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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| LIMELIGHT NETWORKS, INC., | ) | |
| | ) | |
| Plaintiff-Below, Appellant, | ) | No. 138, 2017 |
| | ) | |
| v. | ) | Court Below: |
| | ) | The Court of Chancery of the |
| AKAMAI TECHNOLOGIES, INC., | ) | State of Delaware |
| | ) | C.A. No. 2017-0035-SG |
| Defendant-Below, Appellee. | ) | PUBLIC VERSION-- |
| | | FILED: June 21, 2017 |

# APPELLEE'S ANSWERING BRIEF

OF COUNSEL:

Michael J. Summersgill
Cynthia D. Vreeland
Mark C. Fleming
Rebecca A. Bact
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Mary V. Sooter
WILMER CUTLER PICKERING
HALE AND DORR LLP
1225 17th Street, Suite 2600
Denver, CO 80202
(720) 274-3135

Heath A. Brooks
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

Brock E. Czeschin (#3938)
Nicholas R. Rodriguez (#6196)
RICHARDS, LAYTON & FINGER, P.A.
920 N. King Street
Wilmington, DE 19801
(302) 651-7700

*Attorneys for Defendant-Below, Appellee Akamai Technologies, Inc.*

Dated: June 9, 2017

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## NATURE OF PROCEEDINGS

Plaintiff-Appellant Limelight Networks, Inc. ("Limelight") brought this appeal from the Court of Chancery's order dismissing its complaint for breach of a settlement agreement between Limelight and Defendant-Appellee Akamai Technologies, Inc. ("Akamai").

Limelight and Akamai have been embroiled in continuing litigation for more than ten years. The parties ended their first patent infringement lawsuit in Massachusetts in a settlement obligating Limelight to pay Akamai $54 million in periodic installments. A second patent infringement lawsuit in Virginia remains ongoing. Limelight filed this third lawsuit in Delaware, seeking to gain leverage in Virginia and avoid its payment obligations, despite the fact that ***all of the alleged conduct at issue occurred in connection with the Eastern District of Virginia litigation***. The case provoked the judge presiding in the Virginia action to issue a sua sponte order directing Limelight to explain how this suit was anything other than an attempt to ***"harass Akamai and build litigation costs."*** B77.

Limelight's complaint seeks to transform a discovery email among outside counsel in the Virginia litigation into a highly-consequential notice of termination of the parties' settlement of the Massachusetts case—even though the email does not threaten termination, does not reference the contractual 60-day cure period, and was not directed to Akamai's General Counsel, as the plain language of the

contract's carefully-crafted notice provision requires. The Vice Chancellor correctly ruled that, under governing Massachusetts law, Limelight failed to comply with the parties' notice provision and dismissed Limelight's complaint. Limelight's complaint also fails for a second, independent reason: the asserted breaches undisputedly caused Limelight no harm whatsoever, and are therefore immaterial. Either reason warrants affirmance.

## SUMMARY OF ARGUMENT

1. *DENIED.* The Vice Chancellor did not err in interpreting the Settlement Agreement to require that notice of termination be sent directly to Akamai's General Counsel.

a. *DENIED.* Contrary to Limelight's assertion, the Vice Chancellor's ruling did not turn on "factual findings." His ruling was one of law, based on the Settlement Agreement's unambiguous requirement that notice and opportunity to cure be given as the contract specifies: to Akamai's General Counsel. The Vice Chancellor correctly ruled that Limelight's interpretation, allowing email notice to anyone sufficiently affiliated with Akamai, was contrary to the plain language of the contract and common sense. Nor did the Vice Chancellor go "outside the pleadings"; the decision rested only on Limelight's complaint, incorporated documents, judicially-noticeable public documents, and governing Massachusetts law.

b. *DENIED.* The Vice Chancellor applied the correct legal standard, ruling that Akamai's understanding of the Settlement Agreement was the only one faithful to its unambiguous terms. Limelight's interpretation, in contrast, would allow notice to anyone that it deemed sufficiently affiliated with Akamai, and was thus contrary to common sense and would lead to absurd results (in other

words, it was unreasonable). Under Massachusetts law, the court need not accept Limelight's unreasonable interpretation.

2. *DENIED.* The Vice Chancellor also correctly understood Massachusetts' requirement of strict compliance with notice provisions where the contract contains an opportunity to cure. Limelight's "effective notice" cases are distinguishable as they did not include cure periods. Litigation counsel's email was not "effective notice" in any event, as it did not inform Akamai that Limelight intended to terminate the Settlement Agreement.

3. The Vice Chancellor's decision may also be affirmed because Limelight does not maintain that the asserted breaches caused it any harm. Under Massachusetts law, insignificant breaches that cause no harm cannot justify termination as a matter of law.

## STATEMENT OF FACTS

The following facts are alleged in the complaint, recited in documents incorporated therein, or a matter of public record.[1]

### A. The Massachusetts Litigation and the Settlement Agreement

In 2006, Akamai sued its competitor Limelight for patent infringement in the U.S. District Court for the District of Massachusetts, and a jury found that Limelight infringed and that it was liable for $45.5 million. A65(¶7). After numerous appeals, on which Akamai ultimately prevailed, the parties signed the settlement agreement at issue ("Settlement Agreement" or "Agreement"). A65-67(¶¶8, 12).

The Settlement Agreement granted Limelight worldwide rights to certain Akamai patents, including the patent Limelight infringed. A65-67(¶¶8, 12); A21(§1.5), A23(§2.1). Limelight agreed to pay $54,000,000 in quarterly installments of $4,500,000 between October 2016 and April 2019. A66-67(¶12); A24(§3.1).

The fact of the settlement and the amount Limelight owes are ***not*** confidential. A68(¶16); A26-27(§5.1). The Settlement Agreement provides

[1] On a motion to dismiss, the court "consider[s] documents referred to in a complaint" and can notice "publicly available facts," including public court decisions and filings, such as those in the Virginia action. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169-70 (Del. 2006); *see also Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 n.28 (Del. 2004).

simply that it shall not be "used" or "relied upon in any fashion" in any proceedings between the parties. A67-68; A29(§7.2).

Section 9.3 of the Settlement Agreement provides that one party may terminate the Settlement Agreement only "in the event that the other Party fails to perform any of its material obligations under this Agreement and such breach is not cured within 60 days after receipt of written notice of such breach by the non-breaching Party." A69(¶17); A29-30(§9.3). Section 10.1 specifies the manner in which any notice (including notice of termination) must be provided:

> 10.1 Notice: Any notice to be given by one party to another under this Agreement shall be given by electronic mail, or by overnight courier service, such as Federal Express, ***directed to the following at the address indicated*** or such other address as may be subsequently provided in accordance with this Section 10.1.
>
> With respect to Akamai:
>
> Akamai Technologies, Inc.
> 150 Broadway
> Cambridge, Massachusetts 02142
> ***Attn: General Counsel***
>
> With respect to Limelight:
>
> Limelight Networks, Inc.
> 222 South Mill Avenue, Suite 800
> Tempe, Arizona 85281
> Attn: Chief Legal Officer and Chief Executive Officer

A30(§10.1) (emphasis added).

Although Section 10.1 states that notice may be provided to "such other address as may be subsequently provided," there is no allegation that Akamai (or Limelight) ever provided such an address. *Id*.

Massachusetts law governs the Settlement Agreement. A31(§10.10).

### B. The Virginia Action and Limelight's Claim of Breach

On November 30, 2015, after a final appellate decision directing the District of Massachusetts to reinstate the jury verdict in Akamai's favor (but prior to the execution of the Settlement Agreement), Limelight sued Akamai for patent infringement in the U.S. District Court for the Eastern District of Virginia, before Judge John Gibney. A65-66(¶8). Akamai counterclaimed that Limelight infringed certain Akamai patents not covered by the settlement. A66(¶9); A25(§4.1(a)).

Limelight's complaint in this action arises from a discovery skirmish in the Virginia action. Limelight claims that Akamai breached the Settlement Agreement by allegedly "using and relying on the Settlement Agreement in the Virginia Patent Litigation" in the following ways, A69(¶20):

- Akamai produced the Settlement Agreement ***to Limelight*** in response to Limelight's own discovery requests, A70(¶21);

- Akamai served a rebuttal damages expert report ***on Limelight*** that allegedly relied on the fact and amount of the license in the Settlement Agreement, A70(¶22);

- Akamai's expert allegedly relied on the Settlement Agreement when answering deposition questions posed ***by Limelight***, A70(¶23);

- Akamai added to its exhibit list a press release describing the Settlement Agreement and the Settlement Agreement itself, A70(¶24); and

- Akamai allegedly included the amount of the settlement on a slide prepared for the damages expert's testimony at a *Daubert* hearing, A70(¶25).[2]

Akamai stated on the record at the *Daubert* hearing that neither Akamai nor its expert had relied on or would rely on the Settlement Agreement, and Judge Gibney ordered neither party to use it. B22:24-25; B26:18-20. No testimony was elicited regarding the slide Limelight now challenges. *See generally* B21-26. Indeed, Judge Gibney has now excluded ***both parties'*** damages experts. *See* A263:22-A264:1.

Limelight's only allegation of harm was the purported effect that mentioning the Settlement Agreement would have on the ***Virginia federal judge***. A73(¶33). But it was Limelight—not Akamai—that first informed Judge Gibney of the Settlement Agreement by attaching it to (and discussing it in) motions *in limine* on

[2] As Limelight notes in its brief, out of an abundance of caution, Akamai withdrew both the Settlement Agreement and the related press release from its exhibit list and took other actions to remove reference to the Settlement Agreement from the case. LLBr. at 14 (citing A189). Of course, those actions could have been taken within the 60-day "cure period" following a notice of termination, had Limelight given notice as the Settlement Agreement requires.

December 6, over a month before the January 11 *Daubert* hearing. B3-9; B13 (identifying Exhibit 1 as "a confidential version of the parties' settlement agreement from the prior litigation, titled 'Patent Sublicense Agreement'"). Judge Gibney also made clear that he would ***not*** consider the Settlement Agreement, eliminating Limelight's only purported harm. B23:3-7.

### C. Limelight's Counsel's Email

Limelight's complaint does not allege proper compliance with the Settlement Agreement's critical condition precedent to termination—i.e., written notice of the purported breach to Akamai's General Counsel with a 60-day opportunity to cure. A29-30(§§9.3, 10.1). Limelight's complaint depended on a vague allegation that it "provided Akamai a written notice of breach." A71(¶26). Limelight's purported "written notice" was an email following a deposition of Akamai's damages expert. The email was sent from Limelight's outside litigation counsel in the Virginia action, Azra Hadzimehmedovic, to an associate member of Akamai's outside counsel team in the Virginia action, Matt Hawkinson. The email was not addressed or directed to Akamai's General Counsel, did not threaten termination, did not claim a material breach, and did not reference the cure period. The email reads in full:

> Matt,
>
> As we discussed yesterday during Mr. Meyer's deposition, Akamai's reliance in Mr. Meyer's Reply Report on the parties' settlement agreement from the prior litigation is a breach of the express terms of that settlement agreement as evidenced both by that agreement, a copy of which I handed you yesterday, and by the parties' correspondence in this case, a copy of which I also handed you and is also below.
>
> You were unable to respond yesterday, so please confirm today that Akamai withdraws Mr. Meyer's references to the settlement of the parties' prior litigation and its terms in his Reply Report and in his deposition.
>
> Thank you.
>
> Regards, Azra

A58; A295:4-296:2. Mr. Hawkinson responded that Akamai would proceed in a manner consistent with the Settlement Agreement. A56; A296:3-14.[3]

### D. Limelight's Complaint and Purported "Termination" Letter

On January 17, 2017, Limelight filed this suit. A77. Limelight's complaint sought: (i) a declaration that Limelight properly terminated the Settlement Agreement and remains licensed to Akamai's patents but need not pay any further royalties; (ii) injunctive relief barring further "use" of the Settlement Agreement in other litigations; and (iii) restitution of royalties already paid. The complaint came

[3] Limelight asserts that Mr. Hawkinson "never stated that Limelight should direct notice to Akamai's general counsel." LLBr. 2, 13. That is because Ms. Hadzimehmedovic nowhere suggested that her email was intended as notice under Section 9.3 of the Settlement Agreement.

shortly after Judge Gibney denied Limelight's summary judgment motions and disparaged its damages expert's testimony, previewing its later exclusion. B34.

On the same day it filed suit, Limelight's chief legal officer, Mike DiSanto, sent a member of Akamai's outside counsel team a letter purporting to terminate the Settlement Agreement. B74-75.[4] The letter was cc'ed "via overnight courier" to the attention of Akamai's General Counsel at Akamai's Cambridge headquarters. *Id.*

### E. Judge Gibney's February 3 Order

After learning of Limelight's filing of this case, Judge Gibney issued an order "on [the Court's] own initiative" requesting that Limelight "explain how, despite their position at the [*Daubert*] hearing, Limelight chose to file litigation in Delaware" and expressing concern that Limelight was attempting to "***harass Akamai and build litigation costs***." B77 (emphasis added).

Judge Gibney further noted that "[a]t the [January 11] evidentiary hearing in this case, counsel for Limelight said it had no objection to discussing that settlement agreement before the Court, so long as the information never reached

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[4] As Limelight itself concedes, this Court may properly consider documents attached to the motion to expedite briefing. *See* LLBr. 10 n.4 ("The sealed material is attached to Limelight's motion to expedite briefing[.]"). The Court may also consider the letter because it is not being offered for the truth of the representations contained therein. *See Vanderbilt Income & Growth Assocs., L.L.C. v. Arivida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996).

the jury," B76, at which point "[t]he Court then directed that neither side may use the prior settlement at trial," and "Akamai even made clear that it has no intention of doing so." *Id.* Therefore, Judge Gibney concluded, Limelight's suit created "grave concerns with parties taking inconsistent positions on identical issues in different courts." B77.[5]

### F. Proceedings Below

Akamai moved to dismiss, explaining that Limelight failed to allege notice as required by the Settlement Agreement. A193-197.[6] Akamai also showed that Limelight's alleged breaches, as pled, were not "material" and could not warrant termination. A197-201.

In its opposition, Limelight did not contest key points of Akamai's motion. Limelight conceded that its counsel's email was not directed to Akamai's General Counsel, and did not assert that the email expressed any intent to terminate the Settlement Agreement. A229-237; B96; B98-99. Nor did Limelight deny that the alleged breaches caused Limelight no harm. A237-243; B106-110.

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[5] Pursuant to Judge Gibney's order, the parties submitted letters to the court, after which Judge Gibney's clerk indicated in an email that Judge Gibney had received sufficient information.

[6] Contrary to Limelight's assertions, Akamai did not "abandon[] its earlier denial of breach" (LLBr. 15), but instead focused on arguments appropriate to the motion-to-dismiss stage while maintaining that it had not breached the Settlement Agreement (A199 n.12).

After extensive briefing and oral argument, the Vice Chancellor orally granted Akamai's motion to dismiss. The Vice Chancellor concluded that Section 10.1 was "not an ambiguous provision." A294:6. Rejecting Limelight's interpretation that notice could be directed by email to any Akamai agent, the Vice Chancellor found that Limelight's reading was "not compliant with my understanding of English" and that "it doesn't make sense to me as a matter of common sense" or as a "matter of logic." A294:12-22.[7] The Vice Chancellor determined that the substance of Limelight's email was not "consistent with the definition of the general terms [of] notice," because it was "in the context of a deposition," and the emails were "a negotiation over the use of deposition testimony and an expert report," "not a notice which puts the general counsel of the company on notice that … the equivalent of a forfeiture is liable to occur if there's not a cure within the contractual period." A296:15-297:9. The Vice Chancellor ruled the email insufficient as notice of termination, because it did not serve the "purpose … that the general counsel of the client is directly made aware that its behavior is alleged by the other side to be a material breach so that it can cure …

[7] Although Limelight now suggests in a footnote, LLBr. 10 n.4, that the Vice Chancellor could not consider the email exchange, it conceded the opposite below. A281:10-282:9.

rather than suffer forfeiture of its rights, but not its obligations, under the contract." A297:10-22; A298:1-4.

The Court of Chancery therefore dismissed Limelight's claim for declaratory judgment of termination. Because Limelight's claims for injunctive relief and rescission depended on termination, the Vice Chancellor dismissed those as well. A298:1-15. The Vice Chancellor did not reach the question of whether any alleged breach was material. A297:19-22; A298:4-8.

The Vice Chancellor informed Limelight that nothing prevented it from now serving proper notice on Akamai of its purported breaches. A297:23-298:1. Limelight instead noticed this appeal.

## ARGUMENT

### I. THE COURT OF CHANCERY PROPERLY CONCLUDED THAT THE SETTLEMENT AGREEMENT UNAMBIGUOUSLY REQUIRES THAT CONTRACTUAL NOTICE BE SENT TO AKAMAI'S GENERAL COUNSEL

#### A. Question Presented

The Settlement Agreement allows Limelight to terminate the Agreement only if it provides "written notice" of a breach of a material obligation to Akamai's General Counsel, and Akamai does not cure such breach within 60 days. Limelight relies not on notice to Akamai's General Counsel, but on an email between outside litigation counsel in the Virginia litigation that did not mention breach of a "material obligation," an intent to terminate, or the "cure" provision. Was notice adequate? Preserved at A193-199; A293-299.

#### B. Scope of Review

Massachusetts law governs the Settlement Agreement. A31(§10.10). In Massachusetts, interpretation of a contract, including whether it is ambiguous, is a question of law reviewed de novo. *Balles v. Babcock Power Inc.*, 70 N.E.3d 905, 911 (Mass. 2017).

#### C. Merits of Argument

For two independent reasons, the Vice Chancellor was plainly correct to dismiss Limelight's complaint for failure to allege sufficient notice. First, the

contract unambiguously requires that Limelight send any contractual notice to Akamai's General Counsel, which the complaint does not allege, and Limelight indisputably did not do. Second, Massachusetts law requires that such a notice indicate intent to terminate absent a cure, which Limelight's counsel's email indisputably did not convey.

### 1. Limelight failed to satisfy the notice provision because it did not send notice to Akamai's General Counsel

#### *a. Massachusetts law interprets unambiguous contractual language according to its plain meaning, without resort to extrinsic evidence*

As the Massachusetts Supreme Judicial Court recently reaffirmed, "when the language of a contract is clear, it ***alone*** determines the contract's meaning." *Balles*, 70 N.E.3d at 911 (emphasis added). Contractual language is ambiguous only "when it can support a reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken." *Id.* (internal quotation marks omitted). An interpretation that would produce an "absurd or unreasonable" result "should be rejected." *Ebenisterie Beaubois LTEE v. Deiulis Bros. Constr. Co.*, 2014 WL 5314825, at *2 (Mass. App. Ct. Oct. 20, 2014) (quoting *Cadle Co. v. Vargas*, 771 N.E.2d 179, 183 (Mass. App. Ct. 2002)). Thus, "an ambiguity is not created simply because a controversy exists between the parties, each favoring an interpretation contrary to the other," but rather only if two reasonable

interpretations exist. *Citation Ins. Co. v. Gomez*, 688 N.E.2d 951, 953 (Mass. 1998) (citation omitted); *see also, e.g.*, *L&M Contracting, Inc. v. Mortenson/Westcott*, 2003 WL 22717672, at *1 (Mass. App. Ct. Nov. 18, 2003) (holding that contract documents were not ambiguous where only one party's interpretation was reasonable).

### *b. The Settlement Agreement unambiguously requires notice to Akamai's General Counsel*

The Settlement Agreement's language supports only one reasonable interpretation: that Limelight could only invoke Section 9.3's termination procedure by sending notice of purported breach to Akamai's General Counsel. The Court of Chancery correctly applied the plain meaning of the contract without resort to extrinsic evidence.

The Settlement Agreement allows a party to terminate for breach of a "material obligation[]" only after it provides the other party with "written notice of such breach" and a 60-day opportunity to cure. A29-30(§9.3). The Agreement further specifies that any such notice from Limelight must be "directed to" the attention of Akamai's "General Counsel" at Akamai's headquarters in Cambridge, Massachusetts.

> 10.1 Notice: Any notice to be given by one party to another under this Agreement shall be given by electronic email, or by overnight courier service, such as Federal Express, ***directed to the***

> ***following at the address indicated*** or such other address as may be subsequently provided in accordance with this Section 10.1.
>
> With respect to Akamai:
>
> Akamai Technologies, Inc.
> 150 Broadway
> Cambridge, Massachusetts 02142
> ***Attn: General Counsel***.

A30(§10.1) (emphases added). Notice to Limelight must likewise be "directed to" its Chief Legal Officer and Chief Executive Officer at its offices in Tempe, Arizona. *Id.*

Such notice provisions are not mere formalities; they require specific notice to senior corporate officers to prevent opportunistic attempts to terminate a contract based on supposed breaches that can easily be cured. Massachusetts law thus requires strict adherence to notice provisions where, as here, the contract contains a cure period. *See Milona Corp. v. Piece O' Pizza of Am. Corp.*, 300 N.E.2d 926, 927 (Mass. App. Ct. 1973) ("We are not persuaded that [defendant's] noncompliance with the notice provision was a mere technical failure, because we read that provision as designed to give the plaintiffs an opportunity to cure their defaults and hence as imposing a condition precedent on [defendant's] power to terminate the agreement thereunder."); *Cain v. Kramer*, 2002 WL 229694, at *15 (D. Mass. Feb. 4, 2002) ("*Milona* … has been read to require that notice

requirements be complied with strictly if the parties have expressly included them in an agreement as an opportunity to cure a default." (citing cases)).

As the Vice Chancellor held, the Settlement Agreement's notice provision is not ambiguous, but rather "completely clear." A294, A297. It requires notice "directed to" Akamai's "General Counsel," to personally inform that particular high-ranking officer that Limelight is threatening the drastic remedy of terminating the contract absent a cure. As the Vice Chancellor ruled:

> [T]he requirement that [notice] be made to the general counsel is clearly a negotiated term which has a purpose. And the purpose has to be that the general counsel of the client is directly made aware that its behavior is alleged by the other side to be a material breach so that it can cure, if it wishes to cure, rather than suffer the forfeiture of its rights, but not its obligations, under the contract. This seems to me to be completely clear.

A297. The Vice Chancellor considered Limelight's contrary interpretation—that notice could be sent by email to anyone Limelight deemed sufficiently affiliated with Akamai—which he ruled was contrary to "logic," "common sense," and "English." A294. Having rejected Limelight's unreasonable interpretation, the Court of Chancery correctly held, per the plain terms of the Settlement Agreement, that Limelight's purported notice must be sent to Akamai's General Counsel. And because Limelight has never alleged that it sent any notice to Akamai's General Counsel, the Vice Chancellor properly dismissed Limelight's complaint.

### *c. Limelight's contrary arguments are unavailing*

Limelight advances five arguments in its attempt to avoid the clear language of the Settlement Agreement's notice provision. Many of Limelight's arguments are waived because they were not made in the Court of Chancery; in any event, none shows any error in the Vice Chancellor's ruling.

***First***, Limelight mistakenly argues that the Vice Chancellor made an improper "factual finding regarding the effect of two commas," namely, the commas before "or by overnight courier" and "directed to." LLBr. 20-23.

As a threshold matter, Limelight's argument is waived. Although commas were discussed cursorily at oral argument, A267-268, Limelight did not mention comma placement or cite the Chicago Manual of Style in its brief below. Because this argument was not fairly presented below, it is waived. *See* Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review[.]"); *Shawe v. Elting*, 157 A.3d 152, 162 n.31 (Del. 2017) (finding waiver and noting that "Rule 8 is not satisfied by attempting to anchor serious appellate arguments in the shifting sands of general arguments made below"); *Klauder v. Echo/RT Hldgs., LLC*, 2016 WL 7189917, at *2 (Del. Dec. 12, 2016) (TABLE); *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678-79 (Del. 2013).

In any event, Limelight's argument fails on the merits. The Vice Chancellor's interpretation of the contract is not a "factual finding," but a proper legal interpretation of unambiguous contract language. *Balles*, 70 N.E.3d at 911. Limelight does not dispute that, standing alone, the commas before "or by overnight courier service" and "directed to" should be interpreted as the Vice Chancellor did. LLBr. 21-22. Instead, Limelight argues that the comma before "directed to" might be present only to set off "such as Federal Express," and that without that appositive there might have been no comma at all. *Id.* But Limelight's reading conflicts with the overall structure of Section 10.1. The references to "electronic mail" and "overnight courier service" are included in a single paragraph, followed by two indented paragraphs including the relevant contact information. Had the parties intended that the address paragraphs refer back only to "overnight courier service," they could have given "overnight courier service" its own paragraph, followed by the address information; they did not. Indeed, in its briefing here and below, Limelight felt compelled to rewrite the provision by adding "[1]" and "[2]," demonstrating that different language was necessary even to make Limelight's interpretation ***apparent***, let alone reasonable. A222; LLBr. 21.

Limelight's argument also fails because—as the Vice Chancellor noted—it leads to absurd results. A294:12-22; *see Ebenisterie Beaubois*, 2014 WL 5314825,

at *2 ("[A]n interpretation of a contract should be rejected 'if common sense tells us that the result would be absurd or unreasonable[.]'" (quoting *Cadle*, 771 N.E.2d at 183)); *Speakman v. Allmerica Fin. Life Ins.*, 367 F. Supp. 2d 122, 137 n.27 (D. Mass. 2005) ("[T]he Court must interpret the contract in accordance with justice and common sense, and avoid, where possible, any construction that is unreasonable or inequitable."). Under Limelight's result-oriented reading, the parties negotiated a specific notice provision that envisioned specific notice sent by overnight courier to a particular person (the General Counsel), yet also allowed Limelight to ignore that provision by simply sending an email to any outside agent Limelight deemed sufficiently affiliated with Akamai—in this case, a lawyer who is not even an Akamai employee nor was involved in the Massachusetts litigation. The Court of Chancery properly rejected Limelight's interpretation as contrary to common sense.

Recognizing this deficiency, Limelight argues that it makes sense to require overnight courier service to a particular person to establish a "paper trail" to track delivery, but allow email service to unspecified "Akamai[] agents" because "the use of email obviate[s] the need for a paper trail." LLBr. 24-25. Limelight did not advance this argument in its briefing below, and it is waived. *See supra* p. 20 (citing cases). In any event, Limelight's argument that the notice provision is primarily concerned with tracking delivery makes no sense. Had Limelight sent its

"notice" to Akamai's outside counsel Matt Hawkinson via overnight courier, that mailing could have been tracked to confirm delivery to Mr. Hawkinson, but the mailing indisputably would not satisfy Section 10.1—even under Limelight's interpretation. If the parties' only concern were tracking, they could have written the provision to make clear that email or physical notice could be addressed to any agent of the other party, but did not. That the parties specified that notice must be to Akamai's General Counsel (and, if to Limelight, to its Chief Legal Officer and Chief Executive Officer) clearly evinces their intent that each company's high-ranking lawyer (and in Limelight's case, its CEO as well) must be directly notified if a 60-day cure clock is ticking on a $54 million contract settling major litigation.[8]

***Second***, Limelight argues that the Court of Chancery made an improper "factual finding" that the parties "specifically negotiated for direct and personal notice to Akamai's general counsel." LLBr. 23. Limelight cites nothing for this argument, which presumably refers to the Vice Chancellor's statement that "the requirement that [notice] be made to the general counsel is clearly a negotiated term which has a purpose."[9] A297. Again, that is not a factual finding, but rather

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[8] Limelight cites no reason or authority for its argument, LLBr. 27, that it is somehow unreasonable to notice two Limelight executives for issues (such as an allegation of material breach) affecting a $54 million contract.

[9] Limelight appears to attribute the words "expressly negotiated" (in quotation marks) to the Vice Chancellor, LLBr. 3, but neither the Vice Chancellor nor the

a legal interpretation of the contract's unambiguous language. *See, e.g.*, *McMann v. McGowan*, 883 N.E.2d 980, 983 (Mass. App. Ct. 2008) ("When the words of a contract are not ambiguous, the contract language must be construed in its usual and ordinary sense" so as to "give effect to the parties' intentions." (citation omitted)). The mere fact that the Vice Chancellor's oral order used the term "negotiated" does not mean his dismissal was based on a factual finding.

***Third***, Limelight's argument that the Court of Chancery failed to determine "that Limelight's interpretation was unreasonable," LLBr. 29, borders on frivolous. The Vice Chancellor characterized Akamai's interpretation as "completely clear," and Limelight's interpretation as contrary to "logic," "common sense," and "English"—in other words, unreasonable. A297. The Vice Chancellor was not required to use the magic word "unreasonable" to reject Limelight's interpretation as a matter of law. *See Ebenisterie Beaubois*, 2014 WL 5314825, at *2 ("[A]n interpretation of a contract should be rejected 'if common sense tells us that the result would be absurd or unreasonable[.]'").[10]

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parties used that phrase during the hearing. In any event, Section 10.1 was specifically "negotiated"—i.e., not mere boilerplate—in that it contains contact addresses and personnel unique to each party (Akamai's "General Counsel" and Limelight's "Chief Legal Officer and Chief Executive Officer").

[10] Limelight also relies on the Court of Chancery's statement when deciding the motion to expedite that Limelight's complaint was "colorable." LLBr. 29. Limelight fails to mention, however, that the Court of Chancery also characterized

***Fourth***, Limelight claims that the Vice Chancellor's interpretation "eviscerates" the email notice provision. LLBr. 4, 26. Not so. Section 10.1 requires notice "directed to the following at the address indicated"—here, to Akamai's General Counsel at Akamai's Cambridge headquarters—"or such other address as may be subsequently provided in accordance with this Section 10.1." A30. The contract thus provides for email notice in the event that a party subsequently provides an email address pursuant to Section 10.1, which neither Akamai nor Limelight has yet done. That does not "eviscerate[]" the email notice provision; it simply recognizes that neither party has so far provided an email address at which to receive notice.

Limelight also incorrectly asserts that "Akamai offered no explanation for how, applying its interpretation, a party could effectuate email notice." LLBr. 18. To the contrary, Akamai's reply explained that Section 10.1 allows email notice after an email address is "subsequently provided in accordance with this Section 10.1," and would have allowed notice by email had either of the parties chosen to designate an email address in the original Section 10.1. B101 n.6. Thus, the Settlement Agreement's reference to email notice is not a "nullity." LLBr. 26.

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the colorability standard as "extremely lenient" and "perhaps the lowest standard in the law," A162, and explicitly stated that "a motion to dismiss … is not precluded by my finding of colorability because colorability is a lower standard." A170-171.

Indeed, it is Limelight's argument that renders the notice provision a nullity—"eviscerating" the parties' clear statement that valid notice must be to the limited set of individuals the parties designated.

Limelight also mistakenly asserts that the Court of Chancery "noted that even if an email address for … Akamai's general counsel were provided, there would exist an ambiguity" as to "whether just sending an email to the general counsel could satisfy contractual notice requirements." LLBr. 26. Limelight misreads the record. The Vice Chancellor was discussing a potential ambiguity ***if*** Limelight were to send email notice to Akamai's General Counsel ***before any such email address were added to the contract***—which indisputably never occurred. A269. The Vice Chancellor did not find any "ambiguity" as to whether notice—email or otherwise—had to be sent to Akamai's General Counsel. On that point, he correctly ruled that the Settlement Agreement "clearly makes electronic mail, if applicable, if that's the method chosen to give a notice, be provided to the general counsel of Akamai Technologies." A294. If, on the other hand, Akamai had designated an email address under Section 10.1 and Limelight subsequently emailed notice to that address—neither of which occurred or has been alleged—such an email would suffice under the Settlement Agreement.

***Fifth***, Limelight erroneously suggests that Section 10.1's notice requirements do not apply to termination under Section 9.3. LLBr. 25. Limelight

did not make this argument below, so it is waived. *See supra* p. 20 (citing cases). The argument is also meritless. Section 10.1 applies to "***[a]ny*** notice to be given by one party to another under this Agreement," A30 (emphasis added), which clearly includes the "written notice" required by Section 9.3. A29. Indeed, Section 9.3 contains the Settlement Agreement's only reference to a party giving notice (other than Section 10.1 itself). If Limelight does not believe that Section 10.1's notice requirements apply to the "written notice" under Section 9.3, then it is hard to imagine how they apply at all.

### 2. Limelight independently failed to satisfy the notice provision because its counsel's email did not convey an intent to terminate

The Court of Chancery also rightly held that Limelight's notice was separately deficient because it did not inform the recipient of any intent to terminate absent a cure, as required under the Settlement Agreement and Massachusetts law. *See* A297 (holding that Limelight failed to give "notice that the very drastic and -- which is the equivalent of forfeiture is liable to occur if there's not a cure within the contractual period").

#### *a. The Settlement Agreement and Massachusetts law require notice of intent to terminate when the contract contains a cure provision*

Massachusetts law imposes substantive notice requirements when a contract contains an opportunity to cure. In *Jasty v. Wright Medical Technology, Inc.*, 528

F.3d 28 (1st Cir. 2008), the First Circuit, applying Massachusetts law, held a party's notice deficient as a matter of law because it "did not provide the required notice of [the party's] intent to terminate." *Id.* at 36-37. The *Jasty* contract allowed for termination after "written notice" of the alleged breach and failure to cure within 30 days, but "did not specify any particular formulation of *written* notice." *Jasty v. Wright Med. Tech., Inc.*, 2006 WL 961456, at *15 (D. Mass. Apr. 6, 2006), *aff'd*, 528 F.3d 28 (1st Cir. 2008).[11] Wright sent a letter calling Jasty's conduct "unacceptable" and "frustrating the very purpose of our contract," but these comments were deemed legally insufficient as notice, because they "do not convey Wright's intent to terminate, nor do they provide a thirty-day opportunity for Jasty to cure." 528 F.3d at 36-37; *see also Seaboard Sur. Co. v. Town of Greenfield*, 370 F.3d 215, 223 (1st Cir. 2004) ("notice must be clear, definite, explicit, and unambiguous," and was not satisfied because "Greenfield's letters to Seaboard did not alert Seaboard to a presumed default, nor indicate that Seaboard was in material breach, nor refer to [the notice provision], nor warn that Seaboard would be deemed in default in fifteen days" (citation omitted)).

[11] The *Jasty* notice provision stated: "[T]his Agreement may be terminated at an earlier date by either party for cause if, after providing written notice to the other party, that party has not cured the alleged breach within thirty (30) days." 2006 WL 961456, at *13.

Consistent with these authorities, the Court of Chancery ruled that the Settlement Agreement's notice provision requires notice to a party "that its behavior is alleged by the other side to be a material breach so that it can cure, if it wishes to cure, rather than suffer the forfeiture of its rights, but not its obligations, under the contract." A297. Thus, any notice must "convey[] with reasonable certainty the information reasonably needed to serve th[at] purpose." *Seaboard*, 370 F.3d at 223 (internal quotation marks omitted).

***b. Limelight's counsel's email did not convey intent to terminate***

The Vice Chancellor correctly ruled that Limelight's outside litigation counsel's email to Akamai's outside litigation counsel did not convey an intent to terminate absent a cure. The email nowhere indicates that it is intended as notice of termination—it does not mention Section 9.3, a "material obligation," termination, or the 60-day cure period. Further, Limelight has not pled that the email expressed an intent to terminate absent a cure.

Ultimately, Limelight does not dispute that it failed to give notice of intent to terminate. Instead, it unsuccessfully tries to parse *Jasty* and *Seaboard* to suggest that Massachusetts law does not require such notice. Limelight's arguments fail.

Limelight first claims that the notice in *Jasty* "did not actually assert a breach, or request a cure." LLBr. 34. Limelight misses the point. As the district

court in that case explained: "[T]he Agreement clearly requires such notice as would reasonably advise Jasty that, absent a prompt cure of some breach, termination was in the offing." *Jasty*, 2006 WL 961456, at *15. Limelight does not dispute that its email fails that standard.

Further, Limelight's claim that its counsel's email "request[ed] a cure," LLBr. 34, is a red herring. Limelight's outside counsel asked Akamai's outside counsel to withdraw certain portions of an expert report and deposition that Limelight characterized as "a breach" of the Settlement Agreement. A58. Limelight did not mention the 60-day cure provision of Section 9.3 or otherwise indicate that it was triggering that provision. As in *Jasty*, "[s]uch language does not express, nor even hint, that termination is imminent absent immediate repair of a stated breach." 2006 WL 961456, at *14.

Limelight's attempt to distinguish *Seaboard* fares no better. Limelight argues that the asserted notice in *Seaboard* "did not alert [the breaching party] to the presumed default, nor indicate that [it] was in material breach." LLBr. 35 (internal quotation marks omitted; brackets in original). But Limelight likewise failed to inform Akamai that Limelight alleged breach of a "***material*** obligation," which is a prerequisite to termination under Section 9.3. And as in *Seaboard*, Limelight's alleged notice fails to mention the cure period or in any way indicate that Limelight intended to trigger it. *See Seaboard*, 370 F.3d at 223-24 ("No

reasonable jury could find that Greenfield's letters put Seaboard on notice that th[e] fifteen-day [cure] period had commenced.").

As the Court of Chancery correctly concluded, Limelight's counsel's email does not "put[] the general counsel of [Akamai] on notice that … the equivalent of a forfeiture is liable to occur if there's not a cure within the contractual period." A297. It is merely "negotiation over the use of deposition testimony and an expert report" among outside litigation counsel. *Id.*

## II. LIMELIGHT'S "EFFECTIVE NOTICE" ARGUMENT DOES NOT JUSTIFY DISREGARDING THE SETTLEMENT AGREEMENT'S UNAMBIGUOUS NOTICE REQUIREMENTS

### A. Question Presented

Does Limelight's "effective notice" argument excuse its failure to comply with the Settlement Agreement's notice provision, and if so, did Limelight provide "effective notice" to Akamai's General Counsel? Preserved at A233-237; A 270-74; B103-106.

### B. Scope of Review

Massachusetts law governs the Settlement Agreement. A31(§10.10). In Massachusetts, interpretation of a contract, including whether it is ambiguous, is a question of law reviewed de novo. *Balles*, 70 N.E.3d at 911.

### C. Merits of Argument

Limelight alternatively argues that its failure to comply with the Settlement Agreement's unambiguous requirements should be excused because its counsel's post-deposition email should be deemed "effective notice." The Court of Chancery correctly rejected this argument.

#### 1. Massachusetts law requires strict compliance with contractual notice provisions

Massachusetts law is clear that supposed "effective notice" is not sufficient when a contract provides for an opportunity to cure. *See Cain*, 2002 WL 229694,

at *15 (Massachusetts law requires that "notice requirements be complied with strictly if the parties have expressly included them in an agreement as an opportunity to cure a default"); *see also Jasty*, 2006 WL 961456, at *14 ("'[I]f a party who has the power of termination fails to give notice ***in the form and the time required*** by his reservation, it is ineffective as a termination.'" (emphasis added) (quoting 6 Arthur Corbin, *Corbin on Contracts* § 1266, at 64 (1962)); *Milona*, 300 N.E.2d at 927 (holding that "noncompliance with the notice provision" was more than "a mere technical failure, because we read that provision as designed to give the plaintiffs an opportunity to cure their defaults and hence as imposing a condition precedent" on termination). Accordingly, Limelight could not evade the contractual notice provision by simply sending notice to any agent of Akamai with some connection to the matter. In fact, if such "effective notice" were permitted, it would render Section 10.1 meaningless.

Limelight attempts to distinguish the above-cited cases by claiming that they featured no written notice at all. LLBr. 33-35. But the cases hold that Massachusetts law requires strict compliance with contractual notice provisions where a cure period is required; they nowhere suggest that anything short of that (including a noncompliant written notice) would change the outcome.[12] Further,

[12] Limelight discounts the strict compliance standard recited by the District of Massachusetts in *Cain* based on a stray statement by the state trial court not in a

this line of cases was cited in *Jasty*, where there ***was*** a noncompliant written notice that was held insufficient. 2006 WL 961456, at *14. Limelight does not even attempt to explain why its email satisfies the rule of law stated in these cases, nor does Limelight identify any statements in these cases that would excuse the failure to send notice to the person explicitly required by the contract.

Limelight's argument also conflicts with its own advocacy in this very case. In its first point of appeal, Limelight argues that parties ***may*** require notice to specific executives, and asserts only that Akamai and Limelight failed to do so clearly enough. LLBr. 27 ("If the parties had wanted to require notice delivered directly to either the general counsel of Akamai or *both* the chief legal officer and the chief executive officer of Limelight as a condition precedent to terminating the contract … they could have clearly stated that."). However, Limelight's "effective notice" argument urges that, no matter what the contract stated, Limelight could always have terminated following allegedly "effective notice" to Akamai's outside litigation counsel. Thus, Limelight is effectively saying that no matter how clearly parties write their notice requirements, courts need not enforce them. That is flatly

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decision, but during a charge conference in the underlying matter. LLBr. 34. But nothing in that non-binding quotation, nor in the *Cain* decision itself, suggests that notice sent to the wrong person at the wrong entity (as here) would be sufficient under Massachusetts law.

contrary to Massachusetts law and to the power of sophisticated parties to order their affairs through unambiguous language, as Akamai and Limelight did here.[13]

### 2. Limelight's counsel's email did not put Akamai on notice of Limelight's intent to terminate

Limelight's "effective notice" argument independently fails due to the substantive deficiencies in Limelight's email. As explained in Section I.C.2 above, Limelight's email did not inform Akamai that Limelight intended to trigger Section 9.3—the email did not mention Section 9.3, breach of a "material obligation," termination, or the 60-day cure period. Limelight's email thus could not have placed Akamai on notice—"effective" or otherwise—"that its behavior is alleged by [Limelight] to be a material breach so that it can cure … under the contract." A297.

Limelight cites several cases that it claims stand for the proposition "that effective notice, rather than strict compliance with the form of notice, is what a party must provide when giving notice under a contract." LLBr. 31. As an initial matter, none of Limelight's cases involved notice sent to a person or entity other than the one identified in the contract. Furthermore, all but one of Limelight's cited cases (*Rosen v. Gold Star Wholesale Nursery, Inc.*, 1992 WL 355942 (Mass.

[13] Akamai made these strict compliance arguments prominently below. A193-195; A259-260; A285; B98-106. Limelight misstates Akamai's position when it says—notably without citation—that "Akamai effectively conceded in the Court of Chancery that Massachusetts law requires only effective notice." LLBr. 33.

App. Div. Nov. 19, 1992)) involve contracts ***without*** cure provisions and are thus distinguishable.[14]

Limelight's cited cases are inapplicable for several additional reasons. First, many of them do not address "effective notice" at all. *See, e.g.*, *Gerson Realty Inc. v. Casaly*, 316 N.E.2d 767, 767 (Mass. App. Ct. 1974) (notice provision was satisfied); *Grimm v. Venezia*, 2011 WL 7982163, at *2 (Mass. Super. Ct. July 13, 2011) (The provision "is not even limiting the means of notice, but providing avenues of giving notice that would not be contested"); *Delano Growers' Coop. Winery v. Supreme Wine Co.*, 473 N.E.2d 1066, 1072-73 (Mass. 1985) (statutory notice requirement was satisfied without any suggestion that the notice failed to comply with an explicit requirement).

[14] Although *Rosen* involves a contract with a cure provision, it is an action for damages, ***not termination***. 1992 WL 355942, at *4. It therefore does not implicate the core purpose of the notice provision at issue here, namely to unambiguously notify Akamai's General Counsel of the threat of termination "so that [Akamai] can cure, if it wishes to cure, rather than suffer the forfeiture of its rights, but not its obligations, under the contract." A297. Limelight makes no claim for damages, nor could it, and *Rosen* offers no support for the proposition that "effective notice" can be the basis for termination. *Rosen* also notes that its decision "was not necessarily dependent on Gold Star's technical compliance with terms of the written lease," but rather rested on a promissory estoppel theory—which is not at issue here. 1992 WL 355942, at *5. Finally, *Rosen* is a decision not of the Massachusetts Supreme Judicial Court or Appeals Court, but of the Appellate ***Division*** of the Massachusetts ***District*** Court, decisions of which are non-binding. *See, e.g.*, *In re E.C.*, 55 N.E.3d 979, 986 n.9 (Mass. App. Ct. 2016).

Second, Limelight's cases involved specific contexts irrelevant here. *See Gerson Realty*, 316 N.E.2d at 767 (notice provision requiring registered mail was satisfied by certified mail, return receipt requested); *Boyle v. Zurich Am. Ins. Co.*, 36 N.E.3d 1229, 1237 (Mass. 2015) (involving insurance policy, for which Massachusetts statutory and common-law rules limit the application of contractual notice provisions, due to "the true nature of the relationship between insurance companies and their insureds" in which the policy "is not a negotiated agreement" (citation omitted)).

### 3. Limelight's complaint does not adequately allege "effective notice"

Limelight next argues that its complaint survives dismissal merely because it "alleges that Limelight sent Akamai written notice of breach." LLBr. 35. Limelight is wrong. A court deciding a motion to dismiss "need not accept conclusory allegations as true." *Pfeffer v. Redstone*, 965 A.2d 676, 683 (Del. 2009). Otherwise, a plaintiff could always avoid dismissal simply by parroting the legal standard and alleging that it is met. The Court of Chancery properly looked to the email itself, which was referenced in the complaint and whose content and inclusion in the motion-to-dismiss record were not disputed. A295:4-296:14; A282:2-9; *see Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) ("[A] claim may be dismissed if allegations in the complaint or in the exhibits incorporated into

the complaint effectively negate the claim as a matter of law."); *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 797 (Del. Ch. 2016) ("The incorporation-by-reference doctrine permits a court to review the actual document to ensure that the plaintiff has not misrepresented its contents and that any inference the plaintiff seeks to have drawn is a reasonable one.").[15] The Court of Chancery thus did not err in considering Limelight's counsel's email and concluding that it did not qualify as sufficient notice under any permissible theory.

#### 4. The Vice Chancellor's decision did not depend on a factual finding concerning the effectiveness of notice

Limelight next complains about the Court of Chancery's characterization of its email as "negotiation over the use of deposition testimony and an expert report"[16]—calling this an improper "factual finding at the motion to dismiss stage." LLBr. 37-38. But this is not a factual finding—it is the plain reading of

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[15] For these same reasons, Limelight's citation for the first time on appeal to *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531 (Del. 2011), does not show any error in the Vice Chancellor's decision. *Central Mortgage* involved open and material factual questions on which the plaintiff's allegations had to be taken as true—e.g., the substantive content and effect of "Agency loan files" that were not in the motion-to-dismiss record, and factual issues surrounding 47 alleged instances in which the defendant had acted in the expected way after receiving what the plaintiff deemed notice. *Id.* at 538. Furthermore, *Central Mortgage*—which applied New York law—does not discuss the viability of an "effective notice" theory under Massachusetts law.

[16] Contrary to Limelight's statement, LLBr. 5, the Vice Chancellor never used the word "posturing" in describing Limelight's email.

Limelight's counsel's email, whose content is not in dispute. The court was not precluded from reading unambiguous and undisputed documents that are fairly incorporated into the complaint and determining that they foreclosed recovery as a matter of law. *See Malpiede*, 780 A.2d at 1083 n.19 ("If the appended document, to be treated as part of the complaint … reveals facts which foreclose recovery as a matter of law, dismissal is appropriate." (citation omitted)).

In any event, Limelight's focus on the Vice Chancellor's statement about "negotiation" misses the forest for one tree. The Vice Chancellor's decision rests on the fundamental recognition that Limelight's email did not place Akamai "on notice that the very drastic … equivalent of a forfeiture is liable to occur if there's not a cure within the contractual period." A297. Whether or not the email is characterized as a step in a "negotiation," the substantive ***deficiencies*** the Vice Chancellor identified remain and require dismissal.

**5. Akamai's counsel did not admit "effective notice" during oral argument**

Desperate to find any hook on which to hang its argument, Limelight contends that Akamai's counsel "conceded" at oral argument that Limelight's email was "effective notice." LLBr. 38-40. Counsel conceded no such thing.

First, counsel's point was that Limelight's email was substantively deficient such that it did not place him or any other recipient on notice that Limelight

intended it as notice of breach of a "material obligation" under Section 9.3. A286. That is the very opposite of "conced[ing]" effective notice, and in particular does not admit that any notice sent to outside counsel alone would be sufficient.

Second, it does not matter that Akamai's outside counsel would have elevated ***an actual notice of termination***—rather than Limelight's substantively-deficient email—to Akamai's in-house counsel, who was present at the hearing. LLBr. 39. Such a chain of events, which has not been alleged and did not occur, would not satisfy the contract's requirement that Limelight send notice directly to Akamai's General Counsel or Massachusetts' requirement of strict compliance with such notice provisions. Nor would it satisfy some ill-conceived version of "effective notice" to Akamai's General Counsel—even accepting Limelight's chain of hypotheticals, the notice would have been forwarded to an Akamai in-house lawyer other than the General Counsel (as Limelight admits). LLBr. 40. It is Limelight's responsibility under the contract, not the responsibility of Akamai's outside counsel, to send any contractual notice directly to Akamai's General Counsel as the Settlement Agreement requires.

### 6. Limelight's assorted other explanations do not excuse its deficient notice

Limelight posits a series of other excuses for its deficient notice—some of which are raised for the first time on appeal, and none of which is persuasive.

***First***, Limelight argues that "a client is charged with the knowledge of his attorney." LLBr. 36. But this begs the question, "Knowledge ***of what***?" As explained above (Section I.C.2), Limelight's email did not reasonably inform any recipient that Limelight intended to terminate the Settlement Agreement or trigger the cure period. Moreover, Limelight's argument that it could give notice to ***any Akamai attorney***—rather than the individual explicitly named in the contract (Akamai's General Counsel)—would nullify Section 10.1 and similar provisions in other contracts.

***Second***, Limelight invokes "protective order concerns" that it now claims prevented it from contacting Akamai's General Counsel. LLBr. 36. Limelight waived this argument by not raising it below. *See supra* p. 20 (citing cases). Besides, nothing prevented Limelight from sending a letter to Akamai's General Counsel generally describing its breach allegations without providing details from sealed documents and, more importantly, conveying Limelight's intent to terminate absent a cure within 60 days. Indeed, ***Limelight sent just such a letter*** on January 17, 2017, the day it filed its complaint in this matter. B74-75.[17] The letter from Mike DiSanto, Limelight's Chief Legal Officer, shows that Limelight knew how to give appropriate notice (unlike in its November 11, 2016 email): the letter was sent

[17] As Limelight concedes, this Court may properly consider documents attached to the motion to expedite briefing. *See* LLBr. 10 n.4; *supra* n.4.

"via overnight courier," "Attn: General Counsel," to Akamai's physical corporate address, and references "material breach," "failure to cure within the 60-day period," Limelight's "right to terminate," and "Sections 9.3 and 10.1" of the Settlement Agreement. *Id.*; *see also supra* p. 10-11. The letter also explains the bases for Limelight's breach allegations—i.e., supposed "references to the Settlement Agreement" in the "Reply Report" and "deposition" of "Akamai's damages expert," including "the press release describing the Settlement Agreement" on "its trial exhibit list," and certain references "on January 11, 2017 … at an evidentiary *Daubert* hearing." B74-75. Limelight presumably does not believe it violated any protective order by including this information in a letter from its Chief Legal Officer to Akamai's General Counsel. There is no reason it could not have included similar detail in correspondence two months earlier.[18]

***Third***, Limelight claims that "a communication from Limelight's outside counsel to Akamai's in-house counsel would have violated attorney ethical conduct rules." LLBr. 37. This excuse is likewise waived because not raised below. Moreover, the Settlement Agreement does not require that notice come from Limelight's ***outside counsel***. Rather, notice could have come from a

[18] Limelight has never alleged or argued that any breach remained uncured 60 days after Mr. DiSanto's letter to Akamai's General Counsel.

Limelight executive like Mr. DiSanto, who had no trouble writing directly to Akamai's General Counsel in January 2017. B74-75.

## III. ALTERNATIVELY, THE CHANCERY COURT'S JUDGMENT MAY BE AFFIRMED BECAUSE LIMELIGHT'S ALLEGED BREACHES ARE IMMATERIAL AS A MATTER OF LAW

### A. Question Presented

Can Limelight state a claim for termination of the Settlement Agreement where it does not maintain that it has suffered any harm from the purported breaches? Preserved at A197-201; B106-112.

### B. Scope of Review

The Court of Chancery did not reach Akamai's argument that Limelight's complaint should be dismissed for failure to allege a material breach. A297:19-22; A298:4-8. However, under Massachusetts law, materiality may be properly decided as a matter of law when "the evidence on the point is either undisputed or sufficiently lopsided." *EventMonitor, Inc. v. Leness*, 44 N.E.3d 848, 854 (Mass. 2016) (citation omitted).

### C. Merits of Argument

The Court of Chancery's judgment should be affirmed for the further independent reason that, because Limelight has not alleged any harm, any alleged breach is immaterial and therefore cannot justify termination.

### 1. Limelight was required to show a material breach in order to terminate the Settlement Agreement

In addition to the contract's express statement that termination depends on a breach of a material obligation, Massachusetts law requires material breach of a contract as a premise for termination. *See DiBella v. Fiumara*, 828 N.E.2d 534, 538 (Mass. App. Ct. 2005) ("If the breach is insignificant or accidental, even if there is a default clause, our courts will not allow termination."); *see also Lease–It, Inc. v. Mass. Port Auth*., 600 N.E.2d 599, 602 (Mass. App. Ct. 1992) ("When a party to an agreement commits an immaterial breach of that agreement, the injured party … may not stop performing its obligations under the agreement."). Only "a substantial breach going to the root of the contract" entitles a party to terminate. *Lease-It*, 600 N.E.2d at 602 (citation omitted); 23 Richard A. Lord, *Williston on Contracts* § 63:3 (4th ed. 2002) ("[I]f a breach is relatively minor and not of the essence, the plaintiff is still bound by the contract and may not abandon performance….").

Moreover, Limelight's complaint conceded that a material breach was required for termination: it mentions the requirement for material breach, or pleads that Akamai engaged in a material breach, seven times. *See* A69(¶17) ("The Settlement Agreement provides a right to terminate in the event of one party's

material breach."); *see also* A63(¶2), A74(¶35(ii)), A74(¶35(iii)), A74(¶35(iv)), A76(¶40), A76(¶41).

### 2. Harmless breaches are immaterial as a matter of law

In Massachusetts, harmless actions—even those that technically breach a contract—are immaterial as a matter of law. *See, e.g.*, *EventMonitor*, 44 N.E.3d at 852-55 (no material breach where there was no evidence of harm to employer from employee's copying of employer's proprietary information to a third-party Internet storage site in technical violation of the contract); *DiBella*, 828 N.E.2d at 537-42 (no material breach, although contractual provision requiring consent prior to making structural changes was important to landlord, where tenant replaced dilapidated shed with sturdier storage building); *Zurich Am. Ins. Co. v. Watts Regulator Co.*, 2013 WL 2367855, at *6 (D. Mass. Mar. 21, 2013) ("no evidence that [the breach at issue in that case] was a material breach," as "[n]o harm flowed to Watts as a result of Zurich not having billed the retrospective premium annually").

### 3. Limelight's alleged breaches indisputably caused no harm and are therefore immaterial

Limelight's alleged "breaches" include Akamai's producing the Settlement Agreement ***to Limelight*** in response to Limelight's own discovery requests; referring to the settlement in its expert's reply report served ***on Limelight*** and

allowing its expert to answer ***Limelight's deposition questions*** regarding the Settlement Agreement; initially including the Settlement Agreement on its exhibit list served ***on Limelight***; and referring to the settlement in a single line on a slide shown during a *Daubert* hearing. A69-70(¶¶20-25).

In its brief and at oral argument below, Limelight did not assert that it suffered any harm from Akamai's actions. Indeed, the only alleged harm Limelight originally asserted is that Judge Gibney was supposedly tainted by learning of the Settlement Agreement at the *Daubert* hearing. A73(¶33). But Limelight itself filed the Settlement Agreement with Judge Gibney a month earlier. B1-16. Limelight appears to have abandoned even that claim of harm, which it did not raise when opposing Akamai's motion to dismiss. Moreover, Judge Gibney has ruled that neither party can use the Settlement Agreement at trial, B76, and excluded both parties' damages experts, A263:22-264:1, the only witnesses whose testimony would have referenced the Settlement Agreement.

As in *EventMonitor*, *DiBella*, and *Zurich*, Limelight has indisputably suffered no harm. There is accordingly no material breach justifying termination.

#### 4. Limelight's arguments do not justify termination without harm

Limelight's only response below was that the Settlement Agreement's non-use provision was important, and that it was inappropriate for Akamai to raise

materiality at the motion-to-dismiss stage. A237-243. Limelight did not dispute that it suffered no harm or that harmless breaches are immaterial as a matter of law. *Id.*

Limelight's argument that materiality cannot be decided at this stage is belied by its own earlier admission that "materiality may be decided as a matter of law if 'the evidence on the point is either undisputed or sufficiently lopsided.'" B63(¶49) (quoting *EventMonitor*, 44 N.E.3d at 854). Nor can Limelight rely on its belated argument that some breaches Limelight called "not material but more than insignificant" can justify termination. A276:1-15. Limelight did not make this argument in its brief below, and it is therefore waived. *See supra* p. 20 (citing cases). Regardless, as is clear from the undisputed record, any breach was insignificant at best, and Massachusetts law is clear that insignificant breaches cannot justify termination.

## CONCLUSION

All of the alleged conduct at issue here occurred in the Virginia litigation and, as the judge there noted, Limelight's complaint appears to be an attempt to harass Akamai and build litigation costs. The plain language of the Settlement Agreement required Limelight to provide any notice of alleged breach to Akamai's General Counsel and it is undisputed that no such notice was provided. Accordingly, Limelight's purported termination of the Settlement Agreement was ineffective and the Court of Chancery was correct to dismiss Limelight's complaint. Akamai respectfully submits that the Court of Chancery's judgment should be affirmed.

/s/ *Brock E. Czeschin*

BROCK E. CZESCHIN (#3938)
NICHOLAS R. RODRIGUEZ (#6196)
RICHARDS, LAYTON & FINGER, P.A.
920 N. King Street
Wilmington, DE 19801
(302) 651-7700

*Attorneys for Defendant-Below, Appellee Akamai Technologies, Inc.*

OF COUNSEL:

MICHAEL J. SUMMERSGILL
CYNTHIA D. VREELAND
MARK C. FLEMING
REBECCA A. BACT
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

MARY V. SOOTER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1225 17th Street, Suite 2600
Denver, CO 80202
(720) 274-3135

HEATH A. BROOKS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

Dated: June 9, 2017

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 21, 2017, a copy of the foregoing was served by File & Serve*Xpress* on the following attorneys of record:

John W. Shaw, Esquire
Karen E. Keller, Esquire
David M. Fry, Esquire
SHAW KELLER, LLP
I.M. Pei Building
1105 North Market Street, 12th Floor
Wilmington, DE 19801

/s/ *Nicholas R. Rodriguez*
Nicholas R. Rodriguez (#6196)