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Case Number 261,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELPHI PETROLEUM, INC.,	)	
	)	
Appellant,	)	
Cross-Appellee,	)	No 261,2020
	)	
v.	)	On Appeal From the Superior
	)	Court of the State of Delaware
MAGELLAN TERMINAL HOLDINGS,	)	
L.P.,	)	C.A. No. N12C-02-302 FWW
	)	C.A. No. N19C-05-015 FWW
Appellee,	)	
Cross-Appellant.	)	

APPELLEE/CROSS-APPELLANT'S ANSWERING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

This is the third appeal in this litigation, which was originally brought by Delphi Petroleum, Inc. ("Delphi") against Magellan Terminal Holdings L.P. ("Magellan") on February 29, 2012 (the "First Action"). The First Action involved a dispute related to two Terminalling Agreements between the parties under which Magellan provided services to and stored oil for Delphi at the Port of Wilmington. After nearly seven years of litigation, a week-long trial, and two appeals to this Court, the parties settled their dispute in December 2018 (the "Settlement Agreement"). At that time, Delphi's second appeal, which related only to the calculation of prejudgment interest, was pending. Delphi now refuses to abide by the terms of that Settlement Agreement and asks this Court to vacate the Superior Court's order finding the Settlement Agreement valid and enforceable. Delphi seeks to avoid the Settlement Agreement and continue its campaign against Magellan in an action (the "Second Action") in which Delphi asserted stale claims arising from the very same facts and agreements at issue in, and that could have been asserted in, the First Action. Delphi first raised and threatened to bring those claims during the parties' settlement negotiations in December 2018 while the second appeal was pending, and those claims were expressly encompassed within the parties' Settlement Agreement.

The objective evidence leaves no doubt that the parties reached a binding Settlement Agreement in December 2018. On December 20, 2018, Magellan sent a communication to Delphi's counsel offering to pay $1,050,000 in exchange for Delphi's release of any and all claims, known or unknown, that Delphi might have against Magellan. The next day, Delphi's counsel responded to Magellan's offer by stating unequivocally and without condition, "***Delphi accepts Magellan's offer. We'll work out the paperwork next week***."

In the following weeks, the parties negotiated the language of the document intended to memorialize their Settlement Agreement. Although they never agreed on some of the specific language in the document, the essential terms of the Settlement Agreement were never in dispute: ***Magellan agreed to pay $1,050,000, and Delphi agreed to release all claims it may have against Magellan, expressly including the claims in both the First Action and the Second Action***. Both parties repeatedly referred to the Settlement Agreement as binding and enforceable and, in fact, each stated its intention to the other to take steps to enforce it. Delphi even informed this Court that "the matter is settled in principle." Indeed, as late as April 9, 2019, Delphi's counsel acknowledged the existence of the Settlement Agreement between the parties. It was only after this Court ruled on the second appeal that Delphi changed its tune.

On April 15, 2019, only six days after Delphi's counsel reaffirmed the existence of the enforceable Settlement Agreement and advised Magellan's counsel he would get back to Magellan later in the week concerning the Settlement Agreement, this Court reversed the trial court's ruling on prejudgment interest and directed the trial court to award Delphi additional pre-judgment interest. Despite the fact that the parties had already reached the Settlement Agreement resolving "any and all claims, known or unknown, that Delphi might have against Magellan," Delphi then disavowed the settlement and filed the Second Action on May 1, 2019. Magellan moved to consolidate the two actions, and the Superior Court granted the motion. Magellan then paid the amount owed under the Settlement Agreement and, on May 31, 2019, it moved to enforce the agreement. The parties submitted briefing on the issue, and in December 2019, the trial court held oral argument.

On April 23, 2020, the Superior Court issued its opinion (the "Opinion") granting Magellan's Motion to Enforce the Settlement Agreement and dismissing with prejudice both the First Action and the Second Action. In doing so, the court held that "a valid contract existed between the parties based on Magellan's offer of December 20th and Delphi's unequivocal acceptance of December 21st." The trial court ordered Magellan to "submit…a form of release consistent with [the] Order no later than 30 days from the date of [the] Order," and it permitted Delphi to submit

"any objections to Magellan's proposed form of order no more than 15 days after Magellan's submission."

Magellan submitted its proposed form of release on May 21, 2020, and Delphi submitted its objections on June 5. On July 15, the trial court entered its final order (the "July 15 Order") and adopted Delphi's form of order. Although the July 15 Order properly determined that the parties reached an enforceable settlement agreement disposing of all claims between them, it erroneously stated that Delphi is "entitled to interest at the legal rate from December 21, 2018—the date of the settlement agreement—until May 29, 2019—the date Magellan made payment of the settlement amount."

Delphi now appeals the Superior Court's ruling that the parties entered into a binding Settlement Agreement in December 2018, and Magellan cross-appeals the Superior Court's award of interest to Delphi.

SUMMARY OF ARGUMENT

I. Delphi's Arguments and Magellan's Denials with Specificity

1. ADMITTED.

2. ADMITTED IN PART/DENIED IN PART. Magellan denies Delphi's claim that this Court "awarded Delphi $400,000 more prejudgment interest" in the second appeal. This misstates the Court's order. Further, after the Court issued its decision, it remanded the case to the Superior Court with instructions that were mooted by the Settlement Agreement. Magellan filed its Motion to Enforce Settlement Agreement in May 2019, and the trial court properly held that the parties reached an enforceable Settlement Agreement in December 2018. A141-65.

3. There is no Paragraph 3 in Delphi's Opening Brief on Appeal.

4. DENIED. The Superior Court correctly found that the parties entered into a binding Settlement Agreement when Delphi unequivocally accepted Magellan's December 20, 2018 offer. A164. Neither party conditioned its agreement on the execution of a signed document.

5. ADMITTED IN PART/DENIED IN PART. As Delphi's attorney admitted in his April 9, 2019 letter, the parties "agreed on a settlement" but were unable "to agree on the wording of the document memorializing the settlement." A565. Thus, Delphi conceded the parties had a reached a binding settlement that existed separate and apart from a jointly executed document intended to memorialize

the settlement and to outline the agreed steps to effectuate the settlement (*e.g.,* time and manner of payment). Although the parties never jointly executed a separate written document "memorializing the settlement," both parties unequivocally recognized they had agreed on all essential terms because both parties at different times expressly stated to the other their intention to take steps to enforce the Settlement Agreement. Magellan did not attempt to "expand the scope of release," and the Superior Court made no finding to that effect. Magellan sought only to ensure the language of the document intended for execution included "the broadest release possible" as required by the Settlement Agreement. But even if Magellan did propose language in the written document that was broader than the release to which the parties had agreed (*i.e.,* "the broadest possible release"), this fact would not void the Settlement Agreement, or mean that the Settlement Agreement did not exist. The parties' subsequent disagreement over the precise language of the written document did not rescind or invalidate their Settlement Agreement.

6. Paragraph 6 of Delphi's Opening Brief on Appeal is not a complete sentence. Paragraph 6 appears to be continued in Paragraphs 7, 8, 9, and 10 of Delphi's Opening Brief. Magellan will respond to Paragraphs 7-10 below:

7. DENIED. The Superior Court properly found that the parties had entered into an enforceable Settlement Agreement in December 2018, A164, and did

not make their settlement in any way contingent on the joint execution of a separate written document. A161.

8. DENIED. The Superior Court properly found that the parties had agreed to the essential terms and entered into a binding Settlement Agreement in December 2018 when Delphi accepted Magellan's offer to pay $1,050,000 in exchange for Delphi giving "the broadest release possible—any claim Delphi could ever possibly assert against Magellan even remotely relating to their business relationship…." A163-64, A460.

9. DENIED. Magellan did not breach the Settlement Agreement. Delphi has never previously argued that Magellan breached the Settlement Agreement, and the Superior Court did not find that Magellan breached the Settlement Agreement.

10. DENIED. Magellan did not breach the Settlement Agreement. Delphi has never previously argued that Magellan breached the Settlement Agreement, and the Superior Court did not find that Magellan breached the Settlement Agreement. In fact, in response to Magellan's Motion to Enforce the Settlement Agreement, Delphi has always asserted that ***there was no enforceable settlement***. Delphi's new position directly contradicts the position Delphi has taken throughout the litigation of Magellan's Motion to Enforce the Settlement Agreement. A payment date was not a material term of the Settlement Agreement, and the Settlement Agreement did not specify a date for payment. Magellan also denies Delphi's claim that this Court's

decision in the second appeal makes Magellan "liable for $400,000 of additional damages." This is incorrect and misstates the Court's order.

11. DENIED. Magellan and Delphi never agreed that a separate jointly signed document was a "precondition" of the Settlement Agreement. Delphi's assertion that the Settlement Agreement is only enforceable if memorialized in a signed writing is contradicted by its own repeated statements to Magellan that it would seek to enforce the Settlement Agreement during the parties' discussions regarding the language of the written document.

12. DENIED. The parties reached a binding and enforceable Settlement Agreement when Delphi unequivocally accepted Magellan's offer to pay $1,050,000 in exchange for "the broadest release possible." The Superior Court properly found that the parties' subsequent disagreement over the precise language of the written document did not rescind or invalidate their Settlement Agreement. A164.

13. DENIED. Magellan never denied the existence of the Settlement Agreement and, like Delphi, stated its intention to seek to enforce the Settlement Agreement even though the parties had not agreed on all of the language of the document they proposed to jointly execute. In negotiating the language of that document, Magellan sought to effectuate Delphi's agreement to the "broadest release possible." It is undisputed that Magellan paid Delphi the amount agreed to in the Settlement Agreement. The Settlement Agreement did not specify a payment

date, and the Superior Court did not find the timing of the payment to be a material term of the settlement. A163. Magellan also denies Delphi's claim that this Court's decision in the second appeal held Magellan liable for "an additional $400,000 in damages." This is incorrect and misstates the Court's order.

14. DENIED. The parties' negotiations of the separate document to be jointly executed did not "c[o]me to an end on January 16, 2019." Rather, Magellan sent Delphi a draft document "Magellan [was] willing to sign" on January 17, 2019, A550, and Delphi responded on January 30 promising to "get back to [Magellan] shortly." A563. Delphi finally "got back to Magellan" on April 9, 2019, acknowledging that "***although the parties agreed on a settlement***, they haven't been able to agree on the wording of the document memorializing the settlement." A565 (emphasis added). Delphi's counsel also indicated he would "get back to" Magellan's counsel later that week or early the next week to continue discussing the wording of the document. A565. The parties were not "where they had been before the December Exchange." Opening Br. at 7. They were parties to an enforceable Settlement Agreement, and nothing occurred in the interim to rescind or invalidate that agreement. Magellan has been prejudiced by Delphi's refusal to abide by the terms of that Settlement Agreement, as well as Delphi's change of position concerning the Settlement Agreement (*e.g.*, that there was an agreement but

Magellan breached it) and has been forced to incur legal fees to enforce the Settlement Agreement.

15. DENIED. Delphi has never previously argued, and the Superior Court did not find, that Magellan breached the Settlement Agreement. Indeed, Delphi's position on this point contradicts everything it has previously said about the Settlement Agreement—that there was no enforceable agreement. How could Magellan breach what Delphi denied existed? Magellan did not breach the agreement.

II. Magellan's Summary of Arguments on Cross-Appeal

1. The Superior Court erred when it entered Delphi's proposed order requiring Magellan to pay interest to Delphi from the date of the parties' Settlement Agreement (December 21, 2018) to the date of Magellan's payment of the settlement amount (May 29, 2019). A168. The Settlement Agreement did not require payment on or by a specific date. Nor did it contain any provision calling for the payment of interest. Delphi never argued, and the Superior Court never found, that Magellan had breached the Settlement Agreement in any way, and there was no "judgment" entered against Magellan related to the Settlement Agreement that would serve as a basis for the payment of interest. There is simply no basis for an order requiring Magellan to pay interest to Delphi.

2. Delphi did not request interest in any motion or other request for relief presented to the Superior Court related to the Settlement Agreement. Delphi merely stated, without citing any legal authority, that it was entitled to interest in its objections to Magellan's Proposed Release, B037, ¶ 12, and included language awarding itself interest in the proposed order it submitted after the Superior Court issued its Opinion granting Magellan's Motion to Enforce the Settlement Agreement. B039-40. Magellan never had the opportunity below to dispute Delphi's claimed entitlement to interest, the parties did not provide factual or legal authority

on that issue, and the Superior Court never addressed the issue as a factual or legal dispute.

This Court should reverse the award of interest to Delphi.

STATEMENT OF FACTS

Delphi began this litigation in February 2012. Delphi alleged Magellan breached two terminalling agreements and sought damages for various claimed breaches. A655. After discovery, certain clams were dismissed or resolved on summary judgment, and a trial on the remaining claims took place in July 2015. The Superior Court then entered an 85-page Decision after Trial, awarding Delphi damages on certain claims and dismissing others. A652. Delphi appealed, and Magellan cross-appealed on two issues. In an Opinion dated December 12, 2017, this Court largely affirmed the Superior Court, reversing only on two narrow issues. A641. It reversed the Superior Court's holding that Magellan was liable for fraud. The Court also reversed the Superior Court's decision regarding the amount of pre-judgment interest to which Delphi was entitled and remanded to the Superior Court for a determination as to when Delphi's right to pre-judgment interest for heating overcharges accrued. After briefing on that issue, the Superior Court entered its Order dated July 10, 2018, adopting Magellan's calculation of pre-judgment interest. A631. Delphi again appealed.

In the fall of 2018, after more than six years of litigation and while Delphi's second appeal was pending before this Court, counsel for Delphi sent a letter to counsel for Magellan initiating Delphi's "attempt to settle the matter now…." A407. Delphi's counsel concluded the letter by asking, "[W]hat will Magellan pay?" A408.

Over the next few months, the parties negotiated the binding Settlement Agreement to resolve not only the claims Delphi had already asserted and the issues pending on appeal before the Supreme Court, but also new claims Delphi first raised more than six years after filing the First Action.

1. October-November 2018: Settlement Negotiations

Throughout October and November 2018, the parties exchanged various settlement offers. On November 7, 2018, counsel for Delphi wrote to counsel for Magellan and stated, "Delphi would accept $1m to dismiss the cases and mark the judgment satisfied." A435. Attached to this email was a proposed "Agreement with the terms signed by Delphi's President." *Id.* Delphi's proposed agreement did not include a release of any claims by Delphi. *Id.*

Magellan agreed to pay $1 million to settle the First Action, but it proposed changes to the agreement, including insertion of language by which Delphi would agree that the $1 million "constitutes the total amount . . . owed by Magellan to Delphi as a result of the final adjudication of all claims that were brought or could have been brought in the matter." A439-43. Magellan also proposed that Delphi sign a Release and Satisfaction of Judgment that, *inter alia*, released and discharged Magellan from "any and all liability relating to this litigation, including liability for claims asserted in this matter, any claims that could have been asserted in the matter, and any claims that may have arisen by virtue of the litigation." *Id.*

Delphi refused to agree to this release. Instead, Delphi's counsel indicated it would release only the claims expressly asserted in the First Action. A445. When Magellan inquired whether Delphi believed it had additional claims it intended to bring, Delphi sent two letters to Magellan in early December 2018 disclosing what Delphi alleged were additional claims. A451-55. (Delphi later asserted these claims in the Second Action. B001-08.)

2. December 2018: Formation of Binding Settlement Agreement

On December 19, 2018, Delphi's counsel wrote Magellan's counsel and suggested three options for a potential resolution of the parties' disputes:

> First, Magellan make a final counter offer to Delphi's $1,550,000 offer in settlement of all claims known and unknown, including, but not limited to the DNREC derived claims,[1] for Delphi to accept or reject but not counter.
>
> Second, Magellan make a final settlement offer, again for Delphi's acceptance or rejection but not counter, settling all claims known or unknown excepting only the DNREC derived claims.
>
> Third, Magellan execute the agreement [Delphi's counsel] sent on November 16, 2018 and make a separate settlement offer with respect to the DNREC derived claims. Delphi would agree to reimburse Magellan's legal expenses incurred in defending itself against any DNREC derived claims Delphi prosecutes up to the earlier of the date Delphi accepts Magellan's offer, abandons its claim, or fails to prevail in an amount exceeding such offer in a trial.

A457.

[1] The "DNREC claims" refer to Delphi's "new" claims.

On December 20, 2018, Magellan responded to Delphi's proposal, stating

> Magellan opts to make a final counter-offer to Delphi in the amount of $1,050,000, to settle any and all claims Delphi may have against Magellan, known or unknown, including but not limited to all of the 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 the alleged "new" claims relating to Tanks 3 and 10.

A460-61. In this communication, Magellan "insist[ed] on the broadest release possible"—that "any claim Delphi could ever possibly assert against Magellan even remotely relating to their business relationship must be released." *Id*. Magellan further stated, "This is a non-negotiable condition of the above offer." *Id*. Magellan also offered a detailed rebuttal disputing Delphi's alleged "new" claims and provided evidence refuting those claims. *Id*.

On Friday, December 21, 2018 at 6:25 pm CST, Delphi's counsel sent Magellan's counsel an email stating, "***Delphi accepts Magellan's offer. We'll work out the paperwork next week***." A463 (emphasis added). Within an hour, Magellan acknowledged Delphi's acceptance. A465.

After the intervening holidays—Christmas Eve on Monday and Christmas Day on Tuesday—the parties set to "work[ing] out the paperwork" that is customary in effectuating settlements like the Settlement Agreement. On Wednesday, December 26, 2018 at 8:31 am CST, Delphi's counsel sent a draft written agreement

to Magellan's counsel. A467. Magellan's counsel responded within the hour and advised that Magellan would have some changes to the draft document. A471.

Later that day, Delphi's counsel sent a second email, attaching a further revised draft document. A473. Delphi's counsel stated that he had made the draft agreement "total and broad." *Id.* He also stated—for the first time—that Delphi "need[ed] the settlement agreement executed and Magellan's payment made by [] Friday December 28, 2018", *i.e.,* within two days. *Id.*

Magellan's counsel responded immediately, noting that the parties' Settlement Agreement did not include a deadline for payment. A478. Magellan's counsel sent a second email the same afternoon explaining that such an unreasonably short deadline was not possible because, among other things, "[t]he Magellan management personnel who need to approve the agreement and approve and make payment will not be back in the office until after the New Year." A480. Magellan's counsel stated Magellan would "forward [] its Settlement Agreement for Delphi's review in due course," and that "[a]fter the parties execute the agreement, Magellan will make payment within a reasonable time and in compliance with the terms of the written agreement." *Id*. Magellan sought an agreed and orderly process for effectuating the payment required by the Settlement Agreement.

3. January 2019: Drafting the Document to be Jointly Signed

In the weeks that followed, the parties continued to discuss the specific language of the document memorializing the Settlement Agreement reached in December 2018. Although the parties traded revisions to various written terms, there was no disagreement about the essential terms of the Settlement Agreement and no question that an enforceable Settlement Agreement had been reached.

For example, on January 7, 2019, Delphi filed a motion with this Court requesting an extension of the deadline for filing its Reply brief in the second appeal "on the basis that ***the matter is settled in principle and the settlement agreement is in its final stages***."[2] A483 (emphasis added).

On January 8, 2019, Delphi sent Magellan a proposed document that had been executed by Delphi and asked Magellan to execute the document. A486. The version executed by Delphi had not been approved by Magellan. A499. Moreover, Delphi purported to limit the release to claims "concerning the subject of the Release," which was circular and did not accurately reflect the parties' Settlement Agreement. A486. Magellan advised Delphi it would not sign the proposed document. A499, A501. The next day, Magellan re-sent its prior draft of the document and stated, "If

[2] The draft document included detailed provisions and form documents for dismissing the pending appeal and concluding the matter in the Superior Court. *See, e.g.,* A504 ¶ 3; A520 ¶ 3; A492-497. In expectation that the document would be finalized and executed, both parties refrained from making any additional notices to either Court of the settlement.

this version is not acceptable to Delphi, then Magellan will assess its options, ***including taking steps to enforce the original email agreement of the parties***." A501 (emphasis added). Magellan's counsel asked Delphi's counsel to "[p]lease let me know if Delphi will agree to the attached version or ***if we should prepare to enforce the parties' original email agreement.***" *Id.* (emphasis added).

The same day, on January 9, 2019, Delphi's counsel responded to Magellan's email, repeatedly admitting that the parties had reached an enforceable settlement agreement. A509-10. In its email response, Delphi asserted the following:

(1) "[Magellan's December 20, 2018 letter] said that the release given by 'Delphi' had to relinquish 'any claim Delphi could ever possibly assert against…Magellan' [and] ***Delphi agreed to that***." A509.

(2) Delphi "***agreed to release all its possible claims against Magellan and still does***." *Id*.

(3) Delphi "***holds Magellan to its December 20, 2018 offer, which Delphi accepted.***" *Id.*

(4) The language proposed by Delphi "comports with ***the settlement made on December 20/21*** . . . ." A510.

(5) "Delphi ***concurs that that agreement should be enforced*** and reserves its rights." A509.

(Emphases added above). Delphi also inquired whether Magellan would "prefer to ask the court to enforce the ***December 20/21 settlement offer and acceptance***" or to propose another draft of the written agreement. A510 (emphasis added).

On January 11, 2019, Magellan provided a revised settlement document to Delphi. A517. Delphi responded with a further revised draft of the document. A526.

Delphi stated, "If we are unable to reach an accord on the wording ***Delphi is willing to ask the Court to enforce Magellan's December 20, 2018 settlement offer and Delphi's December 21, 2018 acceptance***." *Id*. (emphasis added).

On January 15, 2019, Magellan's counsel sent a "revised version of the Agreement that hopefully addresses Delphi's concerns." A534. The next day, Delphi sent Magellan another draft version of the written document. A542. Delphi's counsel characterized the draft as "releasing all claims that [Delphi] can control." *Id.* He wrote that [i]f this version is unacceptable, we're at an impasse and we'll go ahead and file our reply brief, and ***Delphi reserves the right to enforce the December 20-21 Agreement***." *Id.* (emphasis added). Magellan's counsel responded the next day, attaching a version of the written document that "Magellan is willing to sign." A550. She also attached a redlined version of the document "showing the (mostly minor) changes from the version [Delphi] sent" the day before. *Id.*

On January 30, 2019, counsel for Delphi emailed counsel for Magellan to say that he expected to "get back to [her] shortly." A563. Almost three months later, on April 9, 2019, counsel for Delphi finally responded.

4. April 2019: Delphi's Reaffirmation of Settlement and This Court's Ruling on Second Appeal

On April 9, 2019, counsel for Delphi emailed Magellan's counsel, candidly and unequivocally admitting the parties had entered into the Settlement Agreement, stating:

> I know we have a common interest in foregoing any more litigation and, although ***the parties agreed on a settlement***, they haven't been able to agree on the wording of the document memorializing the settlement. ***I intend to get back to you on that matter later this week or early next*** . . . .

A565 (emphasis added). Delphi's counsel did not get back to Magellan within the promised timeframe.

On April 15, 2019, this Court delivered its opinion in the second appeal, reversing the Superior Court's decision on prejudgment interest and remanding the matter. A626. After the mandate issued on May 1, 2019, the case was remanded to the Superior Court. A625. Unbeknownst to Magellan at the time, Delphi also filed the Second Action on May 1, 2019. B001. Magellan informed the court of the parties' settlement and its intent to file the Motion to Enforce Settlement Agreement. B009. Delphi informed the court that it disputed that an enforceable Settlement Agreement existed. A252. On May 28, 2019, Magellan paid the settlement amount of $1,050,000 by wire transfer to Delphi. A567.

On May 21, 2019, Magellan filed a motion to consolidate the First and Second Actions. B010. The motion was granted on June 10, 2019. B022. On June 28, 2019, the Superior Court granted Magellan's motion to extend its deadline to respond to the complaint in the Second Action until 30 days after a ruling on the Motion to Enforce Settlement Agreement. A6.

5. May 2019-July 2020: Briefing and Order Granting Magellan's Motion to Enforce Settlement

After Magellan paid the settlement amount, Delphi refused to comply with its obligations. Accordingly, on May 31, 2019, Magellan filed its Motion to Enforce Settlement Agreement. A383. Two briefs from each party followed. A383, A256, A737, A226. The court heard oral argument on December 6, 2019, and took the matter under advisement. A170, A217.

On April 23, 2020, the Superior Court issued its Opinion granting Magellan's Motion to Enforce. A141. It found "objective facts [] demonstrate the parties' clear intent to be bound." A156. The court recognized that the question under Delaware law was "whether the parties 'positively' agreed to be bound only by a formal agreement." A157. It noted that "[b]oth parties conceded . . . during argument before the Court" that each had expressed an intent to "enforce the terms of the December 20th Offer." A163. The court found there was "no evidence that the parties agreed to be bound only by a formal document." A161. It concluded that all essential terms of the contract were present in the December 20 and 21 communications, thus creating an enforceable agreement. A163-64.

When the court issued its Opinion granting Magellan's motion, it directed Magellan to submit a draft release and directed Delphi to submit any objection to the form of the release within 15 days thereafter. A165. Magellan submitted its draft release, B023, B025-27, and Delphi filed its objections. B030. In its objections,

Delphi raised for the first time an assertion that it should be granted interest running from the December 21, 2018 date of the Settlement Agreement. B037, ¶ 12. On July 15, 2020, the Superior Court issued its order granting Magellan's motion and dismissing the cases, but it included an award of "interest at the legal rate from December 21, 2018 - the date of the Settlement Agreement - until May 29, 2019 - the date Magellan made payment of the settlement amount." A166-68. None of the parties' briefs addressed interest, and Delphi never asked for it in any motion or in oral argument. The only references to interest were in the objections and the proposed form of release Delphi submitted to the court, B030-40, which Magellan had no opportunity to address.

ARGUMENT

I. The Settlement Agreement contained all essential terms and created a binding and enforceable contract between the parties.

A. Question Presented

Did the Superior Court correctly exercise its discretion to find that Delphi and Magellan reached a binding agreement to settle all disputes on December 21, 2018, because the Settlement Agreement included all required essential terms and the parties did not make the Settlement Agreement contingent on the execution of a written document?

B. Scope of Review

The existence of an enforceable contract presents a question of fact that this Court reviews for an abuse of discretion. *Cole v. State*, 922 A.2d 354, 359 (Del. 2005) (looking to Delaware "contract law for the applicable standard of review") (citing *Philips Bros. Elec. Contractors, Inc. v. Great Am. Ins. Co*., 133 Fed. Appx. 815, 816 (3d Cir. 2005) ("[I]n the case of a disputed [] contract, what was said and done by the parties, as well as what was intended by what was said and done by the parties, are questions of fact to be resolved by the trier of fact….")); *see also Alston v. Pritchett*, 2015 WL 849689, at *2 (Del. Feb. 26, 2015) (reviewing trial court's order enforcing settlement and noting that "[w]e review questions of fact for abuse of discretion and accept a trial judge's findings unless they are clearly wrong").

"Findings of the trial court that are supported by the record must be accepted by the reviewing court even if, acting independently, it would have reached a contrary conclusion." *Wheeler v. Clerkin*, 871 A.2d 1129, 2005 WL 873341, at *2 (Del. 2005) (Table) (affirming trial court's finding of enforceable contract because the "finding…[was] supported by the record and [was] the product of orderly and logical deductive process").

Citing *Stonewall Insurance Co. v. E.I. DuPont de Nemours & Co.*, 996 A.2d 1254 (Del. 2010), Delphi argues *de novo* review is appropriate. Opening Br. at 25, 39. However, in *Stonewall*, the Court reviewed *de novo* the trial court's entry of summary judgment which was based on its interpretation of an unambiguous contract. *See id.* at 1256, 1259-61. Here, the question is not the ***meaning*** of the parties' contract but whether an enforceable contract ***exists***. Thus, the Superior Court made factual findings regarding the parties' intentions to enter into a binding contract. Those findings are reviewed only for an abuse of discretion.

C. Merits of Argument

1. The Settlement Agreement contained all essential terms.

"'Delaware law favors the voluntary settlement of contested suits . . . .'" *Stone Creek Custom Kitchens & Design v. Vincent*, 2016 WL 7048784, at *3 (Del. Super. Dec. 2, 2016) (quoting *Schwartz v. Chase*, 2010 WL 2601608, at *4 (Del. Ch. June 29, 2010)). Accordingly, Delaware courts recognize that a "settlement agreement is

enforceable as a contract." *Loppert v. WindsorTech, Inc*., 865 A.2d 1282, 1285 (Del. Ch. 2004). Delaware law binds the parties to a settlement agreement "where they agree to all material terms and intend to be bound by th[e] contract" even if the contract is not made in "the presence of the court, and even in the absence of a writing." *Stone Creek*, 2016 WL 7048784, at *3 (quoting *Schwartz*, 2010 WL 2601608, at *4); *see also Whittington v. Dragon Group L.L.C.*, 2013 WL 1821615, at *3 (Del. Ch. May 1, 2013) ("Nothing in the law of contracts requires that a contract be signed to be enforceable.").

Delaware courts recognize that a settlement agreement is enforceable if all essential terms are present, even if it "expressly leaves other matters for future negotiation." *Loppert*, 865 A.2d at 1289. Delphi argues that no settlement agreement was reached by the parties because Delphi and Magellan never agreed on the scope of release Delphi was to provide and thus a material term of settlement was lacking. The Superior Court properly rejected that argument and did not abuse its discretion in finding the parties agreed upon all essential terms, including the scope of the release Delphi agreed to give Magellan.

The Superior Court recognized that "[w]hether or not a settlement agreement was reached is a fact intensive inquiry." A144. In making this factual inquiry and coming to its factual determinations about whether the parties agreed to the essential settlement terms, the court considered all the evidence but relied "heavily on a series

of emails between the parties leading up to" this Court's decision in the second appeal. *Id*. Based on its thorough review of all of the evidence and the arguments presented at the December 2019 hearing, the Superior Court determined the parties entered into an enforceable Settlement Agreement. The court's findings are completely consistent with the record evidence. Even in the unlikely event that the Court might reach a different conclusion based on an independent review of the facts, the Court must nevertheless affirm because there was no abuse of discretion by the Superior Court. *See Alston*, 2015 WL 849689, at *2-3 (holding this Court will accept factual findings by a trial judge unless they are "clearly wrong" and affirming Superior Court's enforcement of settlement agreement where the record showed the Superior Court reviewed the evidence submitted by the appellant and "did not find [appellant's] arguments against enforcement of the settlement persuasive").

a. *An agreement is enforceable if it establishes the heart of the agreement.*

Delaware law provides that an agreement containing "all essential terms" exists where the parties have "establishe[d] the heart of the agreement." *Parker-Hannifin Corp. v. Schlegel Elec. Materials, Inc.*, 589 F. Supp. 2d 457, 463 (D. Del. 2008). A settlement agreement that contains all essential terms of the parties' settlement is enforceable, even if it "expressly leaves other matters for future negotiation." *Loppert*, 865 A.2d at 1289; *see also Parker-Hannifin Corp.*, 589 F. Supp. 2d at 462-63 ("[A] settlement agreement may be enforced although there are

some matters left for negotiation, as long as, all essential terms are present."). Indeed, it is common for an executed settlement agreement to contain many additional terms that are not "essential" to the parties' settlement agreement. *See, e.g., Maya Swimwear Corp. v. Maya Swimwear, LLC*, 855 F. Supp. 2d 229, 236 (D. Del. 2012) (noting that "written settlement document[s] will necessarily contain additional, boilerplate and conventional settlement language, not specifically addressed by the parties" in their original settlement agreement). The addition of those types of terms in the written agreement "does not mean that essential terms remained outstanding or a counteroffer was made." *Id*.; *see also Loppert*, 865 A.2d at 1289 ("Obviously, the formal document was going to have additional, boilerplate terms, but there is no evidence those terms were 'essential'"). Instead, an enforceable contract containing "all essential terms" exists where the parties have "establishe[d] the heart of the agreement." *Parker-Hannifin*, 589 F. Supp. 2d at 463.

"To determine whether a contract was formed, the parties' 'overt manifestation of assent—not subjective intent—controls' the result." *Loppert*, 865 A.2d at 1285 (quoting *Indus. Am., Inc. v. Fulton Indus. Inc.*, 285 A.2d 412, 415 (Del. 1971)). The court must consider:

> [W]hether a reasonable negotiator in the position of one asserting the existence of a contract would have concluded, in that setting, that the agreement reached constituted agreement on all of the terms that the parties themselves regarded as essential and thus that the agreement concluded the negotiations.

Id. "Delaware adheres to the objective theory of contracts" and "considers 'objective acts (words, acts and context)'" to be the best evidence of the parties' intent. *Schwartz*, 2010 WL 2601608, at *4 (quoting *MBIA Ins. Corp. v. Royal Indem. Co*., 426 F.3d 204, 210 (3d. Cir. 2005)).

Here, the Superior Court considered all of the evidence and determined that "both parties intended to be bound at the time of the December 20th offer and December 21st acceptance." A162. It found that Magellan offered to pay Delphi $1,050,000 to settle all claims Delphi may have against Magellan and to obtain "the broadest release possible," and that "Delphi unequivocally accepted the offer." A163-64. The parties' December 20 and 21, 2018 email exchanges established the Settlement Agreement. The court further found that the objective acts and statements of the parties after they reached the Settlement Agreement, including their stated intentions on repeated occasions to enforce the Settlement Agreement, clearly demonstrated and affirmed that Delphi and Magellan mutually agreed to the "heart" of their agreement. A163. Based on this evidence, it found that the Settlement Agreement contained the essential terms of the agreement and that "a valid contract existed between the parties based on [] Magellan's offer of December 20th and Delphi's unequivocal acceptance of December 21st." A164. The Superior Court's factual findings are consistent with the record evidence and certainly cannot be said to constitute an abuse of discretion. This Court should affirm the court's findings.

b. *The parties reached an agreement regarding the scope of the release in the Settlement Agreement.*

The scope of the release the parties expressly agreed upon in the Settlement Agreement was clear. In the December 20 offer, Magellan agreed 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 of the 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 the alleged 'new' claims relating to Tank 3 and 10.

A460 (emphasis added). Magellan "***insist[ed] on the broadest release possible***—any claim Delphi could ever possibly assert against Magellan even remotely relating to their business relationship must be released." *Id*. (emphasis added). ***Delphi unequivocally accepted this offer***. A463. Thus, contrary to Delphi's assertions (at 27), the parties reached an agreement on the scope of the release.[3]

In attempting to memorialize the Settlement Agreement and effectuate Delphi's "broadest release possible," Magellan proposed language in the document for execution by which Delphi would release all claims against "Magellan, its predecessors, assigns, transfers, affiliates, parents of all tiers, subsidiaries of all tiers, and successors, and its and their respective members, owners, general partners,

[3] The Superior Court held its order enforcing the Settlement Agreement should be limited to "the terms of the agreement set out in Magellan's December 20, 2018 letter, including the scope of any release." A164.

limited partners, managers, officers, employees, equity holders, insurers, sureties, and attorneys." A504. This is standard, boilerplate language for releases involving corporate entities.[4] Without such a release, Delphi could attempt to circumvent the Settlement Agreement by suing Magellan's affiliates, employees, or agents instead of Magellan itself. Magellan's request for such language did not negate the existence of the Settlement Agreement; it was simply meant to effectuate the "broadest release possible" as already agreed to by the parties in the Settlement Agreement.

Similarly, Magellan's request for a "hold harmless" or indemnity provision was not a new "material term" of the parties' settlement. Again, this language was simply meant to effectuate the extremely broad release Delphi had already agreed to give Magellan. Magellan sought assurance that Delphi would not attempt to circumvent the "broadest release possible" by having Delphi's agents or affiliates sue Magellan (instead of Delphi suing Magellan directly). Thus, Magellan asked for a "hold harmless" clause, which would protect Magellan entities and individuals from any claims brought by Delphi, its affiliates, and specifically its attorney, Ron Gumbaz. A536-37, ¶ 4. Again, "hold harmless" language is standard fare in

[4] *See, e.g.*, A764, 1 Negotiating & Settling Tort Cases § 11:21, Sample mutual release and settlement agreement, at ¶ ii(a); A769, 26A West's Legal Forms, Alt. Disp. Res. § 11:4 (4th ed.), Confidential severance agreement and release, at ¶ 10; A777, 3 Lane's Goldstein Litig. Forms § 67:3, Release agreement—All claims with confidentiality agreement.

releases.[5] In light of the parties' contentious history and the fact that, during the settlement discussions, Delphi had already indicated its plan to file a new action against Magellan, Magellan reasonably sought to ensure Delphi would not attempt to circumvent the "broadest release possible" language through a sham claim by one of Delphi's affiliates or its attorney.

Moreover, Magellan agreed to Delphi's request that the parties would sign mutual releases with identical terms. A542, A552-53, *compare* ¶ 4 *with* ¶ 5. Magellan also agreed it would "hold harmless" Delphi from any claims by Magellan or its affiliates—which was the same "hold harmless" provision it sought from Delphi, minus the reference to Mr. Gumbaz. *Id.* Again, Magellan was agreeable to this standard language, even though Magellan was not bound by it in the Settlement Agreement.

Delphi contends "[n]o settlement agreement was reached by the parties, because Delphi and Magellan never agreed on the scope of the release Delphi was to provide." Opening Br. at 27. This is directly contrary to Delphi's own prior admissions, which expressly and repeatedly recognized that the parties reached an

[5] *See* A780-81, 27A Sec. Lit. Forms & Analysis § 11:7, Settlement agreement and release – Alternate example, at ¶ 8 (agreeing to "hold [defendants] and their affiliated parties harmless against all claims" and referring to settlement as "this hold-harmless agreement"); *see also* A777-78 (including "hold harmless" language in form release agreement).

agreement regarding the scope of the release in the December 20-21 Settlement Agreement. In fact, Delphi objected to the language proposed by Magellan for inclusion in the document memorializing the settlement because Delphi contended the language went beyond the scope of the release already ***agreed to by the parties***. In a January 9, 2019 email, Delphi's counsel wrote Magellan's counsel:

> In your December 20, 2018 letter to me, you said that the release given by "Delphi" had to relinquish "any claim Delphi could ever possibly assert against…Magellan." ***Delphi agreed to that***. 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 who Delphi has no control . . . . That is what Magellan is now demanding. ***Delphi is still willing to give what it agreed to: a full release of any claim Delphi might have against Magellan, known or unknown, from the beginning of time to the date of the Agreement.***

A509 (emphasis added). He then reiterated:

> ***Delphi agreed to release all its possible claims against Magellan and still does.*** Magellan's drafts want more. Delphi rejects that demand and ***holds Magellan to its December 20, 2018 offer, which Delphi accepted***. Delphi concurs that that agreement should be enforced and reserves its rights.

Id. (emphasis added). The language Magellan sought to include in the document was intended to effectuate Delphi's agreement to give the "broadest release possible." But even if the proposed language went beyond the original settlement terms as Delphi alleged, Magellan's request to include the language would not support Delphi's current argument that the Settlement Agreement never existed. Indeed, as Delphi's January 9 email shows, Delphi itself recognized that the parties already had

reached a binding, enforceable agreement as to the scope of the release in the Settlement Agreement.

These admissions by Delphi fully support the Superior Court's finding that "Magellan's December 20, 2018 email sufficiently set out all of the material terms of the agreement." A145. In other words, the email and Delphi's unconditional acceptance the next day established the "heart of the agreement," *i.e.,* Magellan would pay $1,050,000 in exchange for the "broadest release possible" from Delphi. Magellan's proffered language was largely boilerplate and was intended to implement or effectuate the release to which Delphi already had agreed, not undo it. The Superior Court found that Magellan's December 20, 2018 offer—which Delphi unequivocally accepted on December 21, 2018—contained "all of the terms essential to the Settlement Agreement" and enforced those terms. A163. Whether the parties later offered language in a proposed document that differed does not change the fact that they already had agreed on all essential terms. The court's findings on this key point are fully supported by the record and cannot possibly be considered an abuse of discretion. Accordingly, the Superior Court's holding must be affirmed.

c. *Time of performance was not an "essential" term.*

Delphi argues the Settlement Agreement did not contain all essential terms because it did not include a specific deadline for Magellan to make its payment.

Opening Br. at 30. Delphi cites no authority establishing that a payment date is an essential term of an agreement. Indeed, it is not. Delaware courts routinely enforce contracts that do not specify dates for payment. *See, e.g., Bramble Const. Co., Inc. v. Exit Realty, LLC*, 2009 WL 3069686, at *5 (Del. Super. Aug. 27, 2009) (holding that in Delaware, where a contract does not specify date of performance or specifically declare that "time is of the essence, the law permits the parties a reasonable time in which to tender performance."); *see also Brasby v. Morris*, 2007 WL 949485, at *3 (Del. Super. Mar. 29, 2007) ("[T]he law permits the parties a reasonable time in which to tender performance.").

Instead, Delphi relies only on the fact that some of the draft settlement documents exchanged by the parties before and after reaching the Settlement Agreement included provisions regarding when payment should be made. Opening Br. at 30. In these communications, both Magellan and Delphi sought to include practical, logistical steps for both the "how" and "when" of making payment and dismissing the litigation, but neither party ever included language indicating the terms were essential to the actual agreement. The two emails comprising the Settlement Agreement contained no mention of a specific payment date or timeframe, evidencing that timing or manner of payment (*i.e.,* by wire transfer) were not essential terms. The Superior Court found the December 20, 2018 offer "contained all of the terms essential to the Settlement Agreement," A163, and again,

the court's findings are completely consistent with the factual record and cannot be considered an abuse of discretion.

The parties' actions show they did not view their Settlement Agreement as incomplete because the date of payment was not specified. In fact, the opposite is true. They repeatedly reaffirmed there was a settlement and repeatedly stated their intention to enforce it. And ***even some three months after*** the Settlement Agreement was reached, when Delphi's counsel sent its email of April 9, 2019 reaffirming that "***the parties agreed on a settlement***," Delphi did not mention time of performance or claim that Magellan had not timely paid the settlement amount. A565. Had Delphi objectively believed Magellan failed to timely pay, or that no Settlement Agreement existed because time of payment was an essential term of an agreement, it never would have reaffirmed the Settlement Agreement ***some three months after*** it had been reached. These facts fully support the Superior Court's finding that the Settlement Agreement contained all essential terms, and the court did not abuse its discretion in rejecting Delphi's argument that a payment date was an essential term. Thus, the Court should affirm the Superior Court's ruling.

2. <u>The parties did not make the Settlement Agreement contingent on the execution of a written document.</u>

Delphi also argues the Settlement Agreement is not binding and enforceable because it was never reduced to a single, jointly executed writing. As the Superior Court recognized, this argument is contrary to both Delaware law and the facts.

a. *Delaware law requires a positive agreement to make an agreement contingent on execution of a written document.*

As a preliminary matter, Delphi cites a New York case for the proposition that parties "demonstrate[d] an intent to be bound only by a written executed agreement" merely by negotiating and exchanging drafts of a written agreement. Opening Br. at 34 (citing *Clark v. Gotham Lasik, PLLC*, 2012 WL 987476, at *3 (S.D.N.Y. Mar. 2, 2012)). This is not the rule in Delaware. *Loppert* clearly states that a writing is not required "in the absence of a *positive agreement* that [the settlement agreement] should not be binding until so reduced to writing." 865 A.2d at 1287. Delphi cites no case law suggesting that one party can unilaterally make an executed agreement a condition of settlement without acquiescence or agreement by the other party.[6] But, even if it could, the facts offered by Delphi do not support its claim that Magellan expressly made an executed agreement a condition of settlement.

Magellan's December 20, 2018 offer does not condition settlement on reaching and executing an acceptable written settlement document. Nor does the unequivocal acceptance by Delphi on December 21, 2018. The only reference to another writing is Delphi's statement about the "paperwork," which Delphi's

[6] Likewise, Delphi cites no Delaware precedent for its claim that "referring to a matter as 'settled in principle' does not create an enforceable contract." Opening Br. at 35. Indeed, this rule flies in the face of *Loppert*'s clear holding, as well as the other record facts showing the Settlement Agreement's existence.

counsel dismissingly said could be discussed "next week." There was nothing by Magellan or Delphi purporting to condition settlement on that "paperwork," much less the type of positive agreement by both parties required to establish such a condition. Moreover, well after this, both parties clearly treated the Settlement Agreement as enforceable ***without*** a jointly executed settlement document, stating their intention on multiple occasions to enforce it.

As noted above, under applicable Delaware law, the parties' intention to memorialize their Settlement Agreement in a separate, signed document does not negate the enforceability of the agreement unless the parties "positively agreed" it would. As a matter of fact, based upon the record evidence, the Superior Court properly found no such positive agreement occurred here. A161. There is no basis for this Court to conclude the Superior Court's factual determination was an abuse of discretion.

b. *The parties' written communications do not support Delphi's argument.*

Delphi argues that the parties' written communications prove the parties intended for the Settlement Agreement to be binding only after it was memorialized in a jointly executed document. After considering the evidence, the Superior Court properly rejected this argument.

i. Magellan's December 26, 2018 Email Regarding Timing and Manner of Payment

The evidence shows the parties reached their Settlement Agreement at 6:25 pm CST on Friday evening, December 21, 2018. A463. At that time, Delphi's counsel emailed Magellan's counsel: "Delphi accepts Magellan's offer. We'll work out the paperwork next week." *Id.* Nothing in this email suggested any timeframe or deadline for payment, or any hurry to make payment. The next Monday was Christmas Eve, followed by Christmas on Tuesday. On Wednesday, December 26, 2018, counsel for Delphi sent a draft written agreement to Magellan's counsel at 8:31 am CST. A467. Magellan's counsel responded within the hour, stating: "We will have some changes. Our appellate answer brief is due today, so getting that filed will be our first priority…."[7] A471.

Later that day, at 1:02 pm CST, Delphi's counsel sent a second email, attaching a further revised draft settlement agreement. A473. Delphi's counsel stated that Delphi "need[ed] the settlement agreement executed and Magellan's payment made by [] Friday December 28, 2018", *i.e.,* ***within two days***. *Id.* Magellan's counsel responded immediately, noting the parties' Settlement Agreement did not include "an unreasonably short timeframe for execution of the agreement or for Magellan to make payment." A478, A480; *see id.* ("Nothing Delphi said [in negotiating the

[7] Because Magellan's answer brief was due in the appeal on December 26 (*i.e.*, the next business day after the Settlement Agreement was reached after business hours on Friday evening), Magellan filed the brief on that day to comply with the deadlines imposed by the Court.

December Agreement] reflected that time was of the essence or that Magellan would be asked to expedite execution of an agreement or payment."). Magellan's counsel stated Magellan would "forward [] its Settlement Agreement for Delphi's review in due course," and that "[a]fter the parties execute the agreement, Magellan will make payment within a reasonable time and in compliance with the terms of the written agreement." *Id*.

Magellan's December 26 email merely indicates that Magellan would not be bound by Delphi's newly articulated and unreasonable deadline for making payment or unreasonable conditions on the manner of payment. Instead, Magellan wanted to ensure an orderly procedure for making payment that could accommodate its internal corporate needs. In fact, as the Superior Court noted, the draft agreement sent by Delphi's counsel specified in paragraph 1 that Magellan would wire transfer the settlement funds "[w]ithin __ business days of the signing of this Agreement by both parties . . . ." A160. Each subsequent draft contained a similar provision directing how and when the settlement funds were to be transferred. A468, A475, A487, A503, A511, A519, A527, A535, A543, A551, A556. Thus, the Superior Court properly found the December 26, 2018 email is not evidence that Magellan made an executed settlement agreement an express condition of settlement, and that it merely reflects the fact that—at that time—the parties contemplated executing a written

document that would specify the time and manner of payment. A160. These findings cannot be considered an abuse of discretion.

Far from evidencing that the Settlement Agreement was contingent on a fully executed document, the email shows that Magellan's counsel expressly acknowledged the Settlement Agreement already existed, stating, "Delphi's drafts of the 'papers' are inconsistent with ***the terms of the contract created by the parties*** . . . ," meaning the emails exchanged on December 20 and 21, 2018. A480 (emphasis added). As the Superior Court found, Magellan's December 26 email "is merely a communication regarding performance timing and not evidence of an intent to be bound only by the written agreement." A160. The Superior Court's findings in this respect are, again, wholly consistent with the record and cannot be considered an abuse of discretion.

Magellan's counsel also noted it was not possible for Magellan to comply with the two-day "deadline" imposed by Delphi because, among other things, "the Magellan management personnel who need to approve the agreement and approve and make payment will not be back in the office until after the New Year." A480. Contrary to Delphi's suggestion (at 14), this does not mean Magellan management had not approved the Settlement Agreement or that they did not view it as

enforceable absent a fully executed settlement document.[8] It merely reflects Magellan's internal processes, *i.e.,* a corporate entity like Magellan will not permit an employee to sign a written agreement or to wire settlement funds in excess of $1 million without first following corporate protocols. This is evidence only of the realities of corporate America—nothing else. It is certainly not evidence that refutes the existence of the Settlement Agreement.

ii. January 4, 2019 Email

Delphi also relies on a January 4, 2019, email from Magellan's counsel as alleged evidence that a separate executed agreement was required before the parties actually settled. Opening Br. at 15; A290. The language Delphi relies upon merely explains the rationale behind Magellan's changes to the draft settlement document. A290. Delphi had proposed that the payment provision (which had been moved from

[8] The attorneys for both parties unequivocally expressed their clients' intention to enter into a binding settlement agreement in the December 20 and 21, 2018 communications. Delaware law is clear that "where 'an attorney of record in a pending action acknowledges that a compromise has been reached, he or she is presumed to have the lawful authority to do so,'" even when those parties are business entities. *Loppert*, 865 A.2d at 1288 (quoting *Rowe v. Rowe*, 2002 WL 1271679, at *3 (Del. Ch. May 28, 2002); *see also Shields v. Keystone Cogenerations Sys.*, 620 A.2d 1331, 1335 (Del. Super. 1992) ("An agreement entered into by an attorney is presumed to have been authorized by his client to enter into the settlement agreement."). "The burden is upon the party who challenges the authority of the attorney to overcome the presumption of authority," *Shields*, 630 A.2d at 1335, and Delphi does not—and cannot—carry that burden here. The Superior Court properly rejected Delphi's unsupported allegation that Magellan management had not approved the Settlement Agreement.

paragraph 1 of the draft agreement to paragraph 2) be modified to require Magellan to wire the settlement funds to Delphi "[o]n or before January 10, 2019." A292. Magellan rejected that language and proposed the paragraph be modified to require payment "[w]ithin five (5) business days of both parties signing the Agreement." *Id.* In the transmittal email, counsel for Magellan explained the revision as follows:

> As proposed by Delphi, the agreement makes Magellan's payment due on a date certain, regardless of when the agreement is executed by both parties. We believe Magellan's obligation should be triggered only after the agreement is fully executed.

A290. The draft document contained a specific provision detailing how and when Magellan would be obligated to pay the settlement amount under the terms of that written document, if executed by the parties. Magellan proposed a change to that payment provision to ensure that if the signing of the document were delayed for any reason—or if Magellan signed it but Delphi did not—then the payment obligation would also be deferred because it was tied to the date of signing, not a date certain.

When put in proper context, this email merely shows a reasonable concern that if the document were to be executed, and the parties were to follow the payment terms in the document, those payment terms should be triggered only upon execution by both parties. The Superior Court did not abuse its discretion in finding the January 4 email did not provide any evidence that the parties agreed to be bound only by a jointly executed document. A160-61.

iii. January 7, 2019 Email

In an email sent a few hours after receiving Magellan's January 4 email, Delphi's counsel stated that Delphi had "reinserted the January 9, 2019 payment date" in the draft document and was prepared to execute the agreement by Monday, January 7. A238. On January 7, 2019, Magellan's counsel responded, reiterating that Magellan would not agree to including a date certain for the payment date in the draft document. He wrote, "January 9 is too short of a deadline, and is shorter than the term Delphi had in its previous draft. Magellan will not wire any money until Delphi has signed the final approved version of the Agreement. We've added language reflecting that." A237.

Delphi seizes upon this email as alleged evidence that Magellan would not pay the settlement amount unless the parties jointly executed a document.[9] Opening Br. at 15-16. But, again, Delphi takes this correspondence out of context. Both the January 4 and 7 emails discussed the terms Magellan sought to include in the written document the parties were drafting. The emails expressed Magellan's intent that if the parties' discussions produced a document that would provide a step-by-step guide for implementing the Settlement Agreement, then ***the document*** should not require payment of the settlement amount on a date certain. Instead, Magellan

[9] Delphi cited this document for the first time in its sur-reply brief filed in the Superior Court. A228.

desired that the date for payment established ***in that document*** should be triggered by the execution of the document by both parties.

Magellan never suggested that there would be no settlement if the parties decided not to execute that particular document. In fact, notwithstanding these communications, both Delphi and Magellan stated their intention to enforce the Settlement Agreement regardless of the signing of the draft discussed in this email, and Magellan ultimately did pay the settlement proceeds without a separate, jointly executed written agreement.

c. *Both parties objectively showed their belief that a final, enforceable agreement existed without a separate, fully executed settlement document.*

As the Superior Court recognized, the parties' repeated references to the Settlement Agreement as a final settlement—and their multiple express statements of intention to enforce it—refute any suggestion that a separate, fully executed written agreement was required. These include the following:

- On January 7, 2019, Delphi represented to the Delaware Supreme Court that "the matter is settled in principle and the settlement agreement is in its final stages." A483.
- On January 9, Magellan sent Delphi a draft written agreement and stated that if the writing was not acceptable to Delphi, Magellan would "assess its options, including taking steps to enforce the original email agreement of the parties." A501. Magellan asked Delphi's counsel to "let [Magellan] know if Delphi will agree to the attached version or if [Magellan] should prepare to enforce the parties' original email agreement." *Id*.

- On January 9, Delphi repeatedly "manifested its assent" when it "concur[red] that [the December Agreement] should be enforced," argued that its proposed language "comports with the settlement made on December 20/21," and asked if Magellan would "prefer to ask the court to enforce the December 20/21 settlement offer and acceptance." A509-10.

- On January 11, Delphi told Magellan it was "willing to ask the Court to enforce Magellan's December 20, 2018 settlement offer and Delphi's December 21, 2018 acceptance." A526.

- On January 16, Delphi again "reserve[d] the right to enforce the December [] Agreement." A542.

Delphi tacitly concedes that it made these statements, but it argues "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 negotiation ended." Opening Br. at 36. This is both factually inaccurate and irrelevant.

It is factually inaccurate because months after the January 16, 2019 draft, on April 9, 2019, Delphi's counsel sent a letter to Magellan's counsel expressly acknowledging that "***the parties agreed on a settlement***, [but] they haven't been able to agree on the wording of the document memorializing the settlement." A565 (emphasis added). Far from "deem[ing] the negotiations ended," Opening Br. at 36, Delphi's counsel affirmatively stated, "***I intend to get back to you***" regarding the language of the draft document "later this week or early next." A565 (emphasis added). Delphi does not even acknowledge this letter in its Opening Brief, despite the fact that it is an important part of the record that the Superior Court relied upon

in finding the parties had objectively stated their intentions to be bound by the Settlement Agreement.[10] Delphi's reason for ignoring this evidence is obvious—it is completely inconsistent with Delphi's narrative claiming there was no settlement. The April 2019 letter shows that ***some three months after*** Delphi claims the parties reached an "impasse" that prevented them from reaching a settlement, ***Delphi reaffirmed the Settlement Agreement reached in December 2018***.

Further, even if the parties' efforts to "memorialize" the Settlement Agreement had reached an impasse, the impasse would not change the fact that the Settlement Agreement existed and was enforceable as of that time. As the record evidence shows, and as Superior Court found, Delphi cannot contest that several times in January 2019, Delphi expressly stated its willingness or intention to enforce the Settlement Agreement, regardless of whether a jointly signed settlement document was ever executed. A162-63. Delphi cites no evidence the parties ever agreed to rescind or otherwise invalidate the Settlement Agreement. And again, the contrary is true. Delphi stated as late as April 9, 2019 that the Settlement Agreement

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[10] Delphi's Opening Brief ignores the existence of the April 9 letter, but Delphi's previous characterization of its own conduct is wholly inconsistent with the April 9 letter's express statement that the parties had "agreed on a settlement" but were still working on the wording of the written document "memorializing" that settlement. A565. The Superior Court properly rejected Delphi attempts to deny its own express acknowledgment that up until the time this Court issued its opinion in the second appeal, both parties continued to insist that the Settlement Agreement was binding and enforceable.

was enforceable. Neither party ever disputed the existence of the binding Settlement Agreement until Delphi denied its existence after this Court ruled in Delphi's favor on the second appeal (***less than a week after reaffirming that the Settlement Agreement does exist***). Thus, as Delphi implicitly concedes, and as the Superior Court found, the Settlement Agreement was enforceable in early January 2019, and so it continues to be enforceable to this day. *Id*.

Delaware courts have held that similar communications show clear intent to form a binding settlement agreement. For example, in *Loppert*, one of the parties stated, "We have a deal," and the counterparty responded, "[G]ood—I'll let the company know." 865 A.2d at 1285. As in this case, after reaching their agreement, the parties began exchanging drafts of a document "memorializing their negotiations." *Id.*[11] When a dispute arose between them as to whether the defendant was required to file an answer in the litigation while they continued to work on the settlement documents, the defendant "ended the discussion by stating: 'deal is off . . . . response will be served today.'" *Id.* Despite this attempt to rescind the agreement, the Chancery Court held the parties' earlier correspondence reflecting that they had a deal were "objective facts . . . demonstrating that a contract was formed." *Id*. at

[11] The language Delphi and Magellan used in describing their agreement is markedly different from—and much more unequivocal than—"memorializing their ***negotiations***." Here, the parties repeatedly referred to the "settlement agreement" or their "settlement."

1286. The subsequent attempt to call off the deal did not change the fact that an enforceable agreement existed. *Id.* at 1285-86, 1291; *see also Parker-Hannifin*, 589 F. Supp. 2d at 459-60, 462 (finding enforceable settlement agreement where one party sent a letter outlining a settlement proposal, the counter-party orally accepted the offer, and the offering party acknowledged the settlement in an email); *Spacht v. Cahall*, 2016 WL 6298836, at *2-4 (Del. Super. Oct. 27, 2016) (enforcing settlement agreement in email outlining three essential terms of the settlement and stating that "'formal paperwork will follow'" despite fact that parties never agreed on the "formal paperwork").

The Superior Court properly applied Delaware law, and there was no abuse of discretion in its factual finding that "there is no evidence that the parties agreed to be bound only by a formal document." A161. Indeed, no such evidence exists. Instead, the court correctly found that Magellan's written offer and Delphi's unequivocal email acceptance are objective acts establishing the existence of an enforceable settlement agreement. A164. Similarly, the court's factual findings that the parties' post-agreement correspondence and repeated acknowledgements that an enforceable agreement exists evidence an enforceable settlement are supported in the record and were not an abuse of discretion. A163 ("The parties' intent to be bound by the Agreement is evident."). The Court should affirm the Superior Court's sound rulings.

II. The Superior Court did not determine that Magellan breached the Settlement Agreement. Delphi's new argument should be rejected.

A. Questions Presented

Did Delphi waive its argument that Magellan breached the Settlement Agreement and that breach absolved Delphi of any obligation to comply with the Settlement Agreement? Is Delphi's new argument based on a "ruling" the Superior Court did not make?

B. Scope of Review

On appeal, Delphi argues for the first time that Magellan cannot properly seek to enforce the Settlement Agreement because it first breached the Settlement Agreement. Opening Brief at 38-41. Delphi admittedly did not make this argument in the Superior Court, *id*. at 38, and the argument flatly contradicts its arguments (made below) that no enforceable agreement exists. The "narrow exception" that permits this Court to "consider a question for the first time on appeal…is extremely limited and invokes a plain error standard of review." *Clark v. Clark*, 47 A.3d 513, 518 (Del. 2012) (citing Del. Supr. Ct. R. 8). "Plain error requires the error to be 'so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.'" *Id*. (quoting *Russell v. State*, 5 A.3d 622, 627 (Del. 2010). There was no "plain error" here, and Delphi fails to show it is in the interest of justice for this issue to be addressed for the first time on this appeal.

C. Merits of Argument

Delphi's arguments are not only brand new, but they are based on the demonstrably false premise that the Superior Court "found that Magellan breached the purported settlement agreement." Opening Br. at 40. This argument was not raised or briefed before the Superior Court, however, and the Superior Court did not find ***any*** breach by Magellan, much less a breach that would absolve Delphi of its obligation to comply with the terms of the Settlement Agreement. The Court should reject Delphi's late and unsupported argument.

1. <u>It is improper for Delphi to raise new arguments on appeal.</u>

Delphi provides no Delaware authority permitting this Court to take up a new issue not previously raised at the trial court.[12] Indeed, Delaware law expressly forbids such a practice unless the case fits in the "narrow exception," *i.e.*, if the Court finds "that the trial court committed plain error requiring review in the interests of justice." *Shawe v. Elting*, 157 A.3d 152, 168 (Del. 2017); *see also* Del. Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review"

[12] Delphi (at 39) cites only a Second Circuit case applying New York law. *See Krumme v. Westport Stevens, Inc.*, 238 F.3d 133 (2d Cir. 2000). In *Krumme*, the appellate court chose to exercise its discretion to address an issue not raised below. *Id.* at 141. The court held the district court's decision was "facially inconsistent" because it held the plaintiffs had contractually released the defendant's obligations to them under an earlier contract but then awarded the plaintiffs attorneys' fees based on a provision in the same (released) agreement. *Id.* at 142-43. Here, there is no inconsistency and, as shown below, the Superior Court did not hold Magellan had breached the Settlement Agreement.

except "when the interests of justice so require…."). Delphi has not alleged (and cannot show) "plain error" here.

This Court has explained:

> It is axiomatic that an appellate court will generally not review any issue not raised in the court below. This rule is based on the principle that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Furthermore, it is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable.

Id. (quoting 5 Am. Jur. 2d *Appellate Review* § 618 (2016) (citations omitted)).

Delphi ***never*** argued to the Superior Court that the parties entered into a Settlement Agreement but that Delphi had no obligation to comply with the agreement because Magellan had breached it. To the contrary, Delphi exclusively argued that the parties ***never reached*** a binding settlement agreement. Its new theory—that there actually ***was*** a Settlement Agreement that Magellan breached—is directly contrary to Delphi's arguments in the Superior Court. There is no basis for Delphi to claim the theory is properly before this Court or that there would be no harm or prejudice in raising it for the first time on appeal. In fact, it would be contrary to the interests of justice and fair play to allow Delphi to peddle this theory now.

As requested by the parties below, the Superior Court properly limited its review to the "fact intensive inquiry" as to "[w]hether or not a settlement agreement was reached." A144. Delphi never raised an issue before the Superior Court as to

whether Magellan breached the Settlement Agreement, thus relieving Delphi of its obligation to comply with it. Instead, Delphi always argued to the Superior Court that no Settlement Agreement existed. Nor was there any evidence presented that the parties' exchanges of draft documents designed to effectuate the Settlement Agreement somehow breached that agreement. The only evidence submitted regarding the parties' performance under the Settlement Agreement was that Magellan fully performed under the agreement by tendering payment of the settlement amount, which Delphi accepted.

Because (i) Delphi never presented evidence or argument to the Superior Court about this new breach theory, (ii) Magellan was never given the opportunity to address or refute any such argument,[13] and (iii) the Superior Court never

[13] As Delphi concedes (at 40), its authorities do not support voiding an otherwise enforceable agreement merely because a party breaches the agreement in some way. Instead, the breach must be a ***material*** breach. Opening Br. at 40. Delphi would have to prove ***both*** that Magellan's alleged conduct breached the Agreement ***and*** that the breach was "material." Here, Delphi argues Magellan breached the Settlement Agreement by "refus[ing] to pay the settlement amount until Delphi accepted Magellan's new release." Opening Br. at 41. However, Magellan ***has paid the settlement funds*** (which Delphi accepted) without the requested fully executed releases. Thus, Magellan has fully performed under the agreement. Delphi argues it was harmed by "Magellan's failure to timely pay[] the settlement amount" because it "lost the opportunity to avoid the expense of continued litigation and continued to bear the risk of an adverse decision by this Court." Opening Br. at 41. Any such harm is self-inflicted. The parties have an enforceable Settlement Agreement, and if Delphi had chosen to abide by the agreement, Delphi would not have incurred any litigation expenses or risk. Thus, even if Delphi could establish a breach by

addressed it, there is absolutely no basis for this Court to consider it for the first time on appeal. Had Delphi actually believed Magellan breached the enforceable Settlement Agreement, or if it had any evidence to support this theory, it should have presented it long ago in the Superior Court. Instead, the parties fully briefed and argued the issue of whether there was a Settlement Agreement, and ***Delphi disclaimed the existence of an agreement***. This Court should therefore reject and disregard Delphi's improper, untimely, and unfounded argument that Magellan breached the Settlement Agreement.

2. <u>The Superior Court did not find Magellan breached the Settlement Agreement.</u>

To support its new argument that Magellan breached the Settlement Agreement, Delphi mischaracterizes the Superior Court's findings, and claims ***with no basis*** that the court "found that Magellan breached the purported settlement agreement" and "found as a fact that Magellan did not timely pay the settlement amount…." Opening Br. at 38, 40. Delphi cites as evidence only the fact that the Superior Court's July 15 Order directed Magellan to pay Delphi interest from the date of the Settlement Agreement to the date of the payment. *Id.* at 38. This argument mischaracterizes both the court's Opinion and the record in this case.

Magellan, Delphi could not prove a material breach that would entitle it to a remedy of rescission.

The Superior Court did not find that Magellan breached the Settlement Agreement, and there is ***nothing*** in the court's Opinion that would indicate such a holding. The court's award of interest is simply a consequence of the court's adoption of Delphi's proposed final order and Delaware law recognizing that, in certain circumstances not present here, interest may be awarded on settlement payments. *See, e.g.*, *Lamourine v. Mazda Motor of Am., Inc*., 979 A.2d 1111, 2009 WL 2707387, at *1, *4 (Del. 2009) (Table).

As explained above and below in Part III, Delphi never argued that Magellan breached the Settlement Agreement, the parties never briefed or presented argument regarding whether Delphi was entitled to interest. Nor did the Superior Court expressly state why it was awarding interest. *See* A167-168. To the contrary, when faced with two possible final orders—one prepared by Magellan and one prepared by Delphi—the Superior Court adopted Delphi's proposed order and erroneously awarded interest. And even if the award of interest were not an error, there is no legal or factual basis to suggest that the Superior Court concluded Magellan breached the Settlement Agreement at all, much less that it materially breached the agreement in such a way that it voided the agreement or absolved Delphi of any obligations under the agreement. Indeed, the fact that the same Order also included the releases and ***enforced*** the terms of the Settlement Agreement establishes that the Superior Court found that the Settlement Agreement remains enforceable. Put

simply, even assuming the court found Magellan had, in fact, breached the Settlement Agreement, it did not find the alleged breach to be a "material" breach that voided the agreement. This Court should reject Delphi's untimely and unfounded argument that Magellan breached the Settlement Agreement.

III. The Superior Court erred when it awarded interest on the settlement amount.

A. Question Presented

Did the Superior Court err in its July 15 Order by directing Magellan to pay Delphi "interest at the legal rate from December 21, 2018 through May 29, 2019" when the Settlement Agreement did not require payment on a specific date and the court did not find that interest was a term of the parties' Settlement Agreement? The Superior Court awarded interest without permitting Magellan to address whether Delphi was entitled to interest. Thus, the interests of justice require that Magellan be permitted to raise the issue in this appeal.

B. Scope of Review

This Court's scope of review is *de novo*. *See Reserves Dev. LLC v. Crystal Props., LLC*, 986 A.2d 362, 367 (Del. 2009).

C. Merits of Argument

In the July 15 Order, the Superior Court ordered Magellan to "pay to Delphi the sum of $1,050,000 with interest at the legal rate from December 21, 2018 through May 29, 2019."[14] A168. Magellan appeals this portion of the trial court's order. As discussed above, the trial court correctly ruled that the Settlement Agreement

[14] The Superior Court recognized that it erred when it ordered Magellan to pay Delphi $1,050,000, as Magellan had already paid Delphi the principal amount owed under the settlement agreement. B052-53.

contained all essential terms of the settlement contract. Interest was not one of those terms. Indeed, the matter of interest was never raised during the proceedings below on enforcement of the Settlement Agreement. Delphi first proposed the award of interest in its objections to Magellan's draft release following the Opinion granting Magellan's Motion to Enforce. B030. Magellan had no opportunity to respond.

In *Lamourine v. Mazda Motor of America, Inc*., this Court considered how much prejudgment interest was owed to plaintiffs who reached a settlement agreement with the defendant but expressly reserved the right to pursue a claim for prejudgment interest and attorneys' fees. 979 A.2d 1111, 2009 WL 2707387, at *1. The superior court found the *Lamourine* plaintiffs "had a qualified right to pre-judgment interest," even though they had settled their underlying claims. *Id.* at *4. This Court held that no interest was payable because "interest is to be computed from the date payment is due," and the defendant had made timely payment in accordance with the terms of the parties' settlement agreement. *Id*.; *see also id*. at *4 n.11. The Court found "the settlement agreement [was] the controlling source of law, and that because the defendants paid settlement moneys to [the plaintiffs] in accordance with the settlement agreement," the plaintiffs were not entitled to a payment of interest. *Id*.

Under *Lamourine*, it is clear Delphi is not entitled to interest here. First, unlike the agreement at issue in *Lamourine*, the Settlement Agreement did not reserve the

right for either party to claim interest. Thus, there was no "qualified right" to interest. Indeed, the terms of the release that the parties agreed to in their Settlement Agreement—and that the court ultimately entered below—covered "***any and all*** Claims" between the parties, A168 (emphasis added), A460, which would be sufficient to release any claim Delphi otherwise might have to interest of any type.

Second, as the Superior Court properly recognized, "the parties contemplated that Magellan would pay within a certain amount of time after the signed agreement was executed." A160. The memorializing document was not executed, and the Settlement Agreement itself did not specify a time for payment. Indeed, even as late as April 9, 2019, Delphi acknowledged the parties had a settlement, but it did not claim Magellan's payment was late or that interest was owed or due. A565. So, Magellan's payment of the settlement sum in May 2019 could not be said to have been contrary to the terms of the Settlement Agreement or untimely. *See Lamourine*, 979 A.2d 1111, 2009 WL 2707387, at *4 ("Because the settlement agreement was the source of the defendants' obligation to pay, and the defendants paid the settlement monies to the [plaintiffs] in accordance with that agreement, it follows that no pre-judgment interest could have accrued."). Under Delaware law, where, as here, a contract does not specify the time of performance, the parties have a "reasonable time" within which to perform. *Brasby*, 2007 WL 949485, at *3. In light of the parties' continued efforts to effectuate the Settlement Agreement through their

proposed document, including by specifying the time and manner of payment, it was reasonable for Magellan to refrain from making payment until those payment arrangements were finalized. Once Delphi disclaimed the Settlement Agreement, Magellan promptly tendered the settlement amount to Delphi. This constitutes payment within a "reasonable time" under the facts of this case, and the Superior Court did not find otherwise. Accordingly, the Superior Court erred in ordering Magellan to pay Delphi interest, and that part of the July 15 Order should be reversed.

Finally, even if some award of interest were appropriate, the court should reverse and remand the matter to the Superior Court for a proper determination of the interest amount. In the July 15 Order, the court ordered Magellan to pay interest from December 21, 2018 (the date of the Settlement Agreement) through May 28, 2019 (the date Magellan paid the settlement amount). A167. Even if the Court finds that Magellan owed interest under the Settlement Agreement, that interest would not begin to accrue until "the date payment is due." *Lamourine*, 979 A.2d 1111, 2009 WL 2707387, at *4 n.11 (quoting *Citadel Holding Corp. v. Rosen*, 603 A.2d 818, 826 (Del. 1992). Delphi has never argued that Magellan's payment was due the day Delphi accepted the December 20, 2018 offer. While Magellan still maintains there is no basis for an award of interest here, it cannot be disputed that the parties did not intend for interest to accrue on December 21, 2018.

CONCLUSION

For the reasons stated above, the Court should reject Delphi's arguments and affirm the Superior Court's Orders enforcing the Settlement Agreement and dismissing Delphi's First and Second Actions. The Court should reverse the Superior Court's July 15, 2020 Order only to the extent that it orders Magellan to pay Delphi interest on the settlement amount.

Respectfully submitted,

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