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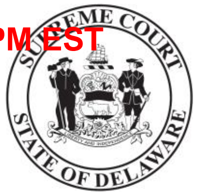

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BTG INTERNATIONAL INC., Plaintiff, Counterclaim Defendant—Appellant v. WELLSTAT THERAPEUTICS CORPORATION Defendant, Counterclaim Plaintiff—Appellee	No. 509, 2017 COURT BELOW Court of Chancery of the State of Delaware, C.A. No. 12562-VCL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 4

STATEMENT OF FACTS 6

ARGUMENT 11

I. THE CHANCERY COURT CORRECTLY DETERMINED THE FIVE-YEAR VS. TEN-YEAR ISSUE WAS A QUESTION OF FACT. 11

A. Question presented. 11

B. Scope and standard of review 11

C. Merits of argument. 11

1. BTG failed to preserve the argument that as a matter of law, the early termination right cut off damages. 11

2. BTG's early termination right raised a fact issue about the amount of damages. 14

(a) BTG's argument fails under the express and implied terms of the Agreement. 16

(b) BTG's argument also fails under the case law. 18

3. Even assuming termination, the damage award was proper. 24

II. THE CHANCERY COURT CORRECTLY INCLUDED IN ITS DAMAGES AWARD SALES FOR PATIENTS SUFFERING FROM TOXICITIES CHARACTERIZED AS "MODERATE" IN PATEL SURVEY. 27

A. Question presented. 27

RLF1 18890533v.1

B. Scope and standard of review.....27

C. Merits of argument.....27

III. BTG FAILED TO PLEAD AND PROVE MITIGATION OF DAMAGES BASED ON WELLSTAT'S HYPOTHETICAL, SUBSTITUTE DISTRIBUTION AGREEMENT.....33

A. Question presented.....33

B. Scope and standard of review.....33

C. Merits of argument.....33

1. BTG waived the argument that Wellstat had to prove and account for profits from a substitute distributor.....33

2. BTG's argument was a mitigation of damages affirmative defense.....34

IV. THE CHANCERY COURT DID NOT ABUSE ITS "BROAD DISCRETION" TO SET A PRE- AND POST-JUDGMENT INTEREST RATE.....39

A. Question presented.....39

B. Scope and standard of review.....39

C. Merits of argument.....39

CONCLUSION.....44

RLF1 18890533v.1

TABLE OF AUTHORITIES

Page(s)

Cases

Amarin Pharma, Inc. v. U.S. Food & Drug Admin.,
119 F. Supp. 3d 196 (S.D.N.Y. 2015) 31

Brandin v. Gottlieb,
2000 WL 1005954 (Del. Ch. July 13, 2000) 39

Brzoska v. Olson,
668 A.2d 1355 (Del. 1995) 35

Carestream Health, Inc. v. M & G Polymers USA, LLC,
9 A.3d 475 (Del. 2010) (TABLE) 14, 19

Charlotte Broad., LLC v. Davis Broad. of Atlanta, L.L.C.,
2015 WL 3863245 (Del. Super. Ct. June 10, 2015) 16

Chevrolet Motor Co. v. McCullough Motor Co.,
6 F.2d 212 (9th Cir. 1925) 21, 22

Chrysler Corp. v. Quimby,
144 A.2d 885 (Del. 1958) 19, 20

Chrysler Corp. v. Quimby,
144 A.2d 123 (Del. 1958) 19, 20

Clark v. Clark,
47 A.3d 513 (Del. 2012) 13

Duncan v. Theratx, Inc.,
775 A.2d 1019 (Del. 2001) 16, 24

Fletcher Int'l, Ltd. v. Ion Geophysical Corp.,
2013 WL 6327997 (Del. Ch. Dec. 4, 2013) 40

J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.,
1988 WL 32012 (Del. Super. Ct. Mar. 30, 1988) 17, 21

Johnson v. State,
813 A.2d 161 (Del. 2001) 13

Koufakis v. Carvel,
425 F.2d 892 (2d Cir. 1970) 23

LeMond Cycling, Inc. v. PTI Holding, Inc.,
2005 WL 102969 (D. Minn. Jan. 14, 2005) 22, 23

Levitt v. Bouvier,
287 A.2d 671 (Del. 1972)..27

M & G Polymers USA, LLC v. Carestream Health, Inc.,
2009 WL 3535466 (Del. Super. Ct. Aug. 5, 2009) 14, 18

M & G Polymers USA, LLC v. Carestream Health, Inc.,
2010 WL 1611042 (Del. Super. Ct. Apr. 21, 2010)............................... 14, 18, 23

Monroe v. State,
9 A.3d 476 (Del. 2010) (TABLE) 34

Montgomery Cellular Holding Co. v. Dobler,
880 A.2d 206 (Del. 2005)..39

Osborn v. Commanche Cattle Indus., Inc.,
545 P.2d 827 (Okla. Ct. App. 1975)... 21, 22

Pharm. Prod. Dev., Inc. v. TVM Life Sci. Ventures, IV,
2011 WL 549163 (Del. Ch. Feb. 16, 2011)...26

Reiver v. Murdoch & Walsh, P.A.,
625 F. Supp. 998 (D. Del. 1985) 20

Reserves Dev. LLC v. Crystal Props., LLC,
986 A.2d 362 (Del. 2009)..14

Ring Bros. Co. v. Martin Bros. Container & Timber Products Corp.,
438 F.2d 420 (9th Cir. 1971) 22

Roofers, Inc. v. Delaware Dep't of Labor,
2014 WL 7010733 (Del. Nov. 24, 2014) 12, 33

Sabree Envtl. & Constr., Inc. v. Summit Dredging, LLC,
149 A.3d 517 (Del. 2016) (TABLE) 42

RLF1 18890533v.1

Shawe v. Elting,
157 A.3d 152 (Del. 2017)....................14

Siga Techs., Inc. v. PharmAthene, Inc.,
132 A.3d 1108 (Del. 2015).................... *passim*

Smith v. Del. State Univ.,
47 A.3d 472 (Del. 2012).................... 11, 13, 14

Summa Corp. v. Trans World Airlines, Inc.,
540 A.2d 403 (Del. 1988)....................39

Transverse, L.L.C. v. Iowa Wireless Servs., L.L.C.,
617 F. App'x 272 (5th Cir. 2015)....................23

Unitrin, Inc. v. Am. Gen. Corp.,
651 A.2d 1361 (Del. 1995)....................37

VICI Racing, LLC v. T-Mobile USA, Inc.,
763 F.3d 273 (3d Cir. 2014).................... 35, 36, 37

Williams Gas Supply Co. v. Apache Corp.,
594 A.2d 34 (Del. 1991)....................40

Rules

Supr. Ct. R. 8....................11

Supr. Ct. R. 14(b)(vi)(A)(3)....................17

Other Authorities

13 Sarah Howard Jenkins, *Corbin on Contracts* § 68.9 (rev. ed. 2003)....................16

24 Richard A. Lord, *Williston on Contracts* § 64:12 (4th ed. 2002)....................26

Restatement (Second) Contracts § 347(a).................... 24, 36

Restatement (Second) Contracts § 350.................... 35, 36

NATURE OF PROCEEDINGS

This case involved an egregious breach of contract by Plaintiff, Counterclaim-Defendant Below/Appellant BTG International Inc. ("BTG"), which engaged in all sorts of intentional misconduct during both the underlying events and this litigation. BTG asks this Court to lessen or eliminate the trial court's damage award, which represented only half of the amount sought by Defendant, Counterclaim-Plaintiff Below/Appellee Wellstat Therapeutics Corporation ("Wellstat").

BTG does not appeal or challenge the trial court's finding of breach of contract. BTG must hope this strategy will obscure the overwhelming evidence of breach and misconduct. The trial court repeatedly found that BTG was dishonest in dealing with Wellstat, *e.g.*, A1967 ("BTG falsified the data."); BTG witnesses were not credible, offering made-for-litigation justifications under oath, *e.g.*, A1978-79 ("There is considerable irony in this litigation-driven, counter-factual contention."); A1979 ("The litigators invented that story as well."), and BTG engaged in bad faith litigation tactics both during discovery and during the trial itself, A2003 ("BTG . . . took disingenuous positions during the litigation"); *id.* ("These positions could not have been asserted in good faith. . . .").

On appeal, BTG makes four arguments that do not withstand scrutiny. First, BTG failed to preserve its primary argument. Both BTG and Wellstat argued in

the trial court that the existence of BTG's early termination right created a *fact issue* about the proper amount of Wellstat's damages. BTG *never* argued the issue as a matter of law and *never* cited a single case to the court below. It should not be able to raise this issue now for the first time on appeal.

Setting aside BTG's waiver, the trial court's analysis was correct. Contract damages should represent (1) full performance based on (2) the parties' expectations at the time of breach. In this case, both elements required resolving a fact question. The Exclusive Distribution Agreement ("Agreement") contained a full ten-year term subject to the possibility of earlier termination, and as of the date of breach, the termination right was neither exercised nor exercisable. As a result, the trial court had to determine whether BTG would exercise a future termination right to determine what constituted full performance based on the parties' expectations as of the date of breach. The most relevant Delaware authority—which BTG simply ignores—supported the trial court's treatment of the issue. BTG does not challenge the trial court's factual finding because BTG's own contemporaneous documents from the time of breach proved that BTG wanted to enjoy the benefits of the full ten year term. A1997-1998.

Second, BTG attacks the trial court's reliance on Wellstat's expert, Neel Patel. BTG quibbles with Patel's interpretation of his underlying survey results. The trial court, however, disagreed. The context in which the disputed question

was asked removed any ambiguity and the ultimate results were confirmed by reference to empirical studies and BTG's own studies. Because the trial court's well-reasoned conclusion was supported by sufficient evidence and the product of an orderly and logical deductive process, the trial court did not commit clear error.

Third, BTG claims Wellstat was obligated as a matter of law to measure alleged profits that it will make from a substitute distribution deal and deduct such hypothetical profits from its damages. BTG waived this argument by repeatedly framing the issue in the trial court as one of a failure to mitigate damages. Waiver aside, the trial court correctly characterized as a mitigation defense BTG's argument that Wellstat should account for hypothetical profits from a hypothetical substitute transaction. BTG failed to adduce any evidence that such a transaction was possible or potentially profitable.

Fourth, BTG attacks the trial court's decision to award pre- and post-judgment interest based on the contract rate rather than the legal rate. BTG cannot overcome the trial court's discretion to set the interest rate. Section 4.8 of the Agreement sets an interest rate for amounts that are unpaid as of the "date such payments are due under this Agreement." A144. The trial court was well within its discretion to adopt this interest rate because Wellstat's damages represented unpaid amounts due under the Agreement.

SUMMARY OF ARGUMENT

I. *Denied*. BTG waived the argument that its early termination right precluded certain damages as a matter of law; in the trial court, BTG agreed it raised a fact issue.

The trial court correctly treated BTG's never-exercised, future early-termination right as raising a fact issue about the amount of damages. This is consistent with the law on contract damages, which requires measuring expectations at the time of breach—not five years in the future. Neither party expected that BTG's early-termination right could be invoked pretextually to limit damages for breach. The relevant case law supports the trial court's decision. Finally, even if one assumed termination, Wellstat's damages represent proper contract damages.

II. *Denied*. The trial court did not abuse its discretion by relying on the evidence and testimony from Wellstat's experts.

III. *Denied*. BTG waived the argument that Wellstat had the burden of proving future Vistogard sales under a new distributor and deducting those amounts. BTG argued this was a question of mitigation.

The trial court correctly concluded that BTG's argument raised a classic mitigation of damages issue because BTG invoked the duty to mitigate and the specific offset turns on whether Wellstat would or could enter into a substitute

transaction. While BTG was free to present evidence on the subject, the trial court found BTG failed to introduce "any evidence." As a result, there is no basis to conclude Wellstat's damages were overstated.

IV. *Denied*. The trial court did not abuse its "broad discretion" in selecting a rate of pre- and post-judgment interest. The trial court was allowed to adopt the interest rate expressly set forth in Section 4.8 of the Distribution Agreement. BTG waived any argument about the proper date to start running prejudgment interest.

STATEMENT OF FACTS

BTG is a subsidiary of the publicly-traded BTG plc. A298.[1] BTG is a healthcare company, whose divisions include a specialty pharmaceutical division focused on antidote products used to treat toxicity and other rare conditions. A298-99. Wellstat is a small, privately-held biopharmaceutical company that focuses on development of life-saving drugs. A299. Relevant to this case, Wellstat developed Vistogard, an orally administered antidote for toxic reactions to 5-fluorouracil ("5-FU"), a commonly used chemotherapy drug. A300. Vistogard can be highly effective at saving lives. *Id.*

Because Wellstat developed drugs but did not commercialize them, Wellstat partnered with BTG, which promoted its expertise in marketing specialty drugs including antidotes, to commercialize Vistogard. A1946. After negotiations that spanned nearly two years, the parties entered into an Exclusive Distribution Agreement as of July 1, 2011. A123-183. Between 2011 and 2015, Wellstat worked to get Vistogard approved by the Food and Drug Administration ("FDA"). After an extended process, Wellstat completed Vistogard's approval submission to the FDA on July 10, 2015, which meant the drug's launch would occur in the early Spring 2016 assuming approval. A1952.

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[1]Given BTG's failure to challenge the trial court's factual findings, Wellstat relies on those factual findings and repeats only those facts necessary to resolve the appeal issues raised by BTG.

For various market reasons, the initial launch of a branded pharmaceutical is universally recognized as critical to its long-term success. Both the litigation experts, B175 (Wellstat's expert), and BTG's own pre-litigation consultants echoed the critical nature of the "launch window," B1 ("The difference between a successful launch and a less successful one can be upwards of 80% in long-term contribution."). Not surprisingly, BTG's own personnel acknowledged the importance of Vistogard's launch for its long term performance: "Long term performance will be set in the first 6 months. *Must Get it Right . . . Early!*" A1959 (citing B34). These operational executives further warned:

> Vistogard will require promotional efforts to raise disease awareness; early investment will be critical to achieve potential of product . . . . Various case studies suggest that inadequate investment at launch significantly impacts peak revenue potential of the product. Early underinvestment would likely decrease peak sales.

A1961 (citing B45).

Because launch is so critical, the Agreement provided for an elaborate procedure to plan for and oversee the launch. The first step was to prepare an Initial Commercialization Plan ("ICP"), well in advance of launch. BTG completely missed the contractual deadline of September 10, 2015 to prepare an ICP, and then in violation of an express obligation to prepare the plan in "good faith," produced a "disingenuous and misleading plan that BTG never took seriously." A1986; A1983-86.

BTG then proceeded to botch Vistogard's launch. Sales representatives are the key component to a successful launch of a branded drug. A1978. BTG's executive management ordered deployment of a shockingly small sales force that in the words of one BTG executive would provide "[p]ainfully low coverage" for Vistogard. A1964 (citing B50); A1969 (BTG launched with three full-time equivalent sales reps). BTG even failed to train this insufficient sales force. A1972. Further breaching the Distribution Agreement, BTG cut budgets for marketing and advertising. A1970-71.

BTG's executive management decided to skimp on the Vistogard launch in favor of investing in a different business unit. A1974. BTG executive management ordered that the Vistogard launch was to be a "[l]ow priority for additional investment," "delivered cost neutrally," and that "all established products are prioritized ahead of [Vistogard]." A1975 (citing B12 & B15). As a result, BTG executive management purposefully ignored the advice of two outside consultants about sales force sizing, A1975-76; vetoed the requests of its own Specialty Pharmaceutical Team to devote additional resources, A1976-77, A1981-83; even fired one manager for "pushing too hard for Vistogard internally," A1964; and dismissed Wellstat's pleas for more resources, A1983. *See also* A1957-66 (detailing the events leading to the launch).

While BTG's executive management did not want to invest in Vistogard, they also did not want to lose the Agreement because it was incredibly lucrative. As of March 2016 (when Vistogard launched), BTG viewed the Agreement as an "evergreen contract for 10 years." A1997 (citing B51). While there is zero evidence BTG considered terminating after five years, BTG did model the financial impact if Wellstat terminated and paid the earlier termination fee. Even after receiving the fee, BTG concluded it would lose $79 million based on an early termination. A1997-98 (citing B165).

BTG pre-emptively sued Wellstat, seeking to preserve the contract, and also seeking damages. Conspicuously, BTG's damages calculation for its alleged lost profits projected profits through the entire ten-year term. A1998.

As part of its damages calculation, Wellstat proffered a survey performed by one of its experts, Neel Patel ("Patel"). Patel's survey of health care providers was designed to provide certain assumptions needed to forecast potential Vistogard sales. BTG focuses on Question 50—the "decision to treat" question. The question asked health care providers to state the percentage of patients to whom they would prescribe Vistogard. A283. The question asked for responses based on categories of patients depending on their symptoms, and used the categories "mild," "moderate," and "severe" to describe the symptoms. *Id.* The question did not further define these categories. But before respondents got to Question 50,

they had to answer multiple questions (Questions 25, 39, 41 & 44) that used the same "moderate" and "severe" nomenclature, and each time the prior questions defined "moderate" to equal Grade 3 symptoms and "severe" to equal Grade 4 symptoms. *E.g.*, A274; A278; A281. With regard to Question 50, Patel assumed respondents (who were sophisticated health care providers) would have kept in their mind the definitions provided repeatedly and consistently in prior questions. A1564 (N. Patel 1217:19-22). As a result, Patel interpreted the responses to Question 50 that health care providers would prescribe Vistogard to 39% of "moderate" patients to mean that health care providers would prescribe Vistogard to 39% of patients exhibiting "Grade 3" symptoms. A681.

The trial court only awarded damages representing potential prescriptions to patients suffering from at least Grade 3 symptoms. A2001. Grades 3 and 4 symptoms are "severe or life-threatening"—the phrase on the Vistogard label—under the Common Terminology Criteria for Averse Events (the "Common Terminology"). A1990.

ARGUMENT

I. THE CHANCERY COURT CORRECTLY DETERMINED THE FIVE-YEAR VS. TEN-YEAR ISSUE WAS A QUESTION OF FACT.

A. Question presented.

Did the trial court correctly treat the measure of Wellstat's damages as a question of fact? A1780-1783; A1919.

B. Scope and standard of review.

"Only questions fairly presented to the trial court may be presented for review" unless this Court "finds that the trial court committed plain error requiring review in the interests of justice." Supr. Ct. R. 8; *Smith v. Del. State Univ.*, 47 A.3d 472, 479 (Del. 2012).

"Damages awards are reviewed for abuse of discretion," and the trial judge's damages award will be upheld so long as it "was based upon conscience and reason, as opposed to capriciousness and arbitrariness." *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015) ("*Siga II*").

C. Merits of argument.

1. BTG failed to preserve the argument that as a matter of law, the early termination right cut off damages.

In the trial court, BTG repeatedly acknowledged that the existence of the early termination right raised a *question of fact* whether Wellstat could recover damages for the full ten-year term. BTG does not challenge the trial court's factual

finding of overwhelming evidence that BTG would not have exercised its option to terminate. A1997-98. Rather, for the first time in this litigation, BTG argues that its early-termination option limited Wellstat's damages *as a matter of law*. Because BTG improperly "raises as its central argument on appeal a proposition it did not fairly raise below," *Roofers, Inc. v. Delaware Dep't of Labor*, 2014 WL 7010733, at *1 (Del. Nov. 24, 2014), the argument is waived.

BTG claims it preserved this issue in two places. BTG Opening Br., at 12 ("BTG Br."). First, BTG cites page 72 of BTG's Opening Post-Trial Brief ("BOB"), which devoted a single bullet point to the termination right and simply observed "Gerardi [Wellstat's expert] did not take this into account." A1714. Second, BTG cites pages 29-30 of BTG's Post-Trial Reply Brief ("BRB") where BTG merely argued there was a factual inconsistency between Wellstat's claim about BTG's motive for breaching (*i.e.*, BTG was "pivoting" away from Specialty Pharmaceutical to invest elsewhere) and the notion that BTG would not have terminated early. A1822-23. BTG's briefing never even alluded to the early termination right as raising an issue of law. During post-trial argument, BTG (as plaintiff) argued its inconsistency theory again, A1861-62, so in response, Wellstat observed: "BTG doesn't dispute that this is a question of fact, not of law." A1919 (Post-Trial Argument Tr., at 91:18-19). BTG did not challenge this statement. A1928-39.

The first time that BTG mentioned *Chrysler v. Quimby* in the court below was in its Motion for Stay Pending Appeal, which was filed at the same time BTG filed a notice of appeal. B285-286. In other words, BTG waited until divesting the Chancery Court of jurisdiction over the merits to even mention this argument.

This Court has consistently held that presentation of an issue as a factual dispute in the trial court is inadequate to preserve related legal issues for appeal. *See, e.g.*, *Clark v. Clark*, 47 A.3d 513, 518 (Del. 2012) (where a party "cites no statutory or common law authority" on an issue in the trial court, but rather "made only a factual argument," court will "infer that [the party] did not intend to make a new legal argument" and thus that the party "did not present . . . the legal question" adequately to preserve the issue for appeal); *Smith*, 47 A.3d at 479 (plaintiff's factual argument below that an "adequate offer of proof had been made" on causation and damages elements of his libel claim held insufficient to preserve the legal argument for appeal that those "elements are not required to state a claim for libel in the first place").

There is also no reason to excuse BTG's waiver. BTG has not made any showing that the fairness or integrity of the trial process was jeopardized and thus cannot meet its burden to show plain error. *Johnson v. State*, 813 A.2d 161, 165 (Del. 2001) (party seeking to excuse its waiver bears the burden of demonstrating plain error). BTG could not discharge its burden, moreover, because the alleged

defect is not "apparent on the face of the record" or "basic . . . in their character." *Smith*, 47 A.3d at 479. BTG asserts the law is settled in its favor, but BTG's assertion does not withstand review of the case law, as outlined below. To the contrary, in deciding BTG's argument raised a question of fact, the trial court relied on a case that this Court recently affirmed. *M & G Polymers USA, LLC v. Carestream Health, Inc.*, 2009 WL 3535466, at *9 (Del. Super. Ct. Aug. 5, 2009), 2010 WL 1611042, at *38-41 (Del. Super. Ct. Apr. 21, 2010) (treating extension of future lost profits damages into contractual renewal term as a question of fact), *aff'd*, 9 A.3d 475 (Del. 2010) (TABLE) (affirming "for the reasons set forth in [the trial court's] well-written opinions"). The alleged error was hardly plain. *Cf. Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017) ("It is prudent for the development of the law that appellate courts have the benefits that come with . . . input from learned trial judges.").

2. BTG's early termination right raised a fact issue about the amount of damages.

If the Court is inclined to address the merits of the early termination issue, the trial court's decision to treat the issue as a question of fact properly squared fundamental contract damages principles with the unique facts of this case. First, "[i]n a breach of contract action, [the Court] determine[s] plaintiff's damages as if the parties had fully performed the contract." *Reserves Dev. LLC v. Crystal Props., LLC*, 986 A.2d 362, 367 (Del. 2009). The contract's stated term was ten years,

although subject to an early termination right, raising at least a fact dispute about what constituted "full" performance.[2] Second, "the standard remedy for breach of contract is based on the reasonable expectations of the parties that existed before or at the time of the breach." *Siga II*, 132 A.3d at 1132-33. At the time of breach, in the first year after FDA approval, BTG had not and could not have terminated. A168 (§12.2) ("Party may elect to terminate *beginning* five (5) years after FDA Approval").[3] So, the trial court had to determine whether the parties reasonably expected, as of the time of breach, whether BTG *would have* terminated at some point in the future. That presented a question of fact.

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[2] The Agreement, for example, defines the "Term" of the contract as ten years from FDA approval of Vistogard subject, however, to the termination provisions in Article XII, creating at least ambiguity about what constitutes the "full" contract Term. A168 (§12.1). That ambiguity is only exacerbated by the Agreement's provision for "automati[c]" renewal for two two-year periods, and reference to the "then-current Term," *id.*, suggesting that "full" performance might entail performance across multiple Terms. And the parties' option to terminate beginning five years after FDA approval is characterized as an "early" termination right, implying that the "full" term of the contract is longer than five years. A168 (§12.2). On appeal, BTG itself indicates that the "full" contract term was ten years. BTG Br., at 12.

[3] BTG incorrectly asserts that the earliest effective date of its termination would have been the end of year five—plus an additional six months under Section 12.11(a)(iii). A171. Because BTG's right to give notice does not even "begin" until the end of year five, the earliest termination would have been five and a half years after FDA approval with an additional six months thereafter.

(a) BTG's argument fails under the express and implied terms of the Agreement.

There is a good reason that BTG presented this as a fact issue in the trial court. Whether BTG would terminate is a factual predicate to whether BTG's argument is sound under basic contract rules. "[D]efault damages rules, like other contract rules, should generally reflect the contract term that most parties would have bargained for at the time of the agreement." *Duncan v. Theratx, Inc*., 775 A.2d 1019, 1021 (Del. 2001). Given that BTG would not have terminated in fact, BTG is merely invoking a counter-factual, hypothetical termination solely to eliminate damages for breach. No party would have bargained for this sort of bizarre term in any contract.

In fact, the purported use of the termination right advocated by BTG runs counter to hornbook contract law, which expressly rejects this sort of after-the-fact invocation of a termination right:

> A party who has reserved a power of termination loses that power if it commits a total breach of the agreement and thereby discharges the other party. A subsequent notice of termination by the breaching party has no effect upon the other party's right to full damages for the existing total breach.

13 Sarah Howard Jenkins, *Corbin on Contracts* § 68.9 (rev. ed. 2003). Relatedly, even where the parties did not specifically negotiate about the issue, a contractual termination right does not include the kind of pretextual use of the right that BTG argues for here. *See, e.g.*, *Charlotte Broad., LLC v. Davis Broad. of Atlanta,*

L.L.C., 2015 WL 3863245, at *7 (Del. Super. Ct. June 10, 2015), *aff'd*, 134 A.3d 759 (Del. 2016) ("Plaintiffs must exercise this discretion [to terminate] in good faith. Clearly if the parties had thought to negotiate for it, the parties would have prohibited terminating the Agreement under the Engineering Clause for pretextual reasons."); *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 WL 32012, at *10 (Del. Super. Ct. Mar. 30, 1988) (otherwise-unrestricted termination right is "subject to the qualification that termination shall not be contrary to equity and good conscience").[4] It is incredible to suggest most parties would have agreed to a contract term so out of step with basic principles.

Citing nothing, BTG claims that the termination provision was intended to limit exposure to damages in litigation. BTG Br., at 16 (arguing the termination right was designed to guard against "exposure in potential litigation with one's counterparty"). This assertion is belied by the inclusion in the Agreement of an express provision limiting litigation damages, such as punitive damages, in an entirely different provision. A177 (§15.4).[5] At most, the contract is ambiguous,

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[4] Wellstat presented this argument to the trial court. A1783 ("Moreover, BTG's argument violates the basic principle of Delaware law that '[w]hen a contract confers discretion on one party, the implied covenant requires that the discretion be used reasonably and in good faith.'"). BTG failed to respond to this argument in the trial court; failed to address the argument before this Court in its Opening Brief, Supr. Ct. R. 14(b)(vi)(A)(3); and thus waived any argument to the contrary.

[5] BTG mentions that Section 12.2's heading is "Termination for Convenience," a phrase that does not appear in the text of the provision, and cites a legal dictionary defining that term. BTG Br., at 16. Putting aside there is no evidence

and BTG's failure to introduce any evidence about the parties' intent forecloses its novel argument on appeal.

(b) <u>BTG's argument also fails under the case law.</u>

BTG does not bother explaining a rationale for the legal rule it advocates; instead, BTG relies almost exclusively on the assertion that "long-established Delaware law" supports its position. BTG Br., at 14. This invocation of precedent is ironic from a party who failed to cite any law in the trial court. The case law BTG does cite is inapposite, and the general body of case law on this issue, while highly fact-dependent, supports the trial court's decision.

Conspicuously, BTG ignores the case relied on by the trial court, *M & G Polymers*. A1999 (n. 208). In that case, the court allowed plaintiff to present evidence of its damages into a non-binding two-year renewal term, 2009 WL 3535466, at *9, concluding that "the question of the duration of the parties' contractual relationship in the absence of a breach" was a matter "the jury should decide as trier of fact," 2010 WL 1611042 at *40; *see also id.*, at *23 (although "a renewal would not have been automatic in the absence of a breach" there was "sufficient factual basis that [plaintiff's] expectation of a renewal was more than pure speculation or conjecture"). This Court affirmed "for the reasons set forth in

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"Termination for Convenience" was a term of art adopted by the parties, the Distribution Agreement expressly says captions or headings "shall have no effect on the meaning of the provisions hereof." *See* A178 (§15.10).

[the trial court's] well-written opinions." *Carestream Health, Inc. v. M & G Polymers USA, LLC*, 9 A.3d 475 (Del. 2010).

The centerpiece of BTG's appeal, *Chrysler Corp. v. Quimby*, 144 A.2d 123 (Del. 1958) ("*Quimby I*"), *adhered to on reh'g*, 144 A.2d 885 (Del. 1958) ("*Quimby II*"), is a 60-year-old case decided under Michigan law of promissory estoppel. This Court did not purport to apply strict contract rules. After observing that the rules for damages in promissory estoppel were subject to "considerable uncertainty" but the key was "prevention of injustice," this Court announced "[u]nder the facts of this case we think that Quimby was entitled [], to . . . profits that might reasonably have been expected during a period of 90 days, at the end of which the contract was terminable." *Quimby I*, 144 A.2d at 133-34.

The "facts of th[at] case" were unique: the breach in *Quimby* was refusing to renew plaintiff's dealership contract, which included an immediately exercisable right to terminate on 90-days' notice. While the Court cursorily dismissed as "miss[ing] the point" plaintiffs' argument that it was "unrealistic" to assume the defendant would exercise its termination right, the Court did not elaborate. *Quimby II*, 144 A.2d at 886. The Court's rejection of plaintiff's argument that the defendant *might not* have terminated should come as no surprise, though, given that the defendant had *already terminated* its contractual relationship with the plaintiff and refused any renewed contractual relationship. *See Quimby I*, 144

A.2d at 132 ("The contract was terminated by [defendant]"); *id.* at 128 ("[defendant] told [plaintiff] that . . . [plaintiff] couldn't have the franchise").

The *Quimby* plaintiffs' position also presented issues not present in this case. Because the contract was one of indefinite duration, terminable at-will on 90-days' notice, plaintiff attempted to create a duration for damages of a "reasonable time." This Court found that position troubling because it effectively was a request to "rewrite the contract by substituting 'a reasonable time' for 'ninety * * * days'." *Quimby II*, 144 A.2d at 886. Here, Wellstat seeks no such revision of its Agreement with BTG. Rather, the trial court's fact-based damages analysis are entirely consistent with the "Term" of the Agreement for "ten (10) years after FDA Approval," subject only to the *possibility* of early termination down the road. A168 (§12.1).

The other two cases cited by BTG are similarly distinguishable, involving disputes where the alleged breach itself occurred in the course of the defendant exercising its right to terminate the parties' contractual relationship. In *Reiver v. Murdoch & Walsh, P.A.*, 625 F. Supp. 998, 1009-10 (D. Del. 1985), the damages issue arose from the immediate termination of plaintiff's employment, and the only question was whether the plaintiff had been terminated "without cause," in which case the defendant "breached the contract in not giving the plaintiff the [required 90-days'] notice." In *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 WL

32012, at *8-11 (Del. Super. Ct. Mar. 30, 1988), the defendant had exercised its termination right at the time of breach, but missed the contractually-prescribed window to give notice by year end; the court thus deemed that already-exercised termination right effective the following year. Given that the defendants in each of these cases had already exercised their termination right at the time of breach, there was no occasion to engage in the factual inquiry whether the defendants might have terminated at some point after breach.[6]

By contrast, where at the time of breach a defendant neither formally terminates (as in *Reiver* and *J.E. Rhoads*) nor unequivocally repudiates the contractual relationship (as in *Quimby*), but instead continues to perform—or, worse, leads the plaintiff to believe the contract will remain in force, as BTG did here—courts refuse to limit plaintiff's damages as a matter of law. In such circumstances, there remains a question of fact about what the defendant would have done but for the breach. For example, in *Ring Bros. Co. v. Martin Bros.*

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[6] Consistent with *Quimby*, *Reiver*, and *J.E. Rhoads*, where a defendant has actually exercised an existing termination right or taken action unequivocally indicating an intent to discontinue the contractual relationship, courts tend to limit damages as a matter of law. This result makes sense because in such cases, there is no question about the parties' expectations at the time of breach. *E.g.*, *Osborn v. Commanche Cattle Indus., Inc.*, 545 P.2d 827, 830-33 (Okla. Ct. App. 1975) (citing *Chevrolet Motor Co. v. McCullough Motor Co.*, 6 F.2d 212 (9th Cir. 1925), as "persuasive reasoning" and holding where it was clear at the time of breach that "no one was going to honor [plaintiff's] contract," expectation damages were limited to the "length of the [termination] notice period—or thirty days from [defendant's] breach of contract").

Container & Timber Products Corp., 438 F.2d 420 (9th Cir. 1971), plaintiff had a term contract with an early termination right upon ten-days' notice. The court rejected defendant's argument that damages "should have been limited to the ten-day notice of termination period," because defendant "did not, at any time, give [plaintiff] written notice of termination" but, instead, "allowed the [plaintiff] to continue to commit its equipment and other resources to the project on the expectation that it would be allowed to complete performance on the contract." *Id.* at 421-23. The court distinguished cases limiting damages to a termination-notice period as involving an "open and notorious repudiation" by the defendant "equivalent to actual notice of termination"; where there was no such "open and obvious repudiation of the contract," it was inappropriate to limit damages as a matter of law. *Id.* at 422-23.[7] Similarly, in *LeMond Cycling, Inc. v. PTI Holding, Inc.*, 2005 WL 102969, at *1 (D. Minn. Jan. 14, 2005), the contract required defendant to use "commercially reasonable efforts" to market plaintiff's product for ten years, with defendant retaining an option to renew for two five-year terms. Defendant breached by failing to use "reasonable efforts" early in the contract term, but continued to make payments to hold the license. On those facts, the court rejected the argument that plaintiff's claim to future lost profits damages "based on

[7] The Ninth Circuit expressly distinguished its decision in *Chevrolet Motors*, 6 F.2d 212, which was the "persuasive reasoning" relied on by *Osborn*, 545 P.2d at 831, as belonging to a line of cases involving unequivocal repudiations. *Ring*, 438 F.2d at 422.

the renewal periods must be dismissed" as a matter of law. *Id.* at *6. The court instead left to the factfinder whether the plaintiff's product "would have been profitable but for [defendant's] performance and that [defendant] would have chosen to renew the contract." *Id.*

Moreover, where the defendant could not have made the relevant decision about the contract's duration at the time of breach, courts in Delaware have held it is a *question of fact* whether, in the absence of breach, the defendant *might* have terminated the contract in the future. The decision in *M & G Polymers* is an example, where the time for the renewal decision was years in the future. *See* 2010 WL 1611042, at *39-40. This result makes sense because, in the absence of an express effort to terminate, the parties' expectations as of the time of breach turn on a prediction of future events, which requires a factual resolution.[8]

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[8] *E.g.*, *LeMond Cycling*, 2005 WL 102969 (no repudiation at time of breach; question of future renewal). Even where there has been an express effort to terminate but the defendant did not have a current right to terminate, courts still treat as a question of fact whether, but-for the breach, the defendant would have terminated at the relevant decision point in the future, *e.g.*, *Koufakis v. Carvel*, 425 F.2d 892, 908 (2d Cir. 1970) (even where defendant sought to terminate contract at time of breach, and plaintiff had "no contractual right" to renewal term, the "possibility of a subsequent decision by the parties to renew for another term" was "purely one of fact"), although some courts have concluded that in certain circumstances, the express termination effectively forecloses a favorable finding for the plaintiff, *e.g.*, *Transverse, L.L.C. v. Iowa Wireless Servs., L.L.C.*, 617 F. App'x 272, 279 (5th Cir. 2015) (stating "there was not sufficient evidence" to support jury's award because "[i]n view of this [termination] letter, no reasonable jury could conclude with reasonable certainty that the contractual relationship between IWS and Transverse would have continued for twelve years.").

This case has all the features that lead courts to treat the measure of damages as a question of fact. At the time of breach, BTG had not terminated the Agreement, could not have terminated the Agreement, and had lured Wellstat into thinking it would not terminate the Agreement. BTG even sued Wellstat to preserve the Agreement. A294. BTG has not challenged the trial court's factual finding that BTG intended to honor the Agreement for its full ten-year term. A1997-1998. And BTG had no right to terminate the contract until years after its breach. A168 (§12.2) ("Party may elect to terminate *beginning* five (5) years after FDA Approval" (emphasis added)). In the unique circumstances of this case, more than in any of the cases cited by BTG or Wellstat, the trial court was justified in treating the measure of Wellstat's damages as a question of fact.

3. <u>**Even assuming termination, the damage award was proper.**</u>

In the alternative, even if the trial court were obligated as a matter of law to assume BTG would terminate at year five, the amount awarded represents proper contract damages because the losses directly caused by the breach would not end at year five. The first step in measuring expectation damages is to determine the lost value of performance to the non-breaching party. Restatement (Second) Contracts § 347(a), cmt. b; *Duncan*, 775 A.2d at 1022. Here, the value of the Agreement was not merely for Wellstat to receive a royalty from BTG selling Vistogard for a period of time, whether five or ten years.

A critical component of value was that BTG would use diligent efforts to *launch* Vistogard using "Diligent Efforts" at BTG's sole cost and expense. A156 (§8.1).[9] This was an incredibly valuable component because the launch of a branded drug establishes the drug's long-term sales trajectory. *Supra* at 7. This is true of all branded drugs, not just Vistogard. *Id.* Had BTG not breached, the trial court found Vistogard would have been "approaching its peak sales" at year five. A1998. But due to BTG's breach the peak is predicted to be much lower and the sales trajectory much lower. A1995-96; A776. Merely awarding Wellstat the lost royalties during five years of sales would not adequately compensate Wellstat for the continued loss caused by the botched launch.

Given this loss, awarding damages based on ten years of sales, meets all requirements for contract damages. First, the damages are based on "but for world" projections representing the objective value Wellstat would expect to earn because the projections are based on efforts "specialty pharmaceutical companies typically devote" to selling products. A766 (explaining the damage projections were based on what "Diligent Efforts" would produce); A131 (§2.11) ("Diligent Efforts" are the efforts "that specialty pharmaceutical companies typically devote" to similar products). Second, the trial court found that projecting lost sales for ten

[9] The Agreement expressly acknowledged this special obligation. A145 (§5.1(a)) ("[I]t being understood and expected that after the launch phase for the Subject Product, subsequent phases might contain less efforts and resources than were contained in the launch phase.").

years was the proper timeframe to avoid unreasonable speculation. A2000. Third, plaintiffs merely have to provide a reasonable "estimate" of the amount of damages. *SIGA II*, 132 A.3d at 1111. Finally, such long-term damages would flow from any breach of a contract involving the launch of a branded drug, so in this context, such damages are direct damages. 24 Richard A. Lord, *Williston on Contracts* § 64:12 (4th ed. 2002) (direct damages are "damages that would follow any breach of similar character in the usual course of events," unlike consequential damages which "do not always follow a breach of this particular character."); *Pharm. Prod. Dev., Inc. v. TVM Life Sci. Ventures, IV*, 2011 WL 549163, at *7 (Del. Ch. Feb. 16, 2011) (endorsing Justice Cardozo's view that the line between direct and consequential damages is "contextual" and "damage which is general in relation to a contract of one kind may be classified as special in relation to another").

II. THE CHANCERY COURT CORRECTLY INCLUDED IN ITS DAMAGES AWARD SALES FOR PATIENTS SUFFERING FROM TOXICITIES CHARACTERIZED AS "MODERATE" IN PATEL SURVEY.

A. Question presented.

Whether the Chancery Court committed clear error by awarding damages based on the interpretation by Wellstat's expert of his survey results? A1772-80; B272-273.

B. Scope and standard of review.

This Court reviews an award of damages for abuse of discretion and will uphold factual determinations underlying the award absent clear error. *SIGA II*, 132 A.3d at 1129-30. This Court will not disturb factual findings that "are sufficiently supported by the record and are the product of an orderly and logical deductive process." *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

C. Merits of argument.

The trial court did not commit clear error when making a factual finding about the number of projected Vistogard sales. To begin with, BTG significantly overestimates Wellstat's burden of proof. The trial court's task was to determine whether Wellstat provided an "estimate" of its damages; "precise certainty" is not required. *SIGA II*, 132 A.3d at 1131, 1133. There is an "established presumption that doubts about the extent of damages are generally resolved against the breaching party," *id*. at 1131, and the risk of uncertainty falls on the wrongdoer.

Here, any uncertainty in projecting long-term future sales arose from BTG's failure to launch Vistogard properly. Moreover, given the trial court's findings about BTG's misconduct, the trial court was entitled to "take into account the willfulness of the breach in deciding whether to require a lesser degree of certainty." *Id.* The Patel survey served as a more than adequate basis for making such an estimate of damages.

BTG claims that Patel's survey contained such a serious "flaw" that the results lacked any basis to support Wellstat's damages. At most, BTG points to an ambiguity in the survey that required interpretation of the results; the trial court's acceptance of Patel's interpretation was based on extensive record evidence and his reasoning was "orderly and logical." A1990-1993. First, the assumption that in answering Question 50, respondents kept in mind the earlier, repeated definitions of "moderate" as "Grade 3" and "severe" as "Grade 4" makes perfect sense. Second, the trial court conducted a sanity check by comparing the results of Patel's survey to empirical studies and BTG's own market research. The trial court found that these studies would indicate larger numbers of potential Grade 3 and 4 patients than Patel's survey found, assuming Patel correctly interpreted "moderate" to mean Grade 3 and "severe" to mean Grade 4, and a higher percentage of treatment with Vistogard for such Grade 3 patients than Patel found:

> The empirical literature supports this finding. Patel's survey indicated that only 5% of all 5-FU patients experience *either* Grade 3

> or Grade 4 toxicity (as defined in the survey), yet numerous scientific studies have found a 15-20% rate of Grade 3 or Grade 4 toxicity (as defined in the Common Terminology). Similarly, Patel's survey found that 39% of physicians would prescribe Vistogard for Grade 3 toxicity (as defined in the survey), yet a January 2016 pricing study by BTG found that 53% of physicians would prescribe Vistogard for Grade 3 toxicity (as defined by the Common Terminology).

A1992 (citations to record omitted). In other words, Patel's survey results would forecast smaller numbers of prescriptions for "on label" patients than other research in the record would have supported. Conspicuously, BTG ignores this devastating factual finding. The trial court did not commit clear error by adopting this factual interpretation of Patel's results.

BTG argues that even if respondents answered Question 50 with the prior definitions in mind, this would not fix the problem because those definitions did not track the "widely used" Common Terminology. BTG Br., at 23. This is a red herring. First, there was no evidence of actual confusion created by Patel's departure from the Common Terminology. Second, while the Common Terminology may be "widely used," the trial court found a lack of industry consensus about what these terms mean. A1991 (n. 179) ("Toxicity grades . . . lack a precise industry standard."). BTG's own survey of health care providers found "no strong consensus on what adverse reactions constitute a severe or life-threatening reaction." B59. Before constructing the survey, Patel conducted "qualitative" interviews with health care providers that revealed no consistent

usage, and thus created his own nomenclature for his survey. A1563 (N. Patel 1216:10-16).

Most importantly, the trial court found that any confusion "worked in BTG's favor." A1991. In other words, the trial court found the departure from the Common Terminology at most caused Wellstat's damages to include fewer "on label" patients than otherwise might have been justified. The trial court explained its reasoning by focusing on Patel's equation of "moderate" with "Grade 3" symptoms when the Common Terminology equates "severe" with "Grade 3":

> The problem with BTG's position is that Patel's classifications worked in BTG's favor. The drug profile presented in the survey accurately described Vistogard as indicated for patients "exhibiting early-onset, severe or life-threatening toxicity." Because the survey described Grade 3 as "moderate," rather than "severe," some of the physicians who responded that they would not treat Grade 3 patients with Vistogard likely did so because the drug's indication did not support using Vistogard to treat moderate toxicity. Had Patel classified Grade 3 toxicity as "severe," as called for by the Common Terminology, it is likely that more doctors would have said that they would prescribe Vistogard. This conclusion is supported by Patel's survey, which found that physicians were almost twice as likely to prescribe Vistogard to treat "severe" toxicity (i.e. Grade 4 in the survey) as they were to treat "moderate" toxicity (Grade 3 in the survey). By classifying Grade 3 as moderate toxicity, rather than severe toxicity, Patel depressed the size of Vistogard's patient pool and favored BTG.

A1991-92. Moreover, as noted above, the trial court found its reasoning was confirmed by the fact that Patel found a much lower decision to treat percentage for patients suffering Grade 3 symptoms than BTG's own research showed.

A1992. BTG wrongly suggests the trial court could not rely on BTG's own research because Wellstat had the burden of proof. *See SIGA II*, 132 A.3d at 1137 ("The Vice Chancellor would have been within his discretion to hold [defendant] SIGA to its own contemporaneous estimate.").

Finally, because Wellstat only had to provide an estimate of damages—precision is not required—Wellstat merely had to provide an estimate of potential sales. Even if Wellstat's damage projections included some potential "off label" sales, there is nothing wrong with that. The law does not prohibit "off label" sales or prohibit BTG from paying royalties to Wellstat based on such sales; the law merely prohibits BTG from purposefully marketing or promoting for such use. A1993. "Off label" sales are inevitable in the drug industry, especially in the oncology field. *See Amarin Pharma, Inc. v. U.S. Food & Drug Admin.*, 119 F. Supp. 3d 196, 200 (S.D.N.Y. 2015) (about 20% of prescriptions are off-label). While the trial court excluded a category of expressly off-label sales—prescriptions for Grade 1 and 2 patients—it did not do so because of any legal bar. The trial court excluded such sales because (1) it questioned the size of such sales to patients with lesser toxic reactions given cheaper alternative therapies; and (2) the fact that drug companies "generally" do not include such sales in forecasts. A1993. In short, the other patients were excluded not because of some technical

on-label, off-label distinction, but because the trial court questioned whether the sales were sufficiently likely to be included in the forecast.

Because the trial court's findings were fully supported by the record and the product of logical reasoning, the trial court did not commit clear error.

III. BTG FAILED TO PLEAD AND PROVE MITIGATION OF DAMAGES BASED ON WELLSTAT'S HYPOTHETICAL, SUBSTITUTE DISTRIBUTION AGREEMENT.

A. Question presented.

Did the trial court err in holding BTG raised a mitigation argument by claiming Wellstat should account for substitute, future sales of Vistogard? A1783-1786.

B. Scope and standard of review.

This Court reviews damages awards for abuse of discretion. *SIGA II*, 132 A.3d at 1128.

C. Merits of argument.

1. BTG waived the argument that Wellstat had to prove and account for profits from a substitute distributor.

BTG waived a challenge to the trial court's treatment as a mitigation defense the claim that Wellstat should have deducted future sales of Vistogard with a new distributor. BTG vigorously argued in the trial court that the issue was one of mitigation and cited mitigation cases, *e.g.*, A1714; A1825, but now claims it preserved the issue by including in its briefs phrases such as this "is not simply a mitigation issue" or Wellstat's failure is a "fundamental failure of proof." A1824; A1714. BTG, however, never elaborated on these conclusory phrases, cited any cases, or made any legal argument other than a mitigation defense. An issue is not fairly presented by passing comments or conclusory statements. *E.g.*, *Roofers*,

2014 WL 7010733, at *1; *Monroe v. State*, 9 A.3d 476 (Del. 2010) (TABLE). For the reasons stated above, plain error review in favor of BTG is not justified. *Supra* at 13-14.

2. <u>BTG's argument was a mitigation of damages affirmative defense.</u>

Wellstat was required to present only an "estimate" of the amount of damages. *SIGA II*, 132 A.3d at 1111. No rule places the burden on plaintiff to account for every possible amount that might offset or reduce its damages. Of course, BTG was free to present evidence that Wellstat's calculation was overstated. The trial court found, however, "BTG failed to introduce ***any evidence*** or expert testimony that would quantify how much Wellstat's damages might be mitigated through future sales of Vistogard." A1999 (emphasis added).[10]

Instead, BTG elected post-trial to argue that Wellstat was *obligated* as a matter of law to account for future sales under a new distribution arrangement. This was a classic mitigation of damages argument. First, the foundation of BTG's

[10]BTG did not even try to introduce any evidence other than a last minute effort to introduce undisclosed expert testimony that was excluded. A1999 (n. 206). BTG does not appeal the trial court's evidentiary ruling. BTG claims Mr. Wohlstadter testified Wellstat will recoup substantially more revenue once it reacquires the distribution rights. BTG Br., at 29. In fact, Mr. Wohlstadter said no such thing. BTG misleadingly cites JX438 as if it represents what Wellstat projects it will earn on re-launch. BTG Br., at 29 (citing A188). But JX438 was prepared in June 2015, A184, almost a year *before* Vistogard was launched, and obviously did not forecast a re-launch of a damaged product. Mr. Wohlstadter testified that as of trial, Wellstat had no specific, future commercialization plan. A1530 (D. Wohlstadter 1174:17-23).

argument was that Wellstat had a legal obligation post-termination to continue selling Vistogard; otherwise, there could be no legal obligation to adjust damages on account of such sales. The only possible source of such obligation would be the duty to mitigate damages. *Brzoska v. Olson*, 668 A.2d 1355, 1367 (Del. 1995) (a "party has a general duty to mitigate damages if it is feasible to do so"). Because BTG's argument was founded on the legal obligation to mitigate, the trial court properly characterized it as a mitigation defense.

Second, BTG's argument depends on the assertion that post-termination, Wellstat would employ a substitute distribution network (Wellstat has no sales force) to keep selling Vistogard. The Restatement (Second) of Contracts deals with "substitute transactions" in the provision governing mitigation, Section 350. The Restatement puts the burden of proof regarding "substitute transactions" squarely on the breaching party:

> The Restatement (Second) of Contracts also looks to the breaching party to show that a substitute transaction was available. Restatement (Second) Contracts § 350 cmt. c. . . . The commentary explains "the burden is generally put on the party in breach to show that a substitute transaction was available...." *Id.* § 350 cmt. c. Several Delaware courts have cited to section 350 approvingly in addressing the duty to mitigate.

VICI Racing, LLC v. T-Mobile USA, Inc., 763 F.3d 273, 300 (3d Cir. 2014) (citation of Delaware cases omitted).

The authority cited by BTG is inapposite. BTG cites Restatement (Second) of Contracts § 347, which says a non-breaching party must subtract from damages

"any cost or other loss that he has avoided by not having to perform." BTG Br., at 30. This principle has zero relevance. BTG bore all the cost of sales and distribution. A156 (§8.1). By not having to perform the Agreement, Wellstat saved no costs and avoided no losses. Moreover, the introductory clause to Section 347 says its rules are "[s]ubject to the limitations stated in §§ 350-53." Section 350 includes the limitation of placing the burden of proof on the breaching party.

Finally, BTG cites comment e to Restatement (Second) Contracts § 347, which is titled "*Actual loss*." The comment does not address accounting for "potential" costs avoided or "hypothetical" substitute transactions. When the comment says that a plaintiff who "makes an especially favorable substitute transaction" must account for it, the comment is talking about a plaintiff having to account for an *actual* transaction. *See* Restatement (Second) Contracts § 347 illus. 12 (explaining comment e with example where, at the time damages are sought, plaintiff has engaged in an actual favorable transaction). This principle simply reflects that a plaintiff cannot ignore actual money saved as of the time it seeks an award of damages.

VICI Racing, LLC proves Wellstat's argument. The Third Circuit held, "[o]nce the loss attributable to nonperformance has been determined, a court must subtract any costs avoided as a result of the breach that are *evident in the record*."

763 F.3d at 294 (emphasis added). The court did not place a burden of proving avoided costs on the plaintiff; instead, the court treated this as a fact a trial court must take into account if the record supports it. The court then addressed the defendants' claim that, in addition to deducting costs avoided "evident in the record," the trial court should have considered "measures [plaintiff] should have or could have taken to limit its loss but failed to take." *Id.* at 294, 301. The court ruled that this argument was a mitigation argument and was waived. *Id.* at 301 ("T–Mobile did not raise failure to mitigate in its pleadings. . . . It did not offer any argument or evidence regarding failure to mitigate at trial.").

Regardless of whether BTG's argument was properly characterized as "mitigation," the trial court's damage award properly reflects BTG's lack of evidence of future substitute sales. Wellstat presented this argument below. A1785-86; *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (this Court "may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court"). As the wrongdoer, BTG bears the risk of uncertainty created by its breach. *SIGA II*, 132 A.3d at 1111 ("The breaching party cannot avoid responsibility for making the other party whole simply by arguing that expectation damages based on lost profits are speculative because they come from an uncertain world created by the wrongdoer.").

Future sales of Vistogard by a new distributor were speculative due to BTG's conduct. First, BTG resisted turning over the distribution rights until a final judgment was entered, making it impossible for Wellstat to engage a substitute distributor. A1580 (C. Gerardi 1281:12-1282:15). Second, by botching the launch, BTG compromised the long-term performance of Vistogard, casting a cloud over its future prospects. The unrebutted testimony of Wellstat's expert was that given this impairment the best estimate of Vistogard's future performance even in the hands of another distributor was the poor sales projections based on BTG's actual performance—*i.e.*, it was unclear sales could improve materially given the impairment. A1580 (C. Gerardi 1282:18-1283:9). Because BTG's conduct contributed to the lack of information about future substitute sales, BTG must suffer the consequences—not Wellstat.

IV. THE CHANCERY COURT DID NOT ABUSE ITS "BROAD DISCRETION" TO SET A PRE- AND POST-JUDGMENT INTEREST RATE.

A. Question presented.

Did the trial court abuse its discretion to select the rate of interest? A1786-88; A1923-25.

B. Scope and standard of review.

The selection of a particular interest rate is reviewed for abuse of discretion. *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 226 (Del. 2005).

C. Merits of argument.

The trial court expressly invoked—and BTG does not challenge—the Court of Chancery's "broad discretion" to select an interest rate different from the legal rate. A2002; *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988) ("While the legal rate of interest has historically been the benchmark for pre-judgment interest, a court of equity has broad discretion, subject to principles of fairness, in fixing the rate to be applied." (citations omitted)); *Brandin v. Gottlieb*, 2000 WL 1005954, at *29 (Del. Ch. July 13, 2000) ("In the Court of Chancery the legal rate is a mere guide, not the inflexible rule."). As a result, the trial court's selection of an interest rate rooted in the parties' contract was not an abuse of discretion because that selection was the product of an orderly thought process and

the application of precedent by analogy. *See Williams Gas Supply Co. v. Apache Corp.*, 594 A.2d 34, 36-37 (Del. 1991).

As well, reliance on the contact rate was equitable. Wellstat damages were discounted using an annual discount rate of 12.43%. A569-572. As a result, by delaying payment, BTG enjoys the benefit of this 12% discount in the value of Wellstat's damages. The 12% contract interest rate, at most, offsets the effect of the large discount rate used to calculate the damages in the first place. It does not act as a windfall to Wellstat or undue punishment to BTG.

Even if an express, contractual interest rate were required to depart from the legal rate, the trial court correctly relied on Section 4.8. The damages awarded Wellstat represent the total of lost royalties that BTG owed under the Agreement, or the "aggregate amount" of payments that "are due under [the] Agreement." A144 (§ 4.8). And, the payments were "not paid on or before such payments are due." *Id.* Once BTG committed a material breach, BTG became liable for contract damages calculated as of date of breach, *Fletcher Int'l, Ltd. v. Ion Geophysical Corp.*, 2013 WL 6327997, at *17 (Del. Ch. Dec. 4, 2013) ("Damages are to be measured as of the time the contract was breached."), and thus the present value of those amounts discounted as to the date of breach represented amounts unpaid "on or before" the date due. BTG itself claims that the "correct approach" to when interest should start running on the damage award was March 2, 2016 because

"pre-judgment interest accumulates from *the date payment was due* to a party." BTG Br., at 37 (emphasis added).

BTG fails to grapple with the language of the contract other than to improperly invoke the heading "Late Payments" to section 4.8. *See* A178 (§15.10) (captions or headings "shall have no effect on the meaning of the provisions hereof"). Instead, BTG inserts language by arguing that "[o]n its face" the provision is "expressly self-limiting to 'payment dispute[s].'" BTG Br., at 34. The sentence providing for interest, however, does not use the phrase "payment disputes"; nor does it contain any language of limitation. In contrast, the following sentence addresses recovery of fees and expenses in "payment dispute[s]" and begins with the introductory phrase "*[i]n addition*, in any payment dispute. . . ." A144 (§4.8) (emphasis added). This sentence shows that the parties knew how to fashion special rules for "payment disputes," but did not specifically confine the availability of contractual interest to "payment disputes." Similarly, the fact that the parties provided different notice periods for a "material breach" and a "payment breach" in section 12.4 (A169) highlights the absence of such distinction in section 4.8 when providing for interest.

The fact that the arbitration clause for disputes involving the Joint Development and Commercialization Committee ("JDCC") provides a special rule for recovery of interest, § 14.5(b) (A176), simply reflects the unique nature of a

JDCC arbitration. The JDCC was a body created to make certain decisions about development and marketing of Vistogard. A JDCC dispute does not involve resolution of any breach of any obligation under the Agreement; it is simply a mechanism to resolve an impasse if members of the JDCC could not agree. And, a JDCC arbitration cannot involve an impasse about a decision that requires one party to spend its own money,[11] and thus cannot involve a dispute about payments due under the Agreement, which is what section 4.8 addresses.

With regard to the start date for prejudgment interest, BTG claims it "objected" below by pointing to a footnote in its Reply Brief. A1826 (n. 14). BTG did not preserve this argument. Wellstat argued that interest runs from the "date of breach," and because the latest possible date of breach was March 2, 2016, Wellstat mentioned that date. A1786-1788. In response, BTG dropped a footnote that merely said, "Even under Wellstat's theory, breach cannot be claimed as of that date," A1826 (n. 14), and said nothing at oral argument. *Sabree Envtl. & Constr., Inc. v. Summit Dredging, LLC*, 149 A.3d 517 (Del. 2016) (TABLE) ("[S]tandalone arguments in footnotes are usually not considered fairly raised in any court."). The trial court adopted Wellstat's legal position that interest runs

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[11] Section 14.5 (A175) excludes from arbitration any JDCC dispute over which either party has a veto under Section 5.1(c) (A146), and Section 5.1(c) gives each party a veto right over any decision that would require that party to spend its own money.

from "date of breach," but selected an earlier date of breach. BTG did not seek reconsideration after the trial court's decision.

CONCLUSION

For the foregoing reasons, Wellstat respectfully requests that this Court affirm the trial court's judgment in full.

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