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THE SUPREME COURT OF THE STATE OF DELAWARE

Delphi Petroleum, Inc. Appellant, Cross-Appellee, v. Magellan Terminal Holdings, L.P. Appellee, Cross-Appellant.	No. 261, 2020 On appeal from the Superior Court for New Castle County C.A. No. N12C-02-302 FWW C.A. No. N19C-05-015 FWW

APPELLANT'S OPENING BRIEF ON APPEAL

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NATURE OF THE PROCEEDINGS

This appeal arises from the 2005 and 2011 Terminalling Agreements between Delphi Petroleum, Inc. ("Delphi") and Magellan Terminal Holdings L.P. ("Magellan"), pursuant to which Magellan provided oil storage and services to Delphi at Magellan's marine terminal located at the Port of Wilmington (the "Terminal").

Delphi brought an action against Magellan in the Superior Court of Delaware in February 2012. The trial court conducted a bench trial in July 2015 and issued its Decision After Trial on June 27, 2016. The trial court awarded Delphi $359,967. This figure was in addition to $330,023.93 Magellan had refunded Delphi on June 19, 2015 and $421,603 Magellan had refunded Delphi on July 24, 2015. Neither of these refunds included interest. Of the damages awarded and payments made, $536,000 related to overcharges Magellan assessed and then concealed, and which Delphi paid from 2005 to 2010.

Delphi filed post-trial motions, which the trial court denied in an Order and Memorandum dated December 30, 2016. Delphi appealed to this Court on January 25, 2017, in part challenging the date the trial court used to start the accumulation of interest. This Court agreed with Delphi on that issue and remanded the matter to the trial court for a calculation of interest under the proper standard.

On remand, Delphi requested that the trial court award interest of $840,145. The trial court found that Delphi was entitled to interest of only $442,833, Magellan's calculation. Delphi appealed the trial court's decision on prejudgment interest to this Court on August 9, 2018. While the second appeal was pending, Delphi initiated settlement negotiations in September 2018. By email exchange of December 20-21, 2018 (the "December Exchange"), Delphi agreed to accept Magellan's offer of $1,050,000, agreed to give Magellan the release it had included in the December Exchange, and said the "paperwork", i.e., the settlement agreement, would be worked out the following week. The parties were unable to agree upon a written settlement agreement so no settlement agreement was executed and the parties awaited this Court's decision on the prejudgment interest issue.

On April 15, 2019, this Court reversed the trial court's ruling on prejudgment interest due Delphi, and directed the trial court to award Delphi $840,145 in interest.

On May 1, 2019, the Supreme Court issued its Mandate to the trial court with the instruction that "the case is hereby remanded for further proceedings in accordance with this Opinion."

Also on May 1, 2019, Delphi filed a new action, C.A. No. N19C-05-015 FWW. The trial court consolidated the first and second actions.

On May 28, 2019, five months after the December Exchange, Magellan paid Delphi $1,050,000, significantly less than the amount due taking into account the $840,145 interest judgment directed by this Court, and then on May 31, 2019 moved to enforce the settlement it alleged was concluded between the parties on December 21, 2018.

By Decision dated April 23, 2020, the trial court ruled that a settlement was reached on December 21, 2018 and dismissed the first and second actions. The trial court in its Opinion directed Magellan to submit "a form of release consistent with this Order", with Delphi having the opportunity to object. On May 21, 2020 Magellan submitted its proposed order. On June 5, 2020 Delphi submitted its objections to Magellan's proposed order. On July 15, 2020, the trial court rejected Magellan's proposed order and ruled that "Delphi's proposed order accurately reflects the terms of the settlement agreement the parties reached on December 21, 2018." The trial court also ordered Magellan to pay interest on the settlement sum from December 21, 2018 to May 28, 2019.

Delphi timely filed a Notice of Appeal on August 12, 2020 in this Court.

SUMMARY OF ARGUMENT

1. Delphi appeals the trial court's ruling that the parties settled this matter in December 2018.

2. Magellan filed its Motion to Enforce Settlement Agreement five months after the December Exchange and only after this Court's decision reversing the trial court's decision. This Court rejected Magellan's prejudgment interest calculation as having "failed to account for a significant portion of [Magellan's] misconduct during the parties relationship" and awarded Delphi $400,000 more prejudgment interest.

4. Delphi does not dispute that it believed it had entered into a settlement with Magellan in the December Exchange subject to the parties executing a written settlement agreement, a condition the parties agreed to both before and after the December Exchange. The December Exchange did not create a binding and enforceable settlement because the parties mutually intended to settle the case by means of a written, signed agreement so that this lengthy litigation could be globally concluded.

5. The parties were never able to execute the settlement agreement Magellan demanded Delphi execute as a pre-condition to Delphi receiving the agreed settlement payment because after the December Exchange Magellan consistently demanded a scope of release far broader than the release in the

December Exchange. The trial court agreed that Magellan attempted to expand the scope of release after the December Exchange.

6. Delphi believes, however, that the trial court erred in enforcing the December Exchange because the trial court failed to properly account for

7. The parties' agreement that for the settlement to be effective the parties had to execute a settlement agreement, which the parties never did.

8. The parties' failure to have a meeting of the minds on the scope of release, an essential term of the settlement agreement; or, in the alternative.

9. Magellan's breach of the December Exchange by its demands for a scope of release never agreed to in the December Exchange.

10. Magellan's breach of the December Exchange by its refusal to promptly pay the agreed settlement amount, which Magellan did not pay until five months later and only after this Court had issued is Mandate making Magellan liable for $400,000 of additional damages.

11. Delaware law provides that even if the parties agree to all the essential terms of a settlement agreement it is not enforceable where the parties agree that the settlement is not final until a written agreement is executed. Since Magellan and Delphi agreed that a signed agreement was a precondition to Delphi's release and Magellan's payment of the settlement amount, and the parties did not execute a settlement agreement, the December Exchange cannot be enforced.

12. The settlement was never consummated because while Magellan had demanded that only Delphi release only Magellan in the December Exchange, Magellan now demanded that a number of other persons and entities release not only Magellan but also a number of other persons and entities. After the December Exchange, Magellan also demanded that Delphi indemnify Magellan against any claims that the newly named additional releasors might ever bring against Magellan or any of its newly named additional releasees. The December Exchange had not required any indemnification from Delphi.

13. Magellan refused to sign a settlement agreement without this broader release. Magellan's release went far beyond the release Magellan requested in the December Exchange, and Delphi did not agree to the broader release. During the entire post December Exchange settlement agreement negotiations Magellan never relented and never offered to accept only the release it had bargained for and Delphi had accepted in the December Exchange. During those negotiations and in the months after the negotiations came to an end on January 16, 2019, Magellan never paid Delphi the agreed settlement amount until six weeks after this Court's decision holding Magellan liable for an additional $400,000 damages.

14. When Magellan rejected all of Delphi's attempts to accommodate Magellan's demands for the broader release, in order to receive the settlement payment, and the negotiations came to an end on January 16, 2019, neither party

was prejudiced. Magellan had not paid Delphi, and Delphi had not released its claims. The parties simply were where they had been before the December Exchange, and before settlement negotiations had begun. The parties stopped negotiations on the agreement and awaited this Court's decision on the prejudgment interest appeal.

15. Even if it is assumed that the parties did have a meeting of the minds as to the scope of the release on December 21, 2018, the trial court found that Magellan demanded Delphi agree to a broader scope of release before Magellan would pay the agreed settlement amount and did not timely tender the settlement payment (because it awarded Delphi interest from December 21, 2018 to May 28, 2019). Delaware law provides that the party that first breaches an agreement cannot sue to enforce it.

STATEMENT OF FACTS

A. The Parties and the Agreements

Delphi is a purchaser and seller of petroleum products. A641. Delphi contracted for terminalling services from Magellan at the Port of Wilmington terminal ("the Terminal") owned by Magellan. A654-655. The parties' relationship ran from September 1, 2005 through August 31, 2014 pursuant to two Terminalling Agreements (the "2005 Agreement" and the "2011 Agreement"). *Id.*

B. Magellan's Overbilling of Delphi for Heating Oil

Magellan agreed to heat Delphi's product under both the 2005 and 2011 Agreements. *Id.* Delphi learned in discovery in November 2014 that Magellan knew no later than January 2011 that it had overbilled Delphi $421,603 from 2007 through 2010. A722.

The trial court found that Delphi proved that Magellan had also overcharged Delphi for heating in 2005-2006. A707-714. The total award on the heating overbill claim was $536,150. *Id.*

The trial court also found that Magellan breached its covenant of good faith and fair dealing by intentionally concealing the overbilled heating charges. A722 ("Magellan knew about the heating 'overbill' due to the use of meters instead of gauges in 2011. Magellan did not notify Delphi or credit Delphi's account. Instead, Magellan admits that it sent Delphi past-due bills that contained incorrect

and excessive amounts. Therefore, the Court finds that Magellan concealed overbilled heating charges.")

In its ruling on Delphi's good faith and fair dealing claim, the trial court found: "It is fundamentally unfair to discover billing errors and not notify the other party when the other party does not have access to the same information. Even more unfair is sending past-due bills on amounts that are known to be inaccurate and excessive." A722.

C. The Trial Court's Decision on Prejudgment Interest

Although the overbilling damages were sustained when Delphi paid Magellan's inflated heating invoices from 2005 through 2010, the court awarded Delphi prejudgment interest starting only on September 25, 2013. A706-707. Notwithstanding that, the trial court recognized it was ordering Magellan to refund "illegitimate sums" Magellan had taken from Delphi based on Magellan's overbilled invoices. A734.

D. This Court's First Ruling

On appeal, this Court ruled that interest on the heating overbill ran from the date Delphi paid the overcharges from 2005 to 2010 rather than from September 25, 2013. A645 ("We remand the case to the Superior Court for any further proceedings to determine the dates from which interest runs or the amount of such interest.").

E. The Trial Court's Decision on Remand

On remand, the trial court asked Delphi and Magellan to submit calculations of the interest owed Delphi. A633. Delphi employed Donald Dahl, a CPA in practice for thirty-four years, to perform the calculation. A638. Delphi submitted Dahl's calculation that the interest owed was $840,145.63. *Id.* Magellan submitted its interest calculation and claimed to owe Delphi only $442,883 of interest. *Id.*

On July 10, 2018, the trial court issued its ruling accepting Magellan's $442,883 calculation and rejecting Delphi's $840,145 calculation. A640.

F. The Parties' Settlement Negotiations

Delphi appealed to this Court. A626. While that appeal was pending, Delphi initiated settlement negotiations in September 2018. A406. On November 7, 2018, Delphi sent Magellan a settlement agreement signed by its President designed to settle the case. A434-437. Magellan rejected Delphi's signed settlement agreement and on November 14, 2018 issued its draft settlement agreement committing to promptly pay $1 million for a release from Delphi. A438-443. Magellan's settlement agreement required that only Delphi release Magellan; it did not require any other persons or entities to release it or any other persons or entities, nor did it require Delphi to indemnify Magellan from claims made by persons and entities not Delphi. *Id.*

On November 16, 2018, while the parties negotiated the terms of the agreement to settle the matter for $1,000,000, Magellan characterized the agreement as "tentative", saying additional time was required to "agree on the written documents". A444-449. Magellan did not expect or understand that the parties' agreement on a payment amount would be a conclusive settlement agreement; that would require the negotiation of all terms and a signed written document. *Id.*

In its April 23, 2019 Opinion, the trial court discounted Magellan's November 16, 2018 email, and erroneously said that at that time "the parties had not engaged in either a formal offer or acceptance." A188. The evidence is to the contrary, however; there could be no more formal settlement offer than Delphi's November 7, 2018 signed settlement agreement, and the cover note conveying that settlement agreement to Magellan stated "Delphi would accept $1MM to dismiss the cases and mark the judgment satisfied". A434-437. Delphi's formal settlement offer followed Magellan October 8, 2018 formal settlement offer, A431-433. In response to Delphi's November 7, 2018 settlement offer Magellan made a formal counteroffer agreeing to the $1,000,000 settlement amount in Delphi's offer but demanding a broader scope of release. A386. Magellan does not dispute that it and Delphi made these formal offers. *See* generally A597-623. This is significant because these November negotiations were the immediate precursor to the

December exchange, and the trial court, because of its mistake of fact, failed to take them into account when it decided that the parties did not agree that a signed settlement agreement would be required before a settlement could be enforceable. *Id.*

In its formal November 2018 settlement offer, Magellan wanted the release to terminate not just the existing case, but any known or unknown claims not yet sued on by Delphi. A438-444. Delphi told Magellan that it had two additional claims, one related to Tank 3 rental charges that Magellan assessed even though Magellan informed the Delaware Department of Natural Resources and Environmental Control ("DNREC") that Tank 3 was out of service. A450-52. The Terminalling Agreement between the parties did not permit Magellan to charge Delphi for rental of tanks that were out of service for repairs, maintenance or API 653 inspections, precisely the reasons Magellan told DNREC that Tank 3 had been taken out of service. *Id.* The documents supporting this claim were not produced by Magellan in discovery and were not discovered until after trial. *Id.* Delphi also notified Magellan of a potential claim related to Tank 10 based on documents in the DNREC files that showed it had been taken out of service for inspection and repair while Magellan had testified at trial that was not the case. *Id.* Magellan did not produce these documents either. *Id.* Given the existence of these new claims, and the mutual desire to make a global settlement, the parties attempted to reach a

new deal that would end the existing case, and also extinguish all claims, known or unknown, that Delphi might have against Magellan. *See generally* A-450-465.

On December 20, 2018, Magellan made a final, non-negotiable offer to pay $1,050,000 to:

> settle any and all claims Delphi may have against Magellan, known or unknown, including but not limited to all claims that were or could have been brought in the litigation, any claims or allegations arising in any way out of the relationship and contracts between Magellan and Delphi, and alleged "new" claims related to Tanks 3 and 10. Magellan insists on the broadest release possible – any claim Delphi could ever possibly assert against Magellan even remotely related to their business relationship must be released. This is a non-negotiable condition of the above offer.

A459-461. The release requested by Magellan applied solely to "Delphi", and not the many other persons or entities Magellan subsequently demanded be covered, and did not require an indemnification from Delphi. *Id.* The release was to be broad insofar as it would release all possible claims Delphi had, whether known or unknown, against Magellan. *Id.*

On December 21, 2018, counsel for Delphi responded as follows:

> Delphi accepts Magellan's offer. We'll work out the paperwork next week.

A462-463. On December 26, 2018, Delphi sent two drafts of a settlement agreement to Magellan including the broad release Magellan had demanded.

A466-476. Delphi's second December 26, 2018 draft agreement called for the release of "all claims of any nature or description whatsoever, howsoever arising, choate or inchoate, whether known or unknown, either party had, have [sic] or may have, against the other, from the beginning of time." *Id.*

Magellan immediately rejected Delphi's drafts and advised that Magellan would draft the release provisions. A479-481. Magellan further stated: "Magellan will forward you its Settlement Agreement for Delphi's review in due course. After the parties execute the agreement, Magellan will make payment in compliance with the terms of the written agreement." *Id.* (Emphasis added.)

Magellan's December 26, 2018 email also stated "the document Delphi provided is not what Magellan's [December 20, 2018] offer made clear would be needed—**creation of** a full and final release and settlement agreement." *Id.* (Emphasis added.).

Magellan's December 26, 2018 email explained that "management personnel who need to . . . approve the agreement and make payment" were not in the office, meaning that the persons with authority at Magellan had not approved the settlement agreement nor had they approved making the $1,050,000 payment. *Id.* Magellan thus openly held the view that a fully executed settlement agreement was needed before Magellan had any obligation to pay Delphi. *Id.* And the trial ruled that Delphi had also made a signed document a condition of the settlement.

A174. Therefore, both parties agreed that a settlement could occur only if both parties signed a settlement agreement. *Id.*

The December 26, 2018 email is the most contemporaneous document from Magellan by which this Court can determine Magellan's belief as to the enforceability of the December Exchange. A466-476. On December 26, 2018, before this Court decided the prejudgment interest issue, Magellan did not think a binding settlement had been reached. *Id.* Until after this Court ruled against it, Magellan consistently demanded that Delphi sign Magellan's draft of a settlement agreement before it would pay the agreed $1,050,000 settlement amount. *See generally* A406-562.

Magellan wrote Delphi on January 4, 2019:

> We believe Magellan's obligation [to pay $1,050,000 should be triggered only after the agreement [then being negotiated] is fully executed.

A555-566. Magellan claims that its January 4, 2019 email "did not suggest [Magellan] would have no obligation to pay at all if the document were not executed". *See generally* A383-405. Magellan ignores its January 7, 2019 email, where it said:

> Magellan will not wire any money until Delphi has signed the final approved version of the Agreement.

A237 (Emphasis added).

With that January 7 email, Magellan forwarded another draft of its "FULL, FINAL, RELEASE AND SETTLEMENT AGREEMENT" which included as Paragraph 2: "If Delphi delivers the final, approved Agreement (in the exact form agreed upon by the parties) signed by its authorized representatives . . . Magellan shall [pay]." *Id.*

Delphi cited Magellan's January 7, 2019 email but the court did not consider it when the court analyzed Magellan's January 4, 2019 email and concluded it did not provide any evidence that the parties agreed to be bound only by a formal document. A162.

Nevertheless, Magellan's January 7, 2019 email cannot be explained away; it meant Delphi would never receive the settlement amount unless Delphi signed Magellan's new settlement agreement with the new indemnity obligation and the new and vastly broader scope of release, not the scope of release Delphi had agreed to in the December Exchange. *Id.* Yet Magellan alleged that the December Exchange was a full and final agreement and did not require any written settlement agreement; it alleged it was bound to pay the settlement amount solely by the December Exchange. *See generally* A383-405.The truth is Magellan did not pay the settlement amount until it realized it was better off with the December exchange than with this Court's Order in the Second Appeal awarding Delphi $400,000 more interest. *Id.* 566.

In all of the many draft settlement agreements Magellan sent to Delphi it demanded Delphi execute the settlement agreement before it would be binding. See for example Magellan's first and last settlement agreement drafts dated of January 2, 2019 and January 17, 2019 respectively. A322-329, A573-584 . Delphi agreed that there would be no settlement unless the parties signed a settlement agreement; the problem was that Magellan never presented Delphi with a settlement agreement Delphi could sign because all of Magellan's settlement agreements required a broader release than Delphi had agreed to in the December Exchange, which the trial court recognized. *Id.*

Magellan filed its Answering Brief on Delphi's appeal on December 26, 2018. A597. Magellan said nothing to this Court, then or ever, about the December Exchange five days earlier. *Id.* Nor did Magellan inform the trial court of the alleged final settlement until after issuance of this Court's Mandate. A624.

G. Magellan Attempts to Expand the Release

On January 2, 2019 Magellan sent Delphi a proposed settlement agreement and, for the first time, Magellan insisted on the release of all claims by Delphi, and in addition by Delphi's

> predecessors, assigns, transferors, affiliates, parents of all tiers, subsidiaries of all tiers, and successors, and its and their respective members. owners, general partners, limited partners, managers, officers, agents, employees, equity holders, insurers, sureties, and attorneys.

A322-29. Magellan similarly expanded the definition of "Magellan" to include many other persons and entities. *Id.* Magellan further required that Delphi agree to hold Magellan and the other new entities and persons harmless against all possible claims that might be made by the many additional releasors Magellan now demanded be included. *Id.*

This was not what Delphi understood Magellan meant in its offer of December 20, 2018. A459-461. That offer, which was limited, as had been the case in all the negotiations that had preceded Magellan December 20, 2018 final offer, to only Delphi releasing only Magellan. *Id.* Nor had Delphi agreed to the expansive list of releasors and releases or an indemnification in its acceptance of the $1,050,000 settlement amount on December 21, 2018 Id. A462-463.

Nonetheless, in multiple drafts over the subsequent two weeks, Delphi attempted unsuccessfully to negotiate a settlement agreement accommodating Magellan's new demands. A464-562.

On January 8, 2019, Delphi sent Magellan a settlement agreement executed by Delphi and requested that Magellan execute the agreement. A330-342. Magellan rejected Delphi's signed settlement agreement. A343-344.

On January 10, 2019, Delphi's counsel wrote to Magellan's counsel as follows:

> This confirms that Magellan has rejected Delphi's signed agreement delivered to you last evening, so that document is of no consequence or effect, and is withdrawn.

A517-518. The e-mail went on to say that while "Delphi" was willing to release known and unknown claims,

> You did not say, and Delphi did not agree, that Delphi had to hold Magellan harmless against all claims that might at some future date be brought by any person or entity other than Delphi including, but not limited to, a Delphi agent, etc. over whom Delphi has no control, and whose claim may bear no relationship to the parties' business relationship.

Id.

On January 11, 2019, Magellan sent Delphi a revised settlement agreement. A517. Like its January 2, 2018 draft, Magellan's proposed agreement required Delphi to release all claims, known or unknown, both of Delphi and "its predecessors, assigns, transferors, affiliates, parents of all tiers, subsidiaries of all tiers, and successors, and its and their respective members, owners, general partners, limited partners, managers, officers, agents, employees, equity holders, insurers, sureties, and attorneys" and agree to release and hold Magellan harmless against such claims. *Id.*

This language, which is not in Magellan's December 20, 2018 offer, is much broader in defining "Delphi". *Id.* It confirms that Magellan wanted entities other than Delphi to release and hold harmless entities other than Magellan. *Id.*

Delphi sent another revised draft of the settlement agreement to Magellan's counsel on January 11, 2019. A525-532. Magellan responded with a "revised version of the Agreement that hopefully addresses Delphi's concerns." A533-540. It did not, because it continued to insist that the scope of the release be broader than "Delphi" and include an indemnity obligation. *Id.*

On January 16, 2019, Delphi sent to Magellan yet another draft agreement. A541-548. Delphi's counsel advised that "if this version is unacceptable, we're at an impasse and will go ahead and file our reply brief, and Delphi reserves the right to enforce the December 20-21 agreement." *Id.*

Magellan did not accept Delphi's January 16, 2019 draft and on January 17, 2019, Magellan's counsel sent to Delphi's counsel a version of the written settlement agreement that "Magellan is willing to sign." A549-561. Since the draft continued to reflect an overly broad definition of "Delphi", and required indemnification, Delphi did not sign the agreement. *Id*.

Although Magellan now claims that a settlement had been reached on December 21, 2018, it continued to demand that Delphi agree to Magellan's

expanded group of releasees and releasors, and refused to, and did not, pay the settlement amount to Delphi. *Id.*

In its January 9, 2019 email conveying yet another draft of its settlement agreement it demanded Delphi sign, Magellan stated "If this version is not acceptable to Delphi, then Magellan will assess its options, including taking steps to enforce the original email agreement [the December Exchange] of the parties." A500-507. Delphi had been willing to honor the December Exchange in the settlement agreement—Delphi's December 26, 2018 draft did exactly that--but Magellan rejected Delphi's draft and then, as found by the trial court in its July 15, 2020 Order, insisted that Delphi enter into a settlement agreement it admits was different from the "original email agreement". A166-169.

Even assuming the trial court was correct in finding a binding agreement was made on December 21, 2018, which Delphi disputes, Magellan lost its right to enforce it by its refusal to pay unless Delphi accepted Magellan's demands that Delphi execute a different settlement agreement that imposed an indemnification and a release the parties never agreed upon. *Id.*

H. This Court's Second Decision

In its April 15, 2019 decision, this Court agreed with Delphi's prejudgment interest calculation, and directed the trial court to carry out its ruling. A629. The Court concluded:

> Delphi has demonstrated that its approach fairly took into account the parties' entire relationship, gave Magellan credit for periods where Delphi had outstanding overdue balances, and conformed with the principles of our first remand. By contrast, Magellan's approach, though presented more simply, simply failed to account for a significant portion of its misconduct during the parties' relationship, in particular the misconduct that related to the overdue balance interest.

Id.

I. Magellan Pays Delphi $1,050,000

On May 26, 2019, five months after the December Exchange and six weeks after this Court's decision, Magellan paid Delphi $1,050,000. A566. Three days later, Magellan filed a Motion to Enforce Settlement, claiming that the December Exchange created an enforceable settlement. A383. Magellan paid the settlement amount even though the parties had never executed a settlement agreement which Magellan and Delphi had consistently demanded as a precondition to settlement and Magellan's obligation to pay. *Id.*

Delphi informed Magellan on May 23, 2019 that Delphi would not accept Magellan's payment as a settlement payment but only as a payment on account of the greater amount Magellan owed Delphi. A254.

J. The Trial Court's April 23, 2020 and July 15, 2020 Rulings

On April 23, 2020, the trial court granted Magellan's Motion to Enforce Settlement. A141. The trial court recognized that:

> As the party seeking to enforce the agreement, Magellan has the burden of showing that a binding contract arose between the parties. Magellan must show that the parties agreed to all material terms and intended to be bound by the agreement.

A144. The trial court enforced the December Exchange even though the parties had consistently shown their intent before and after the December Exchange that it would trigger no payment obligation on Magellan's part until a signed agreement was executed. *Id.* After December 20, 2018, Magellan never offered to accept a release from Delphi alone, and the trial court characterized Magellan's actions after December 20, 2018 as attempts to expand the release. A164

In its Opinion enforcing the December Exchange, the trial court did not define the release within the December Exchange; rather, the trial court directed Magellan to 'submit to the court a form of release consistent with this Order." A165. The trial court allowed Delphi to submit objections to the scope of release Magellan submitted, acknowledging that it clearly understood that the parties had never been able to agree on a scope of release in the extensive negotiations that occurred after the December. *Id.*

On July 15, 2020, the trial court rejected the Magellan's proposed release because it continued to include the overbroad language that Magellan had insisted on before Magellan would sign the settlement agreement and pay Delphi. A168.

The trial court also ordered Magellan to pay interest on the settlement sum from December 21, 2018 to May 28, 2019. *Id.*

ARGUMENT

I. The December Exchange did not create a binding settlement agreement because both parties understood and agreed that the Agreement would be final only upon execution of a written settlement agreement.

A. Question Presented

Did the trial court err in holding that the parties reached a binding agreement to settle all disputes on December 21, 2018, when Delphi's acceptance advised that the parties would subsequently work out the paperwork, the parties were unable to agree on a written settlement agreement, and the parties understood and agreed that Magellan would pay the settlement sum only after Delphi signed a written agreement? This issue was argued by Delphi in response to Magellan's Motion to Enforce Settlement. A256-288. .

B. Scope of Review

This Court's scope of review is *de novo*. See *Stonewall Ins. Co. v E.I. DuPont de Nemours & Co*., 996 A.2d 1254, 1261 (Del. 2010).

C. Merits of the Argument

This Court should reverse the trial court's decision to enforce settlement, because Magellan did not carry its burden to prove the existence of a settlement agreement. All inferences are drawn in favor of the non-moving party. *Sterling Prop. Holdings v. New Castle County*, 2014 Del. Ch. LEXIS 145, at *3 n. 2 (Del. Ch. Aug. 5, 2014); *Carter Farm, LLC v. New Castle County*, 2014 Del. Ch. LEXIS

120, at *8 (Del. Ch. July 17, 2014). A settlement agreement is binding under Delaware law only when the parties "agree to all material terms and intend to be bound by the contract . . . ." *Schwartz v. Chase*, 2010 WL 2601608 at 4 (Ct. Ch. June 29, 2010). Put another way, an enforceable contract has not been formed until all of the terms that the parties themselves regard as important have been resolved. *Roberts Enters., L.P. v Fun Sport, Inc*., 2005 U.S. Dist. LEXIS 18522, at *6 (D. Del. March 7, 2008). The party claiming that a settlement agreement has been reached has the burden of proof, by preponderance of the evidence, to establish that the parties agreed on all material terms. *Latortue v. The Std. Fire Ins. Co.*, 2020 Del. Super. LEXIS 335, at * 2-3 (Del. Super. July 2, 2020) (noting that the party seeking to enforce an alleged settlement agreement "has the burden of proving the agreement's existence by a preponderance of the evidence. [The party] must prove: (1) the intent of the parties to be bound by it; (2) sufficiently definite terms; and (3) consideration." (citations and internal quotations deleted)).

Here, the trial court erred in finding that Magellan carried its burden for two principal reasons. First, the parties never reached an agreement as to the scope of the release, which was clearly an important and material term. Second, the parties never executed a signed release, and the parties' words and conduct showed that they both considered the December Exchange not binding in the absence of a final executed writing.

1. The parties did not consummate a binding settlement agreement, because they did not reach an agreement on the scope of a release.

No settlement agreement was reached by the parties, because Delphi and Magellan never agreed on the scope of release Delphi was to provide. Both Delaware and federal law hold that release provisions are material terms to a settlement agreement. *In re Phila. Stock Exchange, Inc.*, 945 A.2d 1123, 1145 (Del. 2008) ("In any settlement of litigation . . . a release of claims is an essential, bargained-for element'); *Higby v. Century Insurance Company*, 253 F.3d 994, 997 (7th Cir. 2001) (citing *Abbott Laboratories v. Alpha Therapeutic Corp.*, 164 F.3d 385, 388 (7th Cir. 1999) ("[T]he details of . . . release provisions . . . in settlement agreements are inherently material"); *United States ex rel. Allen v. Alere Home Monitoring, Inc.*, 355 F.Supp. 3d 18, 21 (D. Mass. 2019) (noting that because the parties could not reach a meeting of the minds on the scope of the release, a material term of the contemplated settlement, they did not reach an enforceable agreement); *Inamed v. Kuzmak*, 275 F.Supp. 2d 1100, 1125 (C.D. Cal. 2002) ("[T]here is no doubt that release provisions are generally thought to be material terms of any settlement agreement"); *In re Wilson*, No. 3:15-0520, 2017 U.S. Dist. LEXIS 216182 (N.D. Tenn. 2017) (finding that, because "[r]eleases and the scope of releases are material terms of a settlement," a purported settlement agreement in which the scope of release was not specified could not be enforced).

In addition to being objectively material, the scope of release was clearly of great subjective importance to the parties, such that they did not consider their agreement concluded until the scope of release had been finalized. In an attempt to reach an agreement on the scope of the release, the parties negotiated for two months before the December Exchange and one month after, and exchanged multiple draft release clauses. *See generally* A406-562. Magellan's conduct in particular shows the materiality and importance of the scope of the release. Following the December Exchange, which Magellan claims created a final settlement agreement between the parties, Magellan consistently sought to include a previously unrequested, undisclosed, and expansive release in the settlement agreement. *Id*. In fact, Magellan's insistence upon this more expansive release ultimately resulted in the very impasse that caused the negotiations to break down. *Id.* This insistence shows that (1) at the time of the December Exchange, Magellan had in mind a broader definition of "Delphi"—one not limited to the legal entity itself, but inclusive of numerous other entities and individuals—than Delphi did, or (2) Magellan simply changed its mind about the scope of the release it would accept from Delphi. In the former case, it is clear there was never a meeting of the minds between the parties on a material and important term of the settlement agreement. In the latter case, it is clear that Magellan sought to exit the agreement before its material details could be finalized. Accordingly, Magellan's conduct

following the December Exchange is simply inconsistent with its position that the parties had entered into a binding settlement agreement and agreed to all material terms. No settlement agreement came into being and the case was not settled.

In fact, Magellan admitted that the December Exchange was, in its mind, "the original email agreement" and thus Magellan's settlement agreement drafts after the December Exchange with the expanded release and the newly demanded indemnification sought a new and different settlement agreement. A500-507. Magellan continued to demand Delphi execute that new and different agreement until it learned that this Court had ruled against it on April 15, 2019. Magellan then decided it was in its best interest to pay the $1,050,000 without requiring Delphi any longer to execute the new and different settlement agreement it demanded after the December Exchange. Magellan treated the December Exchange as an option, and not an obligation, to be exercised only if it benefited Magellan.

Because this Court's ruling was in favor of Delphi, Magellan seeks to rewrite history and claim that that the scope of the release was never material or important to the parties. The trial court noted that Magellan contended "the scope of release was not material and agreement on those terms was not required for a binding agreement to be formed". A164.

Significant precedent and the parties' conduct shows that Magellan and Delphi never came to an agreement on a material and important term of settlement: the scope of release. For this reason alone, this Court should reverse the trial court ruling and find that no settlement agreement was actually concluded.

Furthermore, Delphi and Magellan had negotiated the payment terms both before and after the December Exchange. See, for instance, Magellan's January 11, 2019 draft of the settlement agreement that the trial court incorrectly attributed to Delphi. A162. Magellan claimed that there was no deadline for its payment of the settlement amount. A760. However, in that January 11, 2019 draft, Magellan set the payment date for January 15, 2019 and Delphi accepted it. The parties had negotiated and set very prompt payment dates in the draft settlement agreements that preceded and followed the December Exchange and the January 11, 2019 Magellan draft. The trial court accepted Magellan's proposition that the payment date was not a material term, which is legally incorrect and contrary to the record. The court cites *Spacht v. Cahall*, 2016 Del. Super. LEXIS 535 (Del. Super. July 25, 2016) (A164 n.87) to merely admonish Magellan for demanding the expanded scope of release and new term requiring indemnification, rather than reject Magellan's motion to enforce the December Exchange. In *Spacht*, the court rejected the contention of the non-movant, who owed the settlement payment, that the absence of payment terms made the settlement unenforceable, because the

payment terms had never been discussed during the negotiation of the settlement agreement. But in stark comparison to the facts of *Spacht*, Delphi and Magellan had negotiated the payment terms intensely throughout the weeks leading up to and following the December Exchange. Until it learned of the adverse ruling in the appeal, Magellan had no intention of paying the settlement amount unless Delphi accepted the overbroad release drafted by Magellan.

Delphi believes this Court need look no further than Magellan January 7, 2019 email to establish the truth. In its January 7, 2019 email Magellan wrote:

> Magellan will not wire any money until Delphi has signed the final approved version of the Agreement.

A236.

Not only the words and actions of the parties prove that they did not believe the December Exchange was a binding settlement agreement absent a signed writing but logic also commands that conclusion. If the December Exchange had been a binding settlement of this then seven year litigation, why did the parties spend so much time and expense to negotiate another agreement over the following three weeks? If the December Exchange was a binding agreement, Delphi would have been owed the $1,050,000 settlement amount in exchange for the release contained in the December Exchange, and the trial court found in its July 15, 2020 Order. But in the days and weeks after the December Exchange, Delphi did not ask

Magellan to pay the agreed settlement amount. Nor did Delphi attempt in those days and weeks while the final settlement was being negotiated to narrow the release it had given or ask for a higher settlement amount. Delphi had waited years to be paid what Magellan owed, and if it believed it had entered into a binding agreement it would have demanded that Magellan pay the settlement amount without requiring anything else from Delphi. If the December Exchange was binding unto itself, as Magellan alleged, Delphi did not have to try to negotiate and execute another written settlement agreement because it would have been owed the settlement payment.

Similarly, had Magellan truly believed that the December Exchange was a binding agreement containing all the essential terms, it would have known it had received the release it demanded in the December Exchange, which the trial court found it had, and would have known it owed Delphi the settlement amount, which it admits it could have paid in a matter of a few days. But Magellan attempts to explain away its failure to pay, saying it needed a signed document for its accountants in order to pay. Yet, Magellan now alleges the December Exchange contained all the essential terms of the settlement and it did not require Delphi to execute a settlement agreement. However, if Magellan needed Delphi to sign a settlement agreement before it could pay the settlement amount, the December Exchange lacked at least one essential term, i.e., the signed document it needed to

fulfill its obligations. But if the December exchange was fully binding on Magellan, it could pay in a matter of days. Magellan refused to pay not because of an internal accounting rule but because it wanted a broader release than it had offered, and Delphi had accepted, in the December Exchange and because given it knew that it required a written document before any settlement could be final given its contentious relationship with Delphi, and the mutual mistrust found by the trial court and admitted by Magellan. April 23, 2020 Decision at 23; A163, Magellan Reply at 16; A753

2. The parties' conduct shows that they did not consider the settlement binding in the absence of a fully executed agreement.

Magellan and Delphi never entered into a binding settlement agreement because the parties never executed a final signed agreement, and their words and objective conduct shows that they did not intend to be bound in the absence of that execution. Under the objective theory of contracts, a court must interpret the parties' intent in light of all the surrounding facts and circumstances. *Schwartz*, 2010 WL 2601608 at 4 (Del. Ch. June 29, 2010) ("[A] reasonable negotiator reading all of the statements made by Balick and Sandler during the negotiations in light of the significant mistrust that existed between the parties would have understood that neither party intended to be bound by the Settlement Agreement until it was signed by both Chase and Schwartz.").

Parties who spend significant effort negotiating the precise terms of a settlement agreement, exchanging multiple drafts over several months, demonstrate an intent to be bound only by a written executed agreement. *See Clark v. Gotham Lasik, PLLC*, 2012 U.S. Dist. LEXIS 40290 at *3 (E.D.N.Y. Mar. 2, 2012) (citing *Abel v. Town Sports Int'l Holdings, Inc.*, 2010 U.S. Dist. LEXIS 136888, at *5 (S.D.N.Y. Dec, 23, 2010) (stating that negotiations regarding the terms of the agreement "approach an express reservation of the right not to be bound until a written agreement was executed")). Here, as in *Schwartz*, a reasonable negotiator would not believe that either party intended to be bound unless and until a fully negotiated contract had been drafted and signed. Delphi and Magellan have an extensive litigation history – spanning eight years and two appeals—and a relationship characterized by mistrust. Delphi's stance in insisting on a signed, written agreement was well-grounded. The court rulings in this case characterize Magellan's conduct as bad faith misconduct. A722. On this basis alone, a reasonable negotiator could not assume that the parties intended to be bound by a simple agreement in principle, which called for the documentation to be developed.

The necessity of a signed agreement is also evidenced by Magellan's refusal to make any payment until Delphi signed Magellan's draft of the settlement agreement. In order to avoid the obvious implication of its own conduct, Magellan

relies on Delphi's January 7, 2019 request to this Court for an extension of time to files it reply, in which Delphi stated that "the matter is settled in principle and the settlement is in its final stages." A482-483. But referring to a matter as "settled in principle" does not create an enforceable contract. *See New York Life Insurance Company v. KN Energy, Inc.*, 80 F.3d 405, 410 (10th Cir. 1996) (finding that a document denominated an "agreement in principle" was not an enforceable contract); *Engineered Date of Products, Inc. v. Art Style Printing, Inc.*, 71 F.Supp. 2d 1073, 1078 (D. Colo. 1999) (noting, as a rule, agreements in principle that refer to subsequent formal agreements are not binding) (quoting *Skycom Corp. v. Telstar Corp*, 813 F.2d 810, 815 (7th Cir. 1987)). It was thus entirely appropriate for Delphi to refer to the matter as "settled in principle": the matter was in its "final stages" of negotiation, and no enforceable contract had yet been executed. Delphi's request to this Court for the extension to file its Reply shows that Delphi did not believe that a settlement had been reached:

> Appellant, Delphi Petroleum, Inc. moves the Court, pursuant to Rule 15(b), for an order extending the time for service and filing of the Reply brief under Rule 15(a) from January 10, 2019 to January 21, 2019, on the grounds that the matter is settled in principle and the settlement agreement is in its final stages. This is the first request for an extension of time to file the Reply brief. Opposing counsel consents to the extension of time. This motion is being filed less than five days in advance of the filing deadline under rule 15(b)(iv) because until this point, settlement was not imminent. <u>At present,</u>

> Appellant believes a full and final settlement is imminent and thus requests that the Court delay the filing deadline for the Reply brief. (Emphasis added.)

Id. Thus, two weeks after the December Exchange, Delphi did not say that a settlement had been reached, only that it was imminent, and Delphi would soon discover that was not the case. *Id*. Magellan consented to the extension. It knew that Delphi still believed that a settlement was not reached in the December Exchange. Magellan also relies on Delphi's reservation of its rights concerning the December Exchange and the statement that Delphi might move to enforce that agreement. A542. But Delphi did not make any statement concerning the enforcement of the Agreement after Magellan rejected Delphi's January 16, 2019 draft and Delphi deemed the negotiations ended. Delphi notified Magellan that if Delphi's January 16, 2019 draft was not acceptable to Magellan, Delphi would consider the negotiations at an impasse. A542. Magellan did not accept Delphi's January 16, 2019 draft. A548. Delphi thus filed its Reply in this Court on January 22, 2019. A111. Delphi never asked Magellan for the settlement amount nor did Delphi move to have the December Exchange enforced.

The necessity of an executed agreement to the parties is made clearer by the lack of partial performance. Courts find it relevant whether one party to the settlement agreement "has partially performed, and that performance has been accepted by the party disclaiming the existence of an agreement." *Ciaramella v.*

Reader's Digest Assoc., 131 F.3d 320, 325 (2d Cir. 1997) (finding that when no money has been paid to the plaintiff and no letter of reference was provided, there was no partial performance of the alleged settlement). The absence of evidence of partial performance weighs against enforcing the settlement. *See Cartier Int'l, N.V. v. QVC, Inc*., 677 F. Supp. 2d 712, 716 (S.D.N.Y. 2009) (holding that failure to make any payments to the plaintiff indicates that there was no partial performance under the alleged settlement). For an action to rise to the level of partial performance, it must result in the transfer of one of the "basic elements of consideration that would have been due . . . under the settlement agreement." *Ciaramella*, 131 F.3d at 325. Further, "mere preparatory acts such as drafting and exchanging documents are insufficient to constitute partial performance." *Nieves v. Cmty. Choice Health Plan of Westchester, Inc*., 2011 U.S. Dist. LEXIS 132175 at *7 (S.D.N.Y. 2011). Magellan did not pay Delphi $1,050,000 until six weeks after this Court ruled against it and until three days before it filed its Motion on May 28, 2019. Furthermore, after Magellan informed Delphi on May 22, 2019 that it intended to pay the $1,050,000, Delphi rejected the payment as a settlement payment. A571. Rather, Delphi made clear to Magellan that it would accept the $1,050,000 only as partial payment of the monies Delphi owed it pursuant to the rulings of the trial court and this Court. *Id*. Accordingly, there was no partial performance of the Agreement.

Ultimately, the parties were unsuccessful in their negotiations and no writing was ever signed. *Id*. The actions of the parties objectively indicate that they intended to be bound only upon the execution of a signed writing. Accordingly, the trial court erred in finding that a binding settlement agreement was reached.

II. The trial court's ruling is inconsistent with its findings that Magellan is liable for interest from December 1, 2018 and would not pay the settlement amount without an expanded release.

A. Question Presented

Where the trial court found that Magellan insisted on an expanded release beyond the terms of its offer before it would pay the settlement, and failed to make timely payment on the alleged agreement, is the agreement enforceable? Delphi did not argue to the trial court that Magellan's breaches of the settlement agreement foreclosed it from enforcing the settlement agreement. Delphi argued that the December Exchange did not create a binding settlement agreement in the first place. The trial court in its Opinion, however, found as a fact that Magellan did not timely pay the settlement amount because it awarded Delphi interest from December 21, 2019 through May 28, 2019, when Magellan made payment. The trial court also found that Magellan tried to expand the release beyond that contained in the December Exchange the trial court enforced. Since Magellan refused to make payment unless Delphi accepted the expanded release, that was also a breach. The trial court's ruling that even though Magellan breached the settlement agreement, it could enforce it is internally inconsistent. There is no prejudice to Magellan in the breach argument being considered. It is a question of law based on facts placed on the record in the trial court proceedings. *See, e.g.*, *Krumme v. Westport Stevens, Inc*, 238 F.3d 133, 142-144 (2d Cir. 2000) (where a

legal issue is first raised on appeal, the court may consider it when it is a question of law without need for additional fact-finding and there is no prejudice to the other party or where consideration of the issue is necessary to avoid manifest injustice; "we refuse to require a defendant to anticipate that a trial court will issue an internally inconsistent decision").

B. Scope of Review

This Court's scope of review is de novo. See *Stonewall Ins. Co. v E.I. DuPont de Nemours & Co.*, 996 A.2d 1254, 1261 (Del. 2010).

C. Merits of the Argument

Even assuming the existence of a settlement agreement, the trial court erred in allowing Magellan, a party clearly in breach of any purported agreement, to enforce it. The trial court ruled that the scope of agreement Magellan demanded after the December Exchange was not in accord with the scope of release in the December Exchange. The trial court also directed Magellan to pay Delphi interest on the settlement award from December 21, 2018 to May 28, 2019 (the date Magellan paid Delphi $1,050,000). A166-169. The trial court thus found that Magellan breached the purported settlement agreement. Delaware recognizes the doctrine of first breach, which precludes a party who is in material breach of an agreement from proceeding to enforce the agreement. *Marcano v. Dendy*, 2007 Del. C.P. LEXIS 36, *18, 2007 WL 1493792 (Del. Com. Pl. May 22, 2007) ("The

party first guilty of material breach of contract cannot complain if the other party subsequently refuses to perform." (citing *Hudson v. D.V. Mason Contractors, Inc.*, 252 A.2d 166, 170 (Del. Super. Ct. 1969)). *See also Preferred Inv. Servs. v. T&H Bail Bonds, Inc.*, 2013 Del. Ch. LEXIS 190, *37 (Del. Ch. Ct. July 24, 2013) ("A party is excused from performance under a contract when the other party materially breaches that contract."); *In re Mobilactive Media, LLC*, 2013 Del. Ch. LEXIS 26, *43 (Del. Ch. Ct. Jan. 25, 2013) ("The question whether the breach is of sufficient importance to justify non-performance by the non-breaching party is one of degree and is determined by 'weighing the consequences in the light of the actual custom of men in the performance of contracts similar to the one that is involved in the specific case.'"). The two terms the parties negotiated most strenuously were the scope of the release Delphi had to give and the settlement payment Delphi would receive. The December Exchange included these two terms but Magellan thereafter refused to pay the settlement amount until Delphi accepted Magellan's new release. If a binding agreement was created by the December Exchange, which Delphi denies, that settlement agreement could not have been more materially breached.

Under the settlement agreement, Magellan's *only* obligation to Delphi was to provide it with a certain sum of money. Magellan made no effort to fulfill this obligation until May 2019, after this Court had issued a ruling in Delphi's favor.

Given that Magellan failed to fulfill its *single obligation* under the agreement, its breach was clearly material. Indeed, through Magellan's failure to timely payment the settlement amount, Delphi lost the opportunity to avoid the expense of continued litigation and continued to bear the risk of an adverse decision by this Court. Furthermore, Delaware law provides that once a party has breached an agreement and thereby lost its right to sue to enforce that agreement it cannot restore that right by belatedly deciding to remedy its breach. Under Delaware law, there is a right to cure a material breach of contract only when the right to cure is expressly stated in the contract. See, e.g., *Lola Cars. Int'l Ltd. v. Krohn Racing, LLC*, 2010 Del. Ch. LEXIS 176, at *89 (Del. Chanc. Aug. 2, 2010) (discussing express contractual cure provision); *AMB Vanadium LLC v. Global Advanced Metals U.S.A., Inc.*, 2020 Del. Super. LEXIS 159, at * 30 (Feb. 6, 2020) (same); *Villare v. Beebe Med. Ctr., Inc.*, 2008 Del. Super. LEXIS 538, at *9 (March 11, 2008) (same). Accordingly, once the trial court found that Magellan breached the December Exchange it should have ruled that Magellan had no right to enforce the settlement agreement it found. For that reason, this Court should reverse the trial court's ruling.

CONCLUSION

Delphi respectfully requests that the Court reverse the trial court's rulings of April 13, 2020 and July 15, 2020 on the ground that the parties intended to, but could not, create a written, signed settlement agreement, and never had a meeting of the minds on the scope of the release to be given Magellan when the parties agreed in principle to settle the matter. Moreover, given the trial court's findings that Magellan breached the agreement found by the trial court, it cannot enforce it.

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