from Reddwerks source code."[136] Based on this evidence, Fortis urges the Court to conclude that source code amounted to Company Products and therefore apply the presumptions in Fortis's favor.

Dematic argues Fortis has not met its burden to show the evidentiary presumptions should apply.[137] Dematic criticizes Fortis for producing no witnesses from Dematic Reddwerks with personal knowledge of engineering integration, sales incentives, or accounting for the relevant transactions during the Earn-Out Period,

[135] Trial Tr. III at 60-63, 69, 71-72, 79-80 (Gill).
[136] *Id.* at 89 (Gill).
[137] Def.'s Post-Trial Opening Br. at 13–19.

and for offering no expert witness on accounting.[138] More substantively, Dematic argues that the absence of the term "source code" in the Disclosure Schedule establishes that source code was not intended to be included within Company Products.[139] Dematic contends that "what Dematic bought from Reddwerks and sold with [Dematic Reddwerks] during the Earn-Out Period was not individual lines of source code, but the 'Company Products' which Dematic and Reddwerks both treated as saleable hardware and software products or 'functionalities' listed in the [Merger Agreement's] Disclosure Schedules."[140] In other words, Dematic argues that Fortis's interpretation of "Company Products" is inconsistent with the unambiguous language of the Merger Agreement.[141]

Dematic endeavors to classify this question as a straightforward issue of contractual interpretation. And it could be, if only the Merger Agreement's language was clear or even remotely precise. It is axiomatic that Delaware courts interpret clear and unambiguous contractual terms according to their ordinary meaning.[142] When contract terms establish a common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contractual

[138] *Id.* at 14.
[139] *Id.* at 15–16.
[140] *See id.* at 16.
[141] *See id.* at 17–19.
[142] *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009) (citing *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006); *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).

language, those terms control, and the Court will not consider extrinsic evidence.[143] A term is not ambiguous simply because the parties disagree about its proper construction.[144] Rather, ambiguity arises when "the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings.[145]

Here, arriving at the correct interpretation of the contract is complicated by the parties' failure to define "Company Products" more precisely. The imprecision does not arise from the parties' decision to refer to the disclosure schedule as the list of Company Products. Rather, the difficulty—and the attendant ambiguity—arises from the glaring lack of clarity in the disclosure schedule itself.

Because the Reddwerks Product List in Schedule 4.12(h) does not expressly list "source code," Dematic argues source code cannot be "Company Products." But the contents of the Reddwerks Product List are so general that the parties could not have intended the descriptions to be exhaustive. For example, the parties defined the PTL Solution—which is comprised of numerous mechanical components and complex software functionalities—simply by listing "PTL" under the heading of "Client Technology," within a sub-list titled "Workflow Software Modules." The parties were similarly vague in describing the various "Software Modules"

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[143] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).
[144] *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).
[145] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

mentioned on the Reddwerks Product List. What those modules comprised, and what modules were "distributed or offered to third parties" when the Merger Agreement was signed, cannot be discerned from the four corners of the Merger Agreement.

Moreover, those same questions are reasonably susceptible to more than one answer. It would be at least plausible for the contracting parties to conclude that "Company Products" was narrow and included only the products listed on Schedule 4.12(h), without encompassing any modifications or changes to combine the various functionalities and modify them to meet a client's individual needs. This interpretation is at least plausible because, as Dematic points out, the Merger Agreement does not contain a "formula" or set of guidelines to be applied to determine how much integration of Reddwerks' source code into Dematic products would bring the integrated product within the meaning of "Company Products."

It also, however, would be equally (if not more) reasonable for the contracting parties to conclude the term applied more broadly to the different functionalities the products provided to Reddwerks' clients and the various components of those functionalities, including the source code necessary to produce the functionalities. This is especially true in view of the Merger Agreement's overall structure and context. That broad interpretation favored both parties; Fortis would be assured the Contingent Consideration targets could be achieved, while Dematic would be

assured Fortis's representations and warranties regarding Company Products would apply broadly to all aspects of the products Fortis offered or distributed.[146] And, the parties' choice to define each company product in one or two words reasonably could be interpreted as intending to encompass all aspects of the modules named.

Accordingly, the Court is compelled to conclude that the term "Company Products" is ambiguous. Confronted with an ambiguity, the Court may—and indeed must in this case—consider extrinsic evidence. The Court's ultimate goal does not change; it still must ascertain the parties' intentions at the time they entered into the contract.[147] But a court construing an ambiguous contract must discern that intent from more than the language contained in the contract's four corners.[148] The extrinsic evidence of intent that the Court may consider includes "all admissible evidence relating to the objective circumstances surrounding the creation of the contract."[149] Extrinsic evidence may include prior agreements and communications between the parties, trade usage or course of dealing, the parties' overt statements and acts, and the "business context" of the parties' dealings.[150]

The evidentiary record does not support Dematic's position at trial that the parties did not intend the term Company Products to include Reddwerks' source

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[146] *See, e.g.,* JX 6 § 4.12 (representations and warranties regarding IP rights for Company Products)
[147] *Salamone v. Gorman*, 106 A.3d 354, 369 (Del. 2014).
[148] *Id.* at 374.
[149] *Id.* (quoting *In re Mobilactive Media, LLC* 2013 WL 297950, at *15 (Del. Ch. Jan. 25, 2013)).
[150] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d at 1232-33; *In re Mobilactive Media, LLC*, 2013 WL 297950, at *15 (Del. Ch. Jan. 25, 2013).

code or functionalities integrated into Dematic's products.[151] Dematic's position that the absence of "source code" on Schedule 4.12(h) somehow establishes that source code did not fall within the term "Company Products" is untenable and unconvincing. The parties' failure to list "source code"—the very component necessary to make Reddwerks' software functionalities operate—is simply an example of the parties failing to expressly list all the necessary components of Reddwerks' products. The extrinsic evidence offered at trial supports Fortis's interpretation of Company Products as including source code integrated into other products or modified to meet the needs of a particular customer.

For example, Fortis offered unrebutted evidence describing how Reddwerks integrated software (including source code) into its products. Reddwerks sold Warehouse Execution System hardware and software to facilitate the delivery of goods. Reddwerks' hardware consisted primarily of lights designed to optimize the picking of products for delivery. Reddwerks' software was composed of thousands of lines of source code that operated together to perform complex functions. These functions were combined and sold in so-called "modules," which were nothing more than "a group of code that allows a particular function to happen."[152] According to Fortis, the essence of Reddwerks' business was selling the functionalities caused by

[151] *See* Def.'s Opening Post-Trial Br. at 27 (arguing that Company Products did not include "new software combining or 'integrating' Dematic and Reddwerks' software into new product.").
[152] Trial Tr. II at 30-31 (Rogers).

its source code, and Reddwerks adapted its source code to meet each customer's specific wants, needs, and circumstances.[153]

Witnesses for Dematic provided further testimony concerning the role of source code in Reddwerks' products. Dematic witness Andrew Gill testified that (1) Reddwerks' business involved selling software "functionality" to customers; (2) software functionality is a product of software; (3) software is a function of source code "that a computer then runs to provide the functionality that you see on the . . . floor of a distribution center;" and (4) source code is "inherent" within software functionality.[154] Gill further conceded that Dematic integrated Reddwerks' functionality into Dematic's platforms in order to make a "commercial product consisting of a functionality equivalent," and that integration required the integration of source code.[155] Gill also testified that (1) the Dematic Due Diligence Team recommended integration of Reddwerks functionality into Dematic platforms; (2) the goal of the integration "would be a commercial product consisting of a functionality equivalent;" (3) the integration was accomplished, "[i]n some cases," by integrating source code; and (4) some of the functionalities that Dematic

[153] *Id*. at 34-35 (Rogers).
[154] Trial Tr. III at 43-44, 53-54 (Gill).
[155] *Id*. at 60-63, 69, 71-74, 79-80 (Gill).

delivered through its Under Armour contract were "derived directly or indirectly from Reddwerks source code."[156]

In addition, the requirement in Section 3.1(h)(i) that Dematic integrate Reddwerks' products into Dematic products and services directly contravenes Dematic's position at trial that integrated products are not Company Products. Dematic's interpretation of this section of the Merger Agreement would render that integration term superfluous, which is a result this Court seeks to avoid when interpreting contracts.[157] If, as Dematic's argument necessarily implies, this provision was nothing more than a gratuitous promise, the Company Holders would not have sought to include it in the Merger Agreement, and Dematic would not have included it in the section governing how the Order Intake Amount and Earn-Out Period EBITDA would be calculated.

Given (i) the clear testimony concerning the role of source code within Reddwerks' products; (ii) the role source code played in integrating Reddwerks' products into Dematic products; and (iii) the fact that Dematic's express promise to integrate Reddwerks' products with Dematic products was included in the section of

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[156] *Id.*

[157] *See Council of Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 7 (Del. 2002) ("A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole."); *Zimmerman v. Crothall*, 62 A.3d 676, 691 (Del. Ch. 2013) (courts "attempt to give meaning and effect to each word in a contract, assuming that the parties would not include superfluous verbiage in their agreement.").

the agreement controlling the calculation of Contingent Consideration, the Court is compelled to conclude Reddwerks' source code and products integrating that source code are Company Products under the Merger Agreement. Company Products referred to the "list of all products currently distributed or offered to third parties" by Reddwerks. The parties agree that the list of Company Products included software functionalities and that Reddwerks was in the business of selling functionalities to its customers. Those functionalities are a product of source code. Dematic wanted to integrate Reddwerks' functionalities into its own products, and in some cases did so by using Reddwerks' source code. Therefore, the more reasonable interpretation of the term "Company Products" is that it included the source code supporting Reddwerks' software functionalities.

Dematic insists that "the Dematic and Reddwerks' transactions were based on the sale of functionalities, not source code;" in other words, customers were "buying functionality" and not the actual code supporting the functionality.[158] Dematic's position is not consistent with the evidence adduced at trial. The functionalities that Reddwerks sold were entirely a function of its source code. Reddwerks' engineers and programmers regularly adapted its source code to fine-tune its functionalities to meet its customers' specific wants, needs, and circumstances. Dematic's attempt to

[158] Def.'s Post-Trial Opening Br. at 16; Trial Tr. III at 91 (Gill).

separate these functionalities from the source code that created them is neither logical nor practical.

Furthermore, Dematic's argument that Reddwerks sold functionalities and not source code is irrelevant under the language of the Merger Agreement. The Company Products identified in the Merger Agreement were the "products currently distributed or offered to third parties" by Reddwerks. Thus, the Merger Agreement does not define Company Products as the products that Reddwerks sold to its customers. Instead, Company Products were those "distributed or offered" to customers. Source code meets that definition. Reddwerks "distributed" source code to customers whenever they purchased Reddwerks' software modules. That source code was modified to meet each customer's needs. Under the language of the Merger Agreement, it therefore is irrelevant that the customers did not actually buy the source code itself. The source code is still within "Company Products."

Finally, Dematic argues Fortis's interpretation would create a contractual right for which Fortis did not bargain when the parties negotiated the Merger Agreement. Specifically, Dematic contends that Fortis's interpretation of Company Products would require the Court to adopt a "never-negotiated formula for allocation of Order Intake credit based on percentages of lines of source code for 'integrated products' . . . ."[159] But this is not the argument Fortis offered or the interpretation

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[159] Def.'s Post-Trial Opening Br. at 18.

the Court is adopting. Rather, the Court has concluded that Company Products included the source code that Reddwerks created to produce the functionalities in its software products. When Dematic integrated some or all of that source code into Dematic products, creating a "functionality equivalent" of Reddwerks' software,[160] and then sold those integrated products to customers, Dematic was complying with its contractual promise to integrate Company Products with its products and services. That promise was not illusory; it was contained in the section governing the calculation of Contingent Consideration and reflected the parties' shared intent that these integrated products would contribute to that consideration.

The Court acknowledges that the Merger Agreement does not contain guidelines the parties agreed to follow to determine how much integration of source code would be necessary before an integrated product became a Company Product. But, as explained above, faced with two reasonable interpretations of the term "Company Products," the Court adopts the interpretation it views as more consistent with the overall structure of the Merger Agreement, including the parties' express agreement that Dematic would integrate Company Products with Dematic Products during the Earn-Out Period.[161] Moreover, this issue underscores the need for the evidentiary presumptions. Dematic failed to produce discovery that could have

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[160] Trial Tr. III at 80 (Gill).
[161] *See* JX 6 § 3.1(h)(i).

permitted the Court and Fortis to evaluate whether the extent of the integration of Reddwerks' source code into Dematic products rose to the level that the integrated product fairly could be included within Company Products.

In conclusion, Fortis has met its burden to establish that source code fell within the meaning of "Company Products" in the Merger Agreement. The Court therefore turns to the evidentiary presumptions imposed before trial and the effect of those presumptions on Fortis's breach of contract claim.

C. The evidentiary presumptions were the most targeted sanction to remedy Dematic's failure to produce responsive documents.

Having adopted Fortis's interpretation of the term Company Products, the Court memorializes its reasons for granting the evidentiary presumptions.[162] Fortis sought sanctions because it contended Dematic intentionally failed to produce responsive documents relating to product integration while repeatedly representing that it had produced all such documents. Dematic did not argue in the motion for sanctions that the Confluence and Jira records were not responsive to Fortis's discovery requests. Instead, Dematic argued that it did not believe production of

[162] Again, those reasons were described at length in the Court's May 11, 2021 bench ruling and also addressed in the Court's Order denying Dematic's application to certify an interlocutory appeal of that ruling. *See* D.I. 185. Those rulings are expressly incorporated in this post-trial decision.

those records was "necessary" or "appropriate" given other records Dematic produced.[163]

Dematic's decision to intentionally withhold those records, along with the other instances of its failure to comply with its discovery obligations until forced to do so by motion practice and court orders, is inconsistent with the overarching purpose of discovery. Discovery is intended "to advance issue formulation, to assist in fact revelation, and to reduce the element of surprise at trial."[164] To that end, pretrial discovery rules are interpreted liberally.[165] Delaware courts have the power to issue sanctions for discovery abuses under their inherent power to manage their own affairs.[166] The decision to impose sanctions must of course be just and reasonable.[167] After considering the evidentiary record presented with Fortis's motion for sanctions, along with Dematic's explanation for its prolonged failure to

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[163] Def.'s Br. in Opp. to Third Mot. for Sanctions at 1-2. The records Dematic produced that it concluded made further production unnecessary were 40 pages of "Release Notes" relating to Dematic iQ. Among other deficiencies, the Release Notes did not identify each instance of product integration, the amount of Reddwerks source code incorporated in any given release, changes to that source code, or whether the source code was active or dormant in the integrated product. The Confluence and Jira records would have contained that information. More fundamentally, it is entirely inconsistent with accepted discovery practice for the producing party to unilaterally decide that a subset of responsive documents is sufficient production while remaining silent about the documents it is withholding on that basis.

[164] *Levy v. Stern*, 1996 WL 742818, at *2 (Del. Dec. 20, 1996).

[165] *Id.* at *2.

[166] *Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1189 (Del. Ch. 2009) (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106–07 (2d Cir. 2002)); *Drejka v. Hitchins Tire Serv., Inc.*, 2009 WL 1813761, at *3 (Del. Super. June 24, 2009) ("This Court is vested with the inherent power 'to manage its own affairs and to achieve the orderly and expeditious disposition of its business.'").

[167] *Genger v. TR Investors, LLC*, 26 A.3d 180, 190 (Del. 2011).

produce facially responsive records while concealing that failure from Fortis, the Court concluded sanctions were appropriate and necessary.

Superior Court Rule 37(b) lists sanctions that the Court may impose if a party fails to provide discovery.[168] Those sanctions may include evidentiary presumptions, preclusion of evidence, striking pleadings, or a finding of contempt. Sanctions serve three possible purposes: punishment, deterrence, or coercion.[169] The Delaware Supreme Court has instructed its trial courts to be "diligent in the imposition of sanctions upon a party who refuses to comply with discovery orders," both to penalize parties whose conduct requires sanctions and to deter other litigants from engaging in similar behavior.[170]

The Court has wide latitude to fashion an appropriate remedy, but the remedy must be tailored to the degree of culpability of the spoliator and the prejudice suffered by the complaining party.[171] In determining what sanctions are appropriate, the Court considers the following factors: (i) the spoliator's culpability or mental state; (ii) the degree of prejudice suffered by the complaining party; and (iii) the availability of lesser sanctions that would avoid any unfairness to the innocent party

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[168] *In re Rinehardt*, 575 A.2d 1079, 1082 (Del. 1990).
[169] *Id.*
[170] *Holt v. Holt*, 472 A.2d 820, 824 (Del. 1984).
[171] *Riverside Fund V, L.P. v. Shyamsundar*, 2017 WL 624856, at *1 (Del. Super. Feb. 14, 2017).

while, at the same time, serving as a sufficient penalty to deter similar conduct in the future.[172]

Each of those three factors supports the sanctions the Court imposed, including the conditional evidentiary presumptions. First, as to culpability, Dematic never argued it was unaware that the Confluence and Jira records were responsive to Fortis's discovery requests. To the contrary, Dematic's contention that it concluded production of the records was not "necessary" or "appropriate" effectively concedes that Dematic considered producing the Confluence and Jira records and consciously chose not to do so based on its unilateral determination about what amount of production was "necessary." In the context of its other failures to produce discovery, Dematic cannot plausibly contend that this failure was a mere oversight. And Dematic's implicit (or at times explicit) contention that the Confluence and Jira records were not relevant was based on its assumption that the Court would adopt Dematic's narrow interpretation of the term Company Products at trial.[173] That is, instead of producing responsive documents and reserving its right to argue that the documents are not relevant based on how the Merger Agreement is interpreted, Dematic presumed it ultimately would prevail at trial on the contractual

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[172] *Id*. at *1 (citing *Beard Research*, 981 A.2d at 1189).

[173] Def.'s Br. in Opp. to Third Mot. for Sanctions at 6 (arguing Fortis was not prejudiced by the failure to produce the Confluence and Jira records because the Merger Agreement "does not provide for Order Intake Credit for Dematic products sold, even if they contained integrated components of Reddwerks code or functionality.").

interpretation issue and thereby excused itself from producing documents in discovery.[174]

Second, Fortis indisputably was prejudiced by Dematic's failure to produce this material. The Confluence and Jira records were directly responsive to Fortis's document requests, and Dematic represented it had produced all responsive material. Dematic's misrepresentation caused Fortis to (1) not move to compel those records within a timeframe that would have allowed the parties to use that information with their experts and at trial;[175] and (2) seek other forms of discovery to try to "trace" Reddwerks' code to reveal Dematic's integration efforts and identify integrated products that Dematic sold during the Earn-Out Period. Fortis also was unable to depose most of Dematic's witnesses regarding this information during the discovery period. The Confluence and Jira records also were related to the interrogatory responses the Court ordered Dematic to supplement in May 2020, but those supplemental responses did not disclose the systems' existence.

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[174] Dematic also argued that the source code information in Confluence and Jira could be misleading without additional "human intervention," by which Dematic seemed to mean some level of interpretation or manipulation by Dematic employees. There was little to no evidence in the record to support Dematic's argument in that regard and, in any event, the contention that discovery might be misleading goes to the weight to be accorded to the evidence, not whether or not it should be produced.

[175] Fortis's expert, Lorraine Barrick, submitted an affidavit explaining that she was unable provide an accurate accounting and render an expert opinion regarding the relevant transactions in this case because Fortis did not have access to records regarding which Reddwerks products were integrated and sold with Dematic products. *See* Pl.'s Reply in Supp. of Third Mot. for Sanctions (D.I. 144), Ex. B, Aff. of L. Barrick ¶¶ 8-9.

Third, the evidentiary presumptions were the most tailored and appropriate sanction to remedy the failure to produce the Confluence and Jira records within any reasonable timeframe. Simply excluding the evidence[176] and shifting attorneys' fees would not remedy the harm Dematic caused Fortis by failing to produce this material. Because the existence of these records and Dematic's failure to produce them was not apparent until shortly before trial, the Court was left with the option to (1) postpone the trial and reopen fact and expert discovery to allow Fortis to obtain this information and incorporate it in its trial strategy; or (2) craft presumptions regarding the issues Fortis otherwise could have used this evidence to prove. Delaying trial, however, would have rewarded Dematic—who already had unsuccessfully sought to continue trial on multiple occasions—while punishing Fortis, who consistently had pushed to maintain the June 2021 trial date. Litigants and judges have an interest in the timely administration of justice and the efficient resolution of cases. The rights of litigants who comply in good faith with the trial schedule and discovery procedures should not be jeopardized by parties who disregard the rules.[177]

[176] *See Terramar Retail Ctrs, LLC v. Marion #2-Seaport Trust*, 2018 WL 6331622, at *11 (a court order precluding a party from introducing in evidence material that it did not divulge in discovery has been recognized as an effective method of encouraging compliance with discovery).
[177] *Wahle v. Medical Ctr. Of Delaware, Inc.*, 559 A.2d 1228, 1233 (Del. 1989).

If the Court ordered Dematic to produce the Confluence and Jira records, there was no realistic way for Fortis to use those records to prove its claims without continuing the trial yet again. The evidentiary presumptions, on the other hand, appropriately remedied Dematic's failure to provide timely, pertinent discovery that was directly relevant to Fortis's claims. Dematic was aware this material existed and knew or should have known that it was relevant to the case and directly responsive to Fortis's claims. Dematic's conscious decision not to produce it or even reveal its existence strongly suggests that the evidence, if fully discovered, would not have been favorable to Dematic's position at trial.[178]

Evidentiary presumptions are significant discovery sanctions, but they are appropriate when the discovery material intentionally was withheld and the party

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[178] Dematic also argued these evidentiary presumptions were not permitted under Delaware law without a finding that Dematic recklessly or intentionally destroyed evidence. The Court rejected that argument, explaining:

> First, the 'reckless or intentional destruction' standard applies when the Court imposes adverse inferences, *not* evidentiary presumptions. Second, Dematic's failure to produce was intentional, as the Court explained in its oral ruling granting sanctions. Third, Dematic incorrectly assumes that 'destruction' of evidence fundamentally is different from a failure to produce evidence until the eve of trial. As this Court explained in its bench ruling on May 10, 2021, there is no practical difference between destroying evidence and intentionally refusing to produce it until the eve of trial. In both instances, the non-producing party cannot effectively use that evidence to present its case. This particularly is true where, as here, the non-producing party bears the burden of proof on the issue to which the discovery relates. Under those circumstances, shifting the parties' burdens and imposing evidentiary presumptions is appropriate and is not a 'substantial issue' marking a departure from settled Delaware law.

Fortis Advisors, LLC v. Dematic Corp., 2021 WL 2259398, at *3 (Del. Super. Jun. 3, 2021) (internal citations omitted).

seeking discovery was substantially prejudiced in its ability to litigate the case.[179] The evidentiary presumptions deprived Dematic "of the advantages of any evidentiary gaps that [its] own misbehavior might have [] caused."[180] The presumptions, however, were tailored and did not automatically result in a judgment in Fortis's favor. Application of the presumptions was conditional, allowing Dematic to continue to pursue its legal defenses regarding the meaning of Company Products, the applicability of the alternative dispute resolution process, and Dematic's entitlement to a setoff. The Court revised Fortis's proposed presumptions to make their application contingent on the Court's resolution of the meaning of Company Products. For all those reasons, the sanctions ordered by the Court on May 11, 2021 were appropriate and necessary to remedy Dematic's serious and repeated violations of the Court's discovery rules and orders.

D. Fortis prevails in its breach of contract claim and is entitled to damages in the total amount of the contingent consideration, less the costs of the D'Angela Litigation.

Because Dematic's procedural challenges fail and because the conditional evidentiary presumptions apply in this case, Fortis has satisfied its burden of proving that Dematic breached the Merger Agreement with respect to the calculation and payment of the Contingent Consideration. Fortis therefore is entitled to the payment

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[179] *See James v. Nat'l Fin. LLC*, 2014 WL 6845560, at *13 (Del. Ch. Dec. 5, 2014); *Rinehardt*, 575 A.2d at 1082.
[180] *Genger*, 2009 WL 4696062, at *19.

of $10 million in Earn-Out Merger Consideration. Because Fortis is presumed to have satisfied the $9.3 million Earn-Out Period EBITDA threshold, Fortis also is entitled to payment of the $3 million Escrow Amount, less the costs associated with the D'Angela Litigation.[181]

Although Fortis argues Dematic was not entitled to indemnification for the D'Angela Litigation, and therefore could not offset those costs and expenses from the Escrow or the Earn-Out Merger Consideration, that argument is unconvincing. Section 7.1(a)(iii) required the Company Holders to indemnify Dematic for "any loss, claim, Action, Liability, fine, penalty, assessment, deficiency, damage or expense (including reasonable legal, accounting, and professional services expenses and costs incurred in the investigation, defense or settlement thereof or the enforcement of any rights hereunder)" that Dematic incurred as a result of "any Action asserted or brought against [Fortis] or [Dematic]" arising from, *inter alia*, "the exercise of any appraisal rights pursuant to the [Delaware General Corporation Law]."[182]

Fortis nevertheless argues Dematic is not entitled to indemnification for "unreasonable" amounts and, according to Fortis, the settlement payment was

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[181] Dematic's claim for indemnification for the D'Angela Litigation is alternatively pleaded as an affirmative defense for setoff and as part of Dematic's indemnification counterclaim. The Court cannot identify any reason to resolve the issue as a counterclaim as opposed to a setoff, and the parties have not argued otherwise.

[182] JX 6 § 7.1(a)(iii)(d). Dematic was permitted to offset the indemnification claims against the Contingent Consideration or the Escrow. *See* JX 6 § 7.6; JX 6, Ex. B at 1.

unreasonable in comparison to the amounts the Company Holders received under the Merger Agreement. But Fortis has not proved by a preponderance of the evidence that the settlement amount was unreasonable.

Fortis did not offer any testimony regarding reasonableness other than its own witnesses' views regarding the amount paid in comparison to the amount other Company Holders received. Fortis did not, for example, offer any evidence that the amount paid in settlement was unreasonable in comparison to the additional risks and costs Dematic would have incurred if it chose to continue litigating the D'Angela Litigation through trial and appeal. Dematic's head of accounting testified that he authorized the settlement amount in consultation with Dematic's executives and lawyers and that the amount authorized was consistent with Dematic's estimates during due diligence regarding the likely cost of resolving the D'Angela Litigation.[183] Fortis did nothing to rebut this testimony. Accordingly, Dematic is entitled to indemnification in the total amount of the settlement and associated attorneys' fees for the D'Angela Litigation.

E. Dematic did not prove it is entitled to indemnification for the defects in the PTL Solution or the associated retrofit.

Dematic's claim for indemnification under the Merger Agreement relating to the PTL System fails for the simple but fundamental reason that Dematic failed to

[183] Trial Tr. V at 158-166 (Carlson).

establish how the discovery of defects in that system after the merger breached any representation in the Merger Agreement. As set forth above, Dematic's counterclaim is based on the theory that the Company Holders are obligated to indemnify Dematic under Sections 7.1(a)(i) or 7.1(a)(vii) of the Merger Agreement. Fortis challenges Dematic's counterclaim on a number of different planes, arguing (1) Dematic mischaracterized the record regarding Dematic Reddwerks executive Alex Ramirez's testimony; (2) Dr. Martens' expert opinion was flawed in several key respects; (3) Dematic failed to identify how the alleged defects in the PTL system, even if true, breached the Merger Agreement; and (4) Dematic failed to name the correct parties – the Company Holders – as counterclaim defendants. Having concluded, however, that Dematic failed to establish that it is entitled to indemnification under Section 7.1(a), Fortis's other arguments are moot and need not be addressed.

Dematic's post-trial opening brief is almost entirely devoted to establishing that the PTL Solution contained a safety defect that Dematic needed to remedy through the retrofit process. Dematic concludes that it is entitled to recover the costs of the retrofit under Section 7.1(a)(i) of the Merger Agreement, which provides indemnification for "any breach or inaccuracy of any representation or warranty of

the Company or any Company Holder contained this Agreement."[184] Accepting for the sake of argument that Dematic successfully established the existence of a safety defect, Dematic nevertheless fails to prove its claim because Dematic neither attempts to identify which "representation or warranty" was breached nor explains what the breach was. Dematic instead argues that the PTL Solution was defective and concludes, *ipse dixit*, that Dematic is entitled to indemnification.

One fundamental problem with Dematic's counterclaim is that it failed to prove that Reddwerks was aware of the alleged safety defect at the time the representations were made. The only evidence Dematic even cites on this point is deposition testimony by Alex Ramirez, who worked at Reddwerks before the merger and became CEO of Dematic Reddwerks after the merger. But Mr. Ramirez testified he did not become aware of the alleged defect until after the merger, when he was serving as Dematic Reddwerks CEO.[185] As such, Dematic has not established that there were existing liabilities or breaches of contract or warranty at the time the representations became effective.

A second fundamental flaw with this counterclaim is Dematic's failure to link the PTL Solution defect to any representation or warranty in the Merger Agreement. Section 7.1(a)(i) does not say that Dematic will be indemnified for safety or product

[184] Dematic's post-trial briefing does not cite Section 7.1(a)(vii), although that section was cited in its original counterclaim.
[185] Ramirez Dep. at 74.

defects; it says Dematic will be indemnified for "any breach or inaccuracy of any representation or warranty" in the Merger Agreement. Dematic does not even try to establish any breach or inaccuracy of any representation or warranty, and therefore necessarily fails to prove its claim.

The only time Dematic even mentions any specific warranties or representations is when Dematic notes that its general counsel sent Fortis a letter on June 9, 2017 (the "June 9 Letter") that "listed the numerous representations and warranties breached as a result of Reddwerks' selling this defectively designed product to Dematic."[186] This factual recitation offers little help to Dematic because Dematic's post-trial briefing fails to explain how any of those representations and warranties were breached. Nevertheless, the Court will address each of the representations and warranties raised in the June 9 Letter.[187]

The June 9 Letter first mentioned Section 4.7(d), which provides "[e]ach product sold or delivered and each service rendered by the Company . . . has been in conformity in all material respects with all applicable contractual commitments and all express or implied warranties, and none of the Company or any Subsidiary thereof has any material Liability or material obligation for replacement or repair

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[186] JX 34; Def.'s Post-Trial Opening Br. at 33 (internal citations omitted); Def.'s Post-Trial Reply Br. at 6-9.

[187] The analysis that follows covers substantially more ground and offers far more detail than Dematic summoned in either of its post-trial briefs.

thereof or other damages in connection therewith . . . ." But Dematic has not attempted to identify any "contractual commitments" to which the PTL Solution failed to conform. Nor has Dematic established that Reddwerks had "any material Liability or material obligation for replacement or repair" of the PTL Solution, as the alleged defect in the PTL Solution had never caused a fire and Reddwerks' customers had never complained about the alleged defect at the time of closing, which was the effective date for the representation.

The June 9 Letter also referenced Section 4.11(b), which provides "neither the Company nor any Subsidiary thereof has breached any Material Contract, and to the Company's Knowledge, no Material Contract has been breached in any respect or cancelled by the other party and has not been duly cured or reinstated . . . ." But Dematic has not argued that Reddwerks breached any contract with its customers. Dematic does not cite a single contract or contractual clause that the PTL Solution defect breached.

The June 9 Letter next cited Section 4.15, which provides "[t]he Company and each subsidiary thereof is in compliance in all material respects with each applicable Law relating to the Company or any Subsidiary thereof or its business or properties, and no written notice has been received . . . from any Governmental Authority or any Person alleging a violation of or Liability under any applicable law." Again, Dematic did not even try to identify a breach of this Section at trial or

in its post-trial briefing. Dematic neither describes any law that was broken nor alleges that Reddwerks received written notice from the government about any violation of law.

The June 9 Letter also identified a possible breach of Section 4.9, in which Reddwerks represented "[n]either the Company nor any Subsidiary thereof has any Liabilities or obligations other than (a) as reflected in the Interim Balance Sheet, (b) Liabilities incurred after the date of such Interim Financial Statements in the ordinary course of business and (c) Company Transaction Expenses." None of Dematic's trial evidence or post-trial argument established a breach of this section.

Next, the June 9 Letter relied on Section 4.28, which is titled "Warranties" and provides:

> Each Company Product manufactured, sold, leased, or delivered by the Company or any Subsidiary thereof has been in conformity with all applicable contractual commitments and all express and implied warranties with respect to such product. To the Company's Knowledge, neither the Company nor any Subsidiary thereof has any Liability (and there is no basis for any present or future action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand against any of them giving rise to any Liability) for replacement or repair of any Company Product or other damages in connection therewith. Section 4.28 of the Disclosure Schedules includes copies of the standard terms and conditions of sale for each Company Product (containing applicable guaranty, warranty and indemnity provisions). No Company Product manufactured, sold, leased or delivered by the Company is subject to any guaranty, warranty, or other indemnity beyond two (2) years from the date of sale.

Dematic has not argued or established that the PTL Solution was not in conformity with any contract or that Reddwerks had any knowledge of liability relating to the PTL Solution before executing the Merger Agreement or at the time of closing.

Finally, the June 9 Letter refers to Section 6.3(a)(iii), which provides "the Company shall, and shall cause its Subsidiaries to . . . conduct it business only in the usual ordinary course of business in accordance with the past practice including using commercial reasonable efforts to . . . comply in all material respects with all order and Laws applicable to the company." As with the other sections referenced in the June 9 Letter, Dematic did not even attempt to show at trial that Reddwerks failed to conduct its business in the usual course or failed to comply with applicable orders or laws.

To re-cap, Dematic's post-trial briefs did not expressly identify which representations and warranties were allegedly breached. To the extent Dematic alluded to particular representations and warranties in its factual recitations, Dematic failed to describe how any of them were breached. Accordingly, Dematic failed to carry its burden of proof with respect to its counterclaim.

CONCLUSION

For the reasons explained above, Fortis has proved that Dematic breached the Merger Agreement by failing to pay the Contingent Consideration. Fortis therefore is entitled to judgment in the amount of $13,000,000, plus costs and interest, less the

$1,512,808.10 in settlement costs and attorneys' fees that Fortis incurred defending the D'Angela Litigation. Dematic has not proved its counterclaim by a preponderance of the evidence, and the Court therefore enters judgment in Fortis's favor as to that claim. If there are any open issues not addressed or mooted by this post-trial opinion, the parties shall notify the Court by letter within ten days. Otherwise, Fortis shall prepare a conforming form of order and file it with the Court within twenty days. If Dematic objects to the form of order, it shall so advise the Court by letter within five days of filing. The appeal period for this post-trial opinion shall not begin to run until the final order is entered as an order of the Court.