



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEMATIC CORP.,)
))
Defendant Below,)
Appellant-Cross Appellee,) No. 180, 2023
))
v.) Court Below – Superior Court of the
) State of Delaware,
FORTIS ADVISORS, LLC,) C.A. No. N18C-12-104 MAA CCLD
))
Plaintiff Below,)
Appellee-Cross Appellant.)

**APPELLANT’S REPLY BRIEF ON APPEAL AND
CROSS-APPELLEE’S ANSWERING BRIEF ON CROSS-APPEAL**

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NATURE OF PROCEEDINGS

Dematic relies upon the Nature of Proceedings in its August 23, 2023 Opening Brief.

On September 14, 2023, Cross-Appellant Fortis filed its combined Opening and Answering Brief.

This is Dematic's combined Answering and Reply Brief.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

5. Denied. The Superior Court did not err in granting a setoff to indemnify Dematic for Losses incurred in connection with the *D'Angela* shareholder appraisal suit. The court did not place the burden of proof on Fortis, but rather explained that Fortis failed to rebut Dematic's evidence proving that the setoff was reasonable. The record amply supports the finding that the legal fees awarded were reasonable.

STATEMENT OF FACTS

Dematic relies upon the Statement of Facts in its Opening Brief.

ARGUMENT

Dematic explains in detail below why this Court should grant the relief Dematic seeks in its Opening Brief, and why Fortis' arguments in opposition fail. But the Court should not be distracted by Fortis' effort to complicate the straightforward: at its core, Fortis' position, adopted by the trial court, that source code is a Company Product that Reddwerks delivered to its customers flunks the credibility test. Neither Reddwerks, Dematic-Reddwerks, or Dematic marketed, sold, or delivered lines of source code to customers. Reddwerks swore as much as part of the Agreement. The trial court's decision, which hinges on the opposite conclusion, must be reversed.

I. THE TRIAL COURT REVERSIBLY ERRED BY FINDING THE DEFINITION OF “COMPANY PRODUCTS” TO BE AMBIGUOUS AND CONSTRUING THAT TERM TO INCLUDE SOURCE CODE.

Fortis argues that the Superior Court correctly found that the definition of “Company Products” is ambiguous and that the evidence supports finding that “Company Products” includes Reddwerks’ source code and any Dematic product that incorporated any amount of Reddwerks’ source code. Fortis is wrong.

By definition, a Company Product must be: (1) a “product[]”; (2) “set[] forth” in Part 1 of Section 4.12(h) of the Disclosure Schedules; (3) and “distributed or offered” by Reddwerks at the time of the Merger. As Dematic explained in its Opening Brief (“OB”), Reddwerks’ source code does not satisfy any of these requirements.

The Superior Court acknowledged that the Company Products definition was not ambiguous in and of itself. Instead, the court found ambiguity in the products names on the Company Products List (the “List”), and the fact that the List identified Reddwerks’ products by a brief description of the function the software performed. Op. 46. Creating an ambiguity where there was none, the court concluded that the lack of detail rendered the List ambiguous, and proceeded erroneously to construe “Company Products” to include “Reddwerks’ source code and products integrating

that source code.” Op. 52. The court’s finding that source code is a “component” of Reddwerks software products was fundamental to its conclusion.

In its Answering Brief (“AB”), Fortis argues that the court correctly found that the definition of “Company Products” is ambiguous, and that “Company Products” included source code. However, Fortis now claims that source code is not a component of Company Products, but rather a form of Company Products. That meritless argument cannot undo the fact that the Superior Court reversibly erred.

A. Source Code Cannot Be a Company Product Because It Is a Component of Reddwerks’ Software.

The Superior Court correctly found that source code is a subcomponent of the software underlying Reddwerks’ products. Op. 48-50. But the court incorrectly found that source code was a “Company Product.” By definition, a Company Product must be a “product.” A145. Because source code is a subcomponent of a product (not the product itself), the Superior Court reversibly erred in reaching this conclusion.

To salvage the court’s erroneous contractual interpretation, Fortis introduces a new argument on appeal: that source code is a *form*, not a *component* of Company Product. According to Fortis, “source code for Company Product is Company Product in source code form.” AB 19. This argument fails.

1. Fortis Waived Its Argument That Source Code is a Form of Company Product.

Although Fortis now—for the first time in the case—argues that “Company Product source code is not a component of Company Product, it is a form of Company Product,” AB 19, during the first two years of this litigation, Fortis consistently argued that Company Products referred to *functionalities* included on the Company Products List. *See* OB 14-18. During that period, as Fortis tacitly concedes, the words “source code” were entirely absent from Fortis’ court filings. *See id.*

Then, two months before trial, Fortis began arguing that source code was an integral part of Reddwerks’ software and repeatedly characterized source code as a component of Reddwerks’ software.¹ Fortis’ latest newly-minted argument did not appear in the record below except for one passing reference during post-trial argument. Post-Trial Hearing Tr. at 11 (AR116). This argument is therefore waived.

¹ *See* AR004-005 (“Company Products...is an industry standard description for packages of functionalities—each of which is based on Source Code and all of which must be individually adapted to an end-user’s particular circumstance.”); A2656 (“[Reddwerks’] software was composed of thousands of lines of source code that operated together to cause complex functions. These complex functions were combined and sold in so-called modules.”); AR067 (“The evidence is unequivocal that – as an integral part of the software modules listed in Disclosure Schedule 4.12(h) – each line of source code was in fact being distributed or offered to third parties as of the time of Closing. Ergo, each line of source code was itself Company Product.”); AR069 (“[T]he 50 software modules are composed almost entirely of source code.”).

Zaman v. Amedeo Hldgs, Inc., 2008 WL 2168397, at *15 (Del. Ch. May 23, 2008);
Supr. Ct. R. 8.

2. The Superior Court Correctly Found That Source Code is a Component of Reddwerks' Software.

Recognizing that it waived its late-breaking argument, Fortis misleadingly asserts that “the Superior Court found that [] ‘source code’ was a form of Company Products.” AB 3. The trial court did no such thing. Rather, it adopted the theory that Fortis had introduced just before trial: that “Company Products” included the components of products identified on the List, including lines of source code. Op. 49, 52. Unsurprisingly, the court described “source code” as “the very component necessary to make Reddwerks’ software functionalities operate.” Op. 49.

Fortis now strives to distinguish that determination by arguing: “[t]he Superior Court did not (as Dematic suggests) find that source code is a component of software. Rather, the Superior Court found that ‘source code’ was a component of the ‘functionalities’ provided to customers by Reddwerks software.” AB 18 n.58. This thin distinction does not rescue Fortis’ argument. The court explained that “Reddwerks’ software consisted of thousands of lines of source code that operated together to perform complex functions” and “[t]hese functions were combined and sold in so-called ‘modules,’” which were the software products identified on the List. Op. 49. In other words, source code is a component of functions, and functions

are a component of the software products on the List. Fortis’ parsing does nothing to change the fact that the court correctly determined that lines of source code are components of the software underlying Reddwerks’ products—*i.e.*, a subcomponent of Company Products. They are not the product itself, or an alternate form of the product.

3. Source Code Is Indeed a Component of Software.

While Fortis chastises Dematic for suggesting that source code is a component of Reddwerks’ software, there is nothing controversial about that statement. Software is the end-product of a compilation of source code. That is how the term is understood in the industry,² and how the parties understood it.³ The record is replete with testimony from witnesses reiterating this truism.⁴

² See, e.g., *Pyrotechnics Mgmt., Inc. v. XFX Pyrotechnics LLC*, 38 F.4th 331, 336 (3d Cir. 2022) (describing source code as “the human-readable statements...that make up a computer program”).

³ See, e.g., AR069 (“[T]he 50 software modules are composed almost entirely of source code.”); *id.* at n.14 (relying on testimony that “[y]ou cannot have a software product without those individual lines of source code”); A2713.

⁴ See, e.g., *Tr. II (Rogers)* 205:20–206:10 (A2632) (“We were selling functionalities, that is correct, which are caused by the lines of code that caused those functionalities to exist.”); *Tr. III (Gill)* 53:19-23 (B508) (“[A]n engineer writes source code, writes a number of different lines of source code. That source code is combined, compiled into code that a computer then runs to provide the functionality that you see on the floor of a distribution center.”); *Tr. III (Easson)* 161:7-9 (B535) (“an individual line of code is useless to anybody unless it’s part of a broader solution, which is many lines of code”); Ramirez Dep. Tr. 57:8-9 (B325) (“I don’t want to get too esoteric, but, like, lines of source code create software product.”).

4. Source Code Is Not Company Product In Source Code Form.

Fortis' latest argument—that “source code for Company Product is Company Product in source code form”—conflates two separate concepts: source code and source code form. “Source code” is the human-readable language that programmers use to write a software program.⁵ Software is comprised of lines of source code that operate together to perform a task.⁶ Each individual line of code that makes up a software program is source code, even though the individual line of source code standing alone cannot make the software program run. A Company Product “in source code *form*,” however, is the written expression of *all the lines* of source code that comprise a software program—if a programmer compiled all those lines, they *could* make the software program run.

Given that critical distinction, Fortis is, of course, correct that a Company Product can be expressed in “source code form.” This would only mean the written expression of *all* the thousands of lines of source code constituting the Company Product. Anything less than the full compilation of source code would not be a

⁵ See SOURCE CODE, Black’s Law Dictionary (11th ed. 2019); *Pyrotechnics*, 38 F.4th at 336.

⁶ See, e.g., *AtPac, Inc. v. Aptitude Sols., Inc.*, 787 F. Supp. 2d 1108, 1114 (E.D. Cal. 2011) (“Literal components [of computer programs] include source codes and object codes and non-literal components include the software’s structure, organization, and user interface.”).

Company Product in source code (or any) form; it would just be individual lines of source code.

Importantly, no party contends that Dematic ever took the complete “Company Product in source code form” (e.g., all the source code comprising the functionality itself), and incorporated it into a Dematic product during the Earn-Out Period without allocating the appropriate Order Intake amount to Reddwerks for the sale of that incorporated Company Product. Rather, this dispute has always been about Fortis’ claim that Dematic integrated discrete lines of source code (comprising *less* than the entire Company Product code) without crediting Reddwerks for the supposed value of those lines of code. Therefore, Fortis’ new theory does not help its argument. Indeed, by pinning its claim on the integration of source code only when it is in Company Product form, Fortis has conceded that the splicing of separate lines of source code that do not together “form” a Company Product is not covered by the Agreement’s Order Intake provision.

5. The Plain Language of the Agreement Does Not Demonstrate That Source Code Is a Form of Company Product.

Finally, Fortis claims that the plain language of the Agreement demonstrates that “source code for Company Product is Company Product in source code form.” The two provisions cited by Fortis do no such thing. *First*, Fortis highlights Reddwerks’ representation in §4.12(h) that “[n]one of the Company Products use,

incorporate or are distributed with any Open Source Software...in a manner that...would require the *Company Product be made generally available in source code form.*” A145 (emphasis added). *Second*, Fortis underscores Reddwerks’ representation in §4.12(j) that “neither the Company nor any Subsidiary thereof has disclosed, delivered or licensed...any *Company Products to any third party in source code form.*” *Id.* (emphasis added). All these citations establish is the uncontroversial reality that Reddwerks’ software products (like all software products) can be expressed in source code form. But they do not establish that anything less than the full compilation of a Company Product’s source code can be deemed a Company Product.

Because Reddwerks’ source code is a component of Reddwerks’ software, not the software itself, the Superior Court reversibly erred by concluding that lines of source are “Company Products.”

B. Source Code Cannot Be a Company Product Because It Was Never Delivered to Reddwerks’ Customers.

Even if the Superior Court correctly determined that the Company Products List is ambiguous, that does not render the entire definition of “Company Products” ambiguous. Regardless of how the List is interpreted, source code can never satisfy the definition of “Company Products” because Reddwerks never “distributed or offered” source code to its customers.

Although placed in the forefront of Dematic’s Opening Brief, Fortis fails to address the blatant discrepancy between Reddwerks’ representation in §4.12(j) of the Agreement that it never distributed any Company Products in source code form, and the court’s determination that Reddwerks had “distributed” source code merely because it was “within” Reddwerks software products. OB 27-28.

Section 4.12(j) provides that:

Except confidential disclosure to employees and contractors...**neither the Company nor any Subsidiary thereof has *disclosed, delivered or licensed, or has a Liability, duty or obligation (whether present, contingent, or otherwise) to disclose, deliver or license, any Company Products to any third party in source code form.***

A145 (emphases added). This representation assured Dematic that the value of the intellectual property it was purchasing was protected.⁷

Overlooking both the plain language and purpose of that representation, the Superior Court concluded that “Reddwerks ‘distributed’ source code to customers whenever they purchased Reddwerks’ software modules.” Op. 53. If that conclusion were correct, it would mean that Reddwerks’ promise in §4.12(j) was a

⁷ See *Model Stock Purchase Agreement* § 3.22 at 177 (Am. Bar Ass’n 2010) (explaining the purpose of a representation like §4.12(j) is to “allow Buyer to determine whether the source code is, and can continue to be, maintained as a trade secret”); *Airframe Sys., Inc. v. L-3 Commc’ns*, 2006 WL 2588016, at *1 (S.D.N.Y. Sept. 6, 2006) (“Software developers guard their source code as highly proprietary technology” so “typically license source code only in exchange for a substantial consideration”).

knowing misrepresentation. Any such contract construction should be rejected. *Veloric v. J.G. Wentworth, Inc.*, 2014 WL 4639217, at *13 (Del. Ch. Sept. 18, 2014).

In seeking to escape the court's demonstrably incorrect position, Fortis inexplicably adopted its newest interpretation that runs even more frontally into conflict with §4.12(j). AB 23. Whereas Reddwerks promised in the Agreement that it *never* delivered "Company Products...in source code form," A145, Fortis' Answering Brief contends that, to the contrary, every delivery of Company Products is a delivery of "Company Product in source code form." AB 23-24. These two positions are explicitly contradictory and irreconcilable, and Fortis' Answering Brief nowhere explains how this conflict could ever be resolved. That Fortis is compelled to advance its latest interpretation despite its facial incompatibility with Reddwerks' explicit representation confirms that the trial court's interpretation is unsupportable, and that Fortis' alternative theory is unreasonable.

Relatedly, Fortis claims that Reddwerks "distributed or offered" its source code to customers at the time of the merger because Reddwerks identified twenty-three source code escrow agreements on §4.11(a) of the Disclosure Schedules. But the very existence of these agreements thwarts Fortis' argument, because the express purpose of placing something in escrow is to avoid delivering it to the end-party

customer.⁸ Software companies use escrow agreements “to ensure that a [customer] can obtain source code in the event that the [software company] is unable or unwilling to provide necessary technical support, but without releasing the source code until such time as it is necessary.” Peter C. Quittmeyer et al., 3 *Computer Software Agreements: Forms and Commentary* § 17:1 (July 2023). Escrow agreements would be unnecessary if a company was already delivering its product in “source code form.”

The Superior Court reversibly erred in finding that Reddwerks “distributed or offered” source code to its customers at the time of the merger.

C. Source Code Is Not a Company Product Because It Is Not On the Company Products List.

Reasoning from the supposed imprecision in the naming of products on the Company Products List, the Superior Court concluded that the List is ambiguous such that Dematic’s interpretation (*i.e.*, “Company Products” is limited to products identified on the List) and Fortis’ interpretation advanced at trial (*i.e.*, “Company Products” *also* includes components of products on the List) were both reasonable.

⁸ *Corporate Counsel’s Guide to Software Transactions* § 8:2 (Apr. 2023) (“The idea behind a source code escrow is to convince the software developer/owner to entrust the source code to a neutral party that is not in the software business.”).

Op. 52. To reach that result, the court erroneously created an ambiguity where none existed.

A “contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.” *Rhone-Poulenc*, 616 A.2d at 1196. Here, the descriptions on the Company Products List have only one reasonable meaning.

1. Dematic Offers the Only Reasonable Interpretation of the List.

As explained in Dematic’s Opening Brief, both the plain language of the Agreement and the commercial context make clear that “Company Products” includes only those products identified on the List. OB 24-27. There was no contractual basis for the court’s decision to add “source code,” which is not a product but simply a component of a product. Tellingly, Fortis no longer defends the court’s finding that source code is a component of Reddwerks’ products.

Instead, Fortis argues that “[t]he specific forms, variations, expressions, and translations of the listed modules and products” cannot be understood without extrinsic evidence. AB 14. But Fortis puts the cart before the horse: courts may look to extrinsic evidence only if there is an ambiguity. *Cincinnati SMSA Ltd. P’ship v. Cincinnati Cellular Sys. Co.*, 1997 WL 525873, at *4, *aff’d*, 708 A.2d 989 (Del. 1998). Only if the form or expression of the “listed modules and products” is one that was “distributed or offered” to Reddwerks’ customers at the time of the merger

would that form or expression of the product fit within the definition of Company Products. Fortis does nothing to show that the List is subject to conflicting meanings.

2. Reddwerks' Software Products Are Unambiguously Defined by their Functionality.

Next, Fortis argues that Dematic's invocation of "functionality" to define "what *was* and *was not* Company Products is explicit acknowledgement that the term 'Company Products' is ambiguous." AB 22 (emphasis in original). Fortis notes that the term "functionality" does not appear on the List, so it contends that "defining Company Products to include 'functionality' requires the same allegedly improper enlargement as defining Company Products to include 'source code.'" *Id.* Again, Fortis is wrong. Defining Reddwerks' software products by their functionality is the only reasonable interpretation of the List.

Dematic relied upon the functionality concept because the listed products are undisputedly named according to the function they perform. A301 (listing Reddwerks' products like "Trailer Cubing," "Inventory Move," and "Cycle Counting"). Fortis admitted as much in the Pre-Trial Order and through its witnesses' trial testimony.⁹ The Superior Court also acknowledged that the List

⁹ AR005 ("Company Products in the Merger Agreement is not an inventory of off-the-shelf widgets. Rather, it is an industry standard description for packages of functionalities."); *Tr. II (Rogers)* 204:9-16 (B478): ("Q. What was your understanding of why this Reddwerks products list was attached? A. Because these

named the software products according to their “software ‘*functionalities*,’ that is, *various functions that Reddwerks’ software accomplished.*” Op. 7 (emphases added). These concessions alone demonstrate that the descriptions on the List are not ambiguous.

Undeterred, Fortis claims that a reasonable person would need to consult extrinsic information to “understand and appreciate the fundamental character or scope of a named product.” AB 17. But the standard is not what a reasonable person would have thought. The standard is “what a reasonable person *in the position of the parties* would have thought the term meant.” *Rhone-Poulenc*, 616 A.2d at 1196 (emphasis added). Here, Fortis concedes that “Reddwerks and Dematic referred to Company Products generally by the names used to market those Company Products to customers.” AB 17. If Reddwerks’ customers understood the product they were purchasing based on the names used on the List, so too would a reasonable person in the position of the parties.

3. Dematic’s Interpretation of the List Is Consistent with §3.1(h) of the Agreement.

Finally, Fortis argues that Dematic’s interpretation of Company Products would render §3.1(h)(i) of the Agreement meaningless because that provision could

were functionalities that our software did.... Dematic wanted to know what they were buying, and this was our best description.”).

only be satisfied by Dematic’s integration of a portion of Reddwerks’ source code into Dematic software. Yet again, Fortis is wrong. As explained in its Opening Brief, Dematic integrated Company Products when it bundled Dematic’s and Reddwerks’ products together in a sale. OB 30–31. When Dematic made such sales, it credited Earn-Out Consideration to Dematic-Reddwerks under §3.1(h)(vi). A1243; A2646-A2650; A615; A806.

The trial court reversibly erred in finding that the List was ambiguous and could reasonably be interpreted to include not only the products identified on the List, but also any amount of unlisted subcomponents of those products (including “source code”).

D. The Extrinsic Evidence Supports Dematic’s Interpretation of Company Products.

Even if this Court were to find the Agreement ambiguous, extrinsic evidence supports Dematic’s interpretation as the only reasonable one. For example, Dematic’s client contracts provide that the licenses “do[] not include a license to source code.” A321. Similarly, Dematic-Reddwerks’ client contracts from the Earn-Out Period state that “[t]he license hereunder does not include a license to source code.” A406; A843. Nevertheless, Fortis argues that the evidence establishing that source code was Company Product is “overwhelming” and “undisputed.” AB 24. This hyperbolic assertion must fail.

1. Dematic Has Consistently Interpreted Company Products as Functionalities.

Contrary to Fortis's assertion that "Dematic's answers to interrogatories are in direct conflict with its position at trial," throughout discovery, both Dematic and Fortis repeatedly defined Company Products with reference to functionalities, *not source code*. Dematic's interrogatory responses are consistent with that understanding. *See* Op. 8-9, 53; B191-B200. For instance, in its Fifth Amended Objections and Responses to Plaintiff's Interrogatories, Dematic refers to different versions of "software" that can be marketed or sold to a client based on the client's *functionality* needs. B197-98. Additionally, in response to Fortis' Interrogatory No. 5, which asked about Dematic's integration of Company Products, Dematic explained that "[e]ach Dematic iQ release added different or additional *functionality*." B196. This is consistent with Dematic's position that source code is not a Company Product. The measure of integration was functionality, not source code.¹⁰

¹⁰ Unsatisfied with the actual text of Dematic's interrogatory responses, Fortis proclaims that, with its interrogatory responses, "Dematic reveals that, whenever it deems necessary or convenient, it is willing to swear source code is Company Product." AB 27. Notably, the term "source code" does not appear in Dematic's interrogatory responses, and Fortis does not cite any response to support its misstatement.

Next, Fortis recites a series of bullet points supposedly describing Gill’s trial testimony, to support their position that “source code is and always was a Company Product within the meaning of the Agreement.” AB 25-28. The core flaw in this argument is that it relies on Fortis’ now-abandoned theory that source code is a Company Product because it is a component of Reddwerks’ software products, rather than its late-breaking theory that source code is just a *form* of Company Product. Indeed, the list of bullet points and the analysis that follows are copy-pasted from Fortis’ Opening Post Trial Brief, *compare* AB 25-28 *with* A2711-2714, which expressly advances the “component” theory, *supra* n.1. The inconsistencies in Fortis’ latest interpretation of Company Products further demonstrates that only Dematic’s interpretation is reasonable.

2. Dematic’s Under Armour Contract Does Not Encompass Company Product, and the Agreement Provides No Apportionment Mechanism to Account for Sales of Dematic Products Spliced with Reddwerks’ Source Code.

Fortis argues that Dematic integrated Reddwerks source code into its software “in order to deliver Reddwerks functionalities” to Under Armour during the Earn-Out Period, thereby making source code “Company Product.” AB 28. That is nonsensical. The Agreement achieves integration by bundling products, *see* §3.1(h)(iv). A124-125. But it does not provide a mechanism to apportion sales of Dematic products spliced with some lines of Reddwerks’ source code. *See* OB 32.

At trial, Andrew Gill explained that the Under Armour contract required Dematic to deliver Dematic iQ, a product that does not contain Reddwerks functionality. *Tr. III* at 86:10-87:8 (B516). At most, some of Dematic iQ’s functionalities were “derived directly or indirectly from Reddwerks source code.” AB 28 (quoting *Tr. III (Gill)* 89:8-89:13 (B517)). But that fact—that Dematic utilized some portion of Reddwerks’ source code—does not convert Dematic iQ into a Company Product. Lines of source code themselves are not Company Products, nor does the mere use of names suggestive of Reddwerks functionalities evidence that the contract sold Company Products. Under the Agreement, Dematic products that contain only components of a Company Product—*e.g.*, lines of source code that fall short of comprising the full functionality—do not contribute to the Order Intake amount. *See* OB § I.C.2(c).¹¹

In response, Fortis insists that “Agreement did *in fact* supply a method for calculating Order Intake Amount attributable to the sale of *any* Company Products,” namely the aggregate dollar value of “all Company Products” sold under contracts entered into during the Earn-Out Period. AB 29-30. Fortis further contends that

¹¹ Notably, the stand-alone Dematic-Reddwerks entity, run largely by Reddwerks’ former executives, primarily prepared the monthly accounting statements that were sent to Fortis during the Earn-Out Period. None of those Reddwerks executives ever suggested that individual lines of source code should have been allocated and accounted for in these statements. No one at the time believed that such source code allocation was part of the Order Intake process.

Dematic could have accounted for the sale of Company Products (including portions of Reddwerks' source code) because Reddwerks sold and priced its software on an "a-la-carte" basis and Dematic had access to Reddwerks' software pricing worksheets. *Id.*

Even if true, that does not support Fortis' argument that source code is Company Product. The argument tacitly presupposes that the complete source code underlying a Company Product (meaning the full functionality) would be embodied within a Dematic product. The pricing worksheet only lists prices for functionalities, not for situations where some, but not all, of a Company Products' source code is spliced with Dematic's products. B109. Fortis' argument fails because the only conduct at issue here involves splicing only individual lines of source code, *not* the entire corpus of source code required for a fully functionality. The extrinsic evidence supports only Dematic's interpretation of "Company Products." In holding otherwise, the trial court reversibly erred.

II. THE TRIAL COURT REVERSIBLY ERRED BY IMPOSING THE EVIDENTIARY PRESUMPTION SANCTION.

The trial court’s evidentiary sanction established that Fortis would be entitled to recover complete damages, without Fortis having to put forward any competent evidence of damages, or to demonstrate that Fortis had any non-speculative basis upon which to calculate damages. In its Opening Brief, Dematic showed that this was an abuse of discretion, requiring reversal. OB § II. Dematic’s brief further demonstrated that the trial court’s underlying thesis for imposing the sanction—the idea that Dematic had been improperly withholding discovery related to source code in the face of Fortis’ repeated requests for such material—was inconsistent with the *actual* procedural history, wherein Fortis first raised the issue of source code just a few months before trial. OB 17-18. Fortis’ Answering Brief answers neither of Dematic’s contentions. That concession by default alone is reason to vacate the trial court’s sanction ruling, and reverse.

Instead, Fortis responds by retreading its assertion that the trial court itself put forward that the sanctions were appropriately tailored, because they were contingent on the trial court accepting Fortis’ legal interpretation of “Company Products.” But this response is neither relevant nor persuasive.

A. Fortis fails to respond to Dematic’s arguments.

The prejudicial impact of the trial court’s mischaracterization of the discovery record is manifest. Fortis implicitly conceded that it *never* raised source code in any

discovery request until just before the Gill deposition. Nevertheless, the trial court’s opinion denying Dematic’s request for an interlocutory appeal of its sanctions order plainly begins with, and is premised on, the demonstrably incorrect assertion that “[f]rom the outset of this case, Fortis focused its discovery efforts on determining how Dematic integrated Reddwerks products, *including its source code*, into Dematic’s software.” B356 (emphasis added); A2614-15 (describing the trial court’s understanding—which it candidly observed “may well be a misunderstanding”—that the parties’ dispute had always turned on whether “Dematic products that simply integrated a portion of Reddwerks’ source code” are Company Products). Of course, that is not accurate, which explains why even Fortis does not take this position on this appeal. Before this Court, Fortis asserts only that “[f]rom the inception of this case, Fortis sought documents related to the integration of Reddwerks Company Products software into Dematic products and services.” AB 1; *see also id.* 12-13 (arguing vaguely that Dematic “failed to produce evidence of its integration of Company Products”). Notably absent from the record citations is any reference to source code.

Indeed, despite (i) Dematic having dedicated five pages of its brief to detailing, motion-by-motion, the fact that Fortis never raised source code as an issue until just before filing its third sanctions motion that generated the evidentiary presumption, OB 14-18, and (ii) Dematic *explicitly* calling Fortis out for

“[d]isregarding the record, [to] claim[] that information about merging Reddwerks source code had been what Fortis had always sought,” *id.* 18, Fortis does not even address, let alone attempt to rebut, Dematic’s position. Fortis’ failure to respond to Dematic’s factual argument—especially where Dematic devoted such rigorous attention to it—tacitly concedes the merits of that argument. *City of Wilmington v. Goldstein*, 1986 WL 7990, at *2 (Del. June 26, 1986) (holding that a party “tacitly concede[d]” an argument he “did not respond to”); *The Fed. Land Bank of Baltimore v. Pusey*, 1986 WL 9041, at *5 (Del. Super. July 21, 1986) (holding that “failure to respond” to arguments is “a concession on the merits of those arguments”). Stated differently, even Fortis concedes that the trial court issued the sanctions based on a fundamental misunderstanding about what Fortis had been seeking (and, thus, what Dematic was reasonably on notice to produce). Therefore, the trial court’s sanction based on Dematic’s supposed “intentional” refusal to provide discovery is without evidentiary basis, and constitutes an abuse of discretion.¹²

¹² Fortis also fails to respond to Dematic’s argument (*see supra* at 24-25) that, given the absence from the Agreement of any mechanism to allocate the value of individual lines of source code, Fortis would have been unable to prove any non-speculative damages based on Dematic’s inclusion of some lines of Reddwerks’ source code in Dematic (or Dematic-Reddwerks) products. OB 35-39. If Fortis could identify any non-speculative method of apportionment rooted in the Agreement’s terms, then surely it would have identified it in opposition to Dematic’s insistence that no such methodology exists. Fortis’ silence concedes that none exist. But, the sanctions imposed by the trial court enabled Fortis to recover purely speculative damages. Where the record makes plain that Fortis could not have met even the low threshold for non-speculative damages for even a dollar of Fortis’ claimed injury, *see* OB 35-

B. Fortis' tailoring arguments are irrelevant, and anyway unconvincing.

Rather than attempt to support the trial court's findings with citations to the underlying record, Fortis merely regurgitates the trial court's own description of its tailoring and refers this Court to the trial court's unsupported "fact-based account" of the discovery process. AB 33. Ten of the eleven record citations in this section of Fortis' brief cite *exclusively* to the trial court's decisions. Fortis cannot resuscitate the trial court's erroneous decision by repeating, mantra-like, those same errors. Fortis' claim that the evidentiary presumption was tailored is non-responsive to the arguments Dematic actually made regarding the factual and legal shortcomings of the trial court's sanction.

Aside from irrelevance, Fortis' views of the court's supposed "master tailoring" are also wrong. Fortis contends that the court engaged in "master tailoring" because it conditioned the presumption on agreeing with Fortis' source-code theory. AB 37-38. But this is a red herring. If the trial court *did not* agree with Fortis' position regarding source code, the case would have been over as a matter of straightforward contract interpretation, and no damages calculations would be required. The only circumstance in which damages, and thus an evidentiary

40, the trial court's imposition of the evidentiary presumption in these circumstances was a further abuse of discretion, requiring reversal.

presumption about damages, would come into play is the one presented here—where the court accepts Fortis’ view of Company Products. In that case, the evidentiary presumption was not conditional or tailored at all; instead it guaranteed Fortis full recovery without requiring Fortis to make any evidentiary showing in support and with no viable means for Dematic to rebut the “presumption.” A2613-14. Put otherwise, because the presumption only operates in the context of a damages analysis where the court has already rejected Dematic’s contract interpretation, the supposed “tailoring” did not actually limit the sanction’s execution or reach. Because that one-sided presumption relieved Fortis of its burden of production and proof on damages, it was a reversible abuse of discretion.¹³

¹³ Fortis asserts that Dematic “argues that the sanction is an adverse inference” AB 36 n.109, whereas the trial court rejected that the evidentiary presumption was an adverse inference, *see* B362. To be clear, Dematic never claimed that the evidentiary presumption was an adverse inference. Instead it argues the limits of adverse inferences to urge that those same limits apply to the court’s sanction. The portion of the opinion cited by Fortis on this point highlights that a court may only issue an evidentiary presumption in the face of *more extreme* conduct than is present in this case—reckless or intentional destruction of discovery material. AB 36 n.109 (citing Op. 61 n.178). Even in those circumstances, a court cannot utilize a presumption to relieve the moving party of its burden of proof. OB 39-40. *A fortiori*, in the less egregious circumstances present here, the court was equally constrained from employing sanctions to circumvent Fortis’ evidentiary burden. Regrettably, that is what the trial court did.

III. THE TRIAL COURT REVERSIBLY ERRED BY PERMITTING FORTIS TO RECOVER THE EBITDA AND ORDER INTAKE AMOUNTS.

The trial court committed reversible error by concluding, based on an objectively erroneous reading of the record, that Fortis did not forfeit its right to seek recovery of the EBITDA amount that it had voluntarily relinquished to Dematic. Dematic's Opening Brief directly quoted the relevant correspondence wherein Dematic categorically rejected Fortis' attempt to reserve rights related to the calculation of the Contingent Consideration, and provisions of the Agreement showing that Fortis' transmission of the Joint Notice contractually conceded Dematic's right to recover the \$3 million EBITDA amount. OB 42-44. Given the clarity of the record supporting Dematic, Fortis is unable to respond in kind. Instead, Fortis merely asserts, without record support, that Dematic *did* consent to this reservation. And as a fallback contention, Fortis argues that the court's inversion of the factual record was not a mistake, but only a fact determination—to which this Court supposedly must defer—that Fortis' trial testimony was more credible than the undisputedly authentic contemporaneous documentary evidence. The problem with this argument is that the court never purported to make the determination Fortis suggests.

As for Dematic's argument that Fortis had no contractual right to challenge the Order Intake amount, Fortis sticks to its well-worn script. Unable to respond to

Dematic’s actual argument—that the trial court baselessly relieved Fortis of its obligation to appoint an accountant simply because Dematic did not move to appoint one first—Fortis refashions the argument into an unrecognizable strawman. Left unrebutted, yet again, are Dematic’s actual arguments.

A. EBITDA

The trial court concluded that “Dematic agreed to a reservation of rights” to Fortis to challenge the EBITDA calculation. As support, the trial court cited *only* the single record document reflecting the parties’ pre-Joint Notice emails, *see* AB 42 & 40 n.115 (citing A1274). In those emails Dematic repeatedly asserts, in no uncertain terms, that the Joint Notice “fully and finally resolves any dispute related to the *calculation* of the Earn Out Period EBITDA” and that the parties “acknowledge that Fortis is reserving its rights, *with the exception of the right to challenge the Earn-Out Period EBITDA*, which the parties have agreed is conclusive.” A1275. How Fortis can continue to insist otherwise in their opposition brief is inexplicable, especially since Fortis assiduously avoids explaining what else Dematic could have meant by its refusal of Fortis’ reservation.

Fortis fares no better arguing that, really, Fortis did not mean what the Joint Notice expressly said. First, Fortis’ argument turns entirely on the proposition that the Joint Notice—which on its face admits that the released funds were “owed in full” to Dematic—was sent as part of a “compromise” where Dematic accepted

Fortis’ reservation to challenge Dematic’s entitlement to those funds. AB 48. Apart from its implausibility, that argument doubly defies the record, which plainly shows that Dematic rejected that reservation, and also that Fortis *unilaterally* agreed to release the escrow amounts after Dematic made clear that it would sue for their release unless Fortis articulated a basis for continuing to withhold consent. Specifically, in response to Dematic’s notice that it would seek to interplead the escrow as a result of Fortis’ “refusal to perform under the merger agreement” and its “assertions without factual or legal basis,” Fortis replied on July 2, 2017 first asking for a call, only to cancel it the next day because Fortis was now “on board to release the escrow.” A1268-1270. Fortis made this offer unilaterally, without any “compromise” negotiations. In fact, Fortis did not even raise the idea *of any* reservations until three days later. A1278-1279.

Fortis’ argument further fails because, even taken on its terms, Fortis’ strained interpretation cannot escape the Notice’s plain language. Whatever the merit of Fortis’ claim that sending the Notice under §1.4(b) means that Fortis could release the funds without admitting to their liability for those funds,¹⁴ AB 47-51, Fortis

¹⁴ The Joint Notice, by its plain terms, was sent “pursuant to Section 1.4(c) of the Escrow Agreement”—not 1.4(b) or (d). §1.4(c) applies only where the seller has conceded liability for the claimed amount. So contrary to Fortis’ claim, when the joint notice uses that language, under § 1.4(c), that is a concession of liability *to the claimed amount*, not an agreement to pay over that amount while Fortis mulls over whether it really owes it.

nowhere explains why it wrote that the claimed amount “is owed in full to [Dematic],” A1272 (emphasis added), if Fortis really meant that the claimed amount was merely being paid under protest, and perhaps some other amount (or no amount) was owed. Fortis’ attempt to make this language vanish by claiming that the precise verbiage of the Joint Notice was mandated by the Agreement, *see* AB 49, is untenable. The key assertion that the amount was owed “in full” was added by Dematic and Fortis; those words *are not* included in the Form Notice in Annex III to the Agreement. *See* A219.

Unable to escape that the trial court erroneously misinterpreted the correspondence, Fortis falls back to asserting that “the Superior Court’s finding regarding the existence of a reservation of rights agreement between the parties was a factual finding” that credited the supposed testimony of Fortis CEO Rick Fink “that Dematic had agreed to the reservation of rights in favor of Fortis.” AB 50. The problem for Fortis is that neither the trial court or Fink said what Fortis claims they did.

To reiterate, the trial court relied solely on its mistaken interpretation of the record evidence to conclude that Dematic accepted Fortis’ reservation of rights to challenge the EBITDA calculation. But although the court references Fink’s testimony some 30 pages earlier, in the Fact section of its Opinion, when the court discusses Fortis’ reservation, it concludes only that Fortis *asserted* a reservation of

rights, not—as Fortis misleadingly asserts—that Dematic *accepted* it. Compare Op. 17 (“Instead, Fortis reserved its right to challenge the amount of Contingent Consideration to which it was entitled.” (citing *Tr. I (Fink)* 168-74 (B412-413)) with AB 50 (“Fortis CEO Rick Fink testified that Dematic had agreed to the reservation of rights in favor of Fortis, and the Superior Court cited this testimony with approval in support of its finding.” (citing Op. 17 & *Tr. I (Fink)* 148:20-151:14 (B407))). Fink’s testimony cited by the court says nothing about Dematic’s acceptance of Fortis’s reservation. His testimony was that “there was much email discussion and, say, a -- a reservation of rights on the part of Fortis on behalf of the company holders,” but not that that Dematic agreed to that reservation. (*Tr. I (Fink)* 149:17-150:12 (B407)).¹⁵ But, even if Fink did say what Fortis now pretends he said, there is no amount of self-serving testimony from Fortis that could overcome Dematic’s contemporaneous explicit *refusal* to agree to Fortis’ reservation.¹⁶ See, e.g., *Ray v.*

¹⁵ The other testimony that Fortis cites—never cited by the trial court—is no different. At best, that testimony confirms that Fortis *intended* to reserve rights or that the witness believed Dematic had agreed. *Tr. IV (Attebury)* 28:17-29:6 (B568). There is no testimony or documents supporting the idea that Dematic *actually* agreed to this reservation of rights.

¹⁶ The fact that Dematic agreed to “reserve[] any and all rights *on other issues*,” A127 (emphasis added), does not establish that Dematic agreed to the reservation of rights respecting calculations of the EBITDA amount. The opposite is true: Dematic’s limited agreement to reserve rights “on other issues” highlights that its agreement excluded certain subject matters, namely calculation disputes.

Williams, 2020 WL 1542028, at *21 (Del. Ch. Mar. 31, 2020) (rejecting as “not credible” “testimony [that] is inconsistent with contemporaneous documents”).

B. Order Intake

Dematic’s Opening Brief further showed that none of the five considerations the trial court relied upon to relieve Fortis of its contractual obligation to resolve disputes about the sufficiency of Dematic’s calculation of Contingent Consideration supported permitting Fortis to recover the entirety of the Order Intake Amount. OB § III. Dematic’s argument is straightforward: the parties contractually agreed to a process to resolve calculation disputes; Fortis sought to raise such a dispute but never initiated the mandated process; so accordingly, Fortis lost its ability to enforce the contractual right at issue. This argument is, and always was, about holding Fortis to the terms of the right it contracted for. Fortis negotiated for a Contingent Consideration subject to certain conditions, most relevant, the requirement to seek an accountant to resolve the calculation dispute. Fortis now attempts to advocate for a much broader (and more valuable) right to Contingent Consideration than it or Reddwerks bargained for—one with no preconditions. To be clear, Dematic did not argue that the trial court had no jurisdiction to resolve this contractual question. Rather, it claims that the court should have interpreted the scope of the contractual right to preclude Fortis’ effort to seek Contingent Consideration that it never subjected to the contractually agreed accountant test.

None of Fortis' responses—which either just parrot the court's holding or misconstrue Dematic's argument—are persuasive.

First, Fortis continues to claim that the calculation was the result of manifest error. AB 4, 39-40. But as established in Dematic's Opening Brief, and confirmed above, OB § I, *supra* § I, Dematic correctly did not treat individual lines of source code as Company Products, so its calculations were not the result of manifest error. *Second*, Fortis likewise continues to argue that the dispute “was not a dispute about the calculation but a dispute about contract interpretation,” and thus was not subject to the accountant requirement. AB 44. But Fortis has no response to Dematic's identification of contemporaneous communications wherein Fortis itself asserted the existence of a calculation dispute, A1480-A1481, except to dismiss the correspondence as “ambiguous.” AB 44. *Third*, Fortis offers no justification for the trial court interpreting the Agreement to require Dematic to appoint an accountant to audit Dematic's own calculations, even though Fortis should have but failed to take such steps. Unable to justify that topsy-turvy result, Fortis pretends that Dematic argued something entirely different, namely that the Agreement gives Dematic the right to refuse to participate even in an audit that Fortis *does* initiate. That is not Dematic's position, and Fortis fails entirely to respond to Dematic's actual argument. *Finally*, despite Dematic expressly disclaiming any jurisdictional element to the defense, Fortis echoes the trial court's conclusion that Dematic was

actually asserting an alternative forum for resolution of the dispute—a forum that Dematic waived by failing to raise the “jurisdictional” argument sooner. AB 45-46. As earlier explained, Dematic’s claim is not one of jurisdiction, but rather of the scope of the contractual right to Contingent Consideration. None of the cases Fortis cites (which all concern arbitration clauses, AB 46 n.134), speak to Dematic’s argument that it did not waive its right to insist on the contractual right it bargained for.¹⁷

¹⁷ *James J. Gory Mech. Contracting, Inc. v. BPG Residential Partners V, LLC*, 2011 WL 6935279, at *3 (Del. Ch. Dec. 30, 2011) (“[W]aivers of contractual rights are not lightly found” and “must be unequivocal.”); *Vill. Green Holding, LLC v. Holtzman*, 2018 WL 4849964, at *7 (Del. Ch. Oct. 5, 2018) (“The ongoing litigation of distinct rights...does not constitute waiver of Plaintiff’s contractual [] rights.”).

IV. THE TRIAL COURT REVERSIBLY ERRED BY REJECTING DEMATIC’S COUNTERCLAIM.

The trial court rejected Dematic’s counterclaim regarding the PTL wiring defect having concluded that Dematic failed to show at trial that anyone at Reddwerks actually knew about the defect. This, too, was reversible error. Fortis concedes in its Answering Brief that actual knowledge *is not* the standard for Knowledge required by the Agreement. Rather, as Fortis is forced to admit, §1.1(xx) of the Agreement defines Knowledge as what the enumerated Reddwerks officers would have known “after reasonable inquiry.” Nothing in the trial court’s decision, however, reflects whether this “reasonable inquiry” was made. The Opinion speaks only in terms of the lack of actual knowledge.¹⁸ That alone requires reversal.

Moreover, as Dematic showed in its Opening Brief, the evidence at trial affirmatively establishes Dematic’s right to indemnification. The record shows that had Reddwerks officers made the requisite inquiry, they would have actually learned of the PTL defect, meaning that Reddwerks as a matter of contract had Knowledge of the defect.¹⁹ Because the PTL defect that Reddwerks had contractual Knowledge of unquestionably *could have* been the basis for a “future...complaint, claim, or

¹⁸ The trial court’s Opinion never even cites §1.1(xx)’s definition of Knowledge.

¹⁹ In a particularly confused section of Fortis’ Answering Brief, it describes this imputed knowledge as “an evidentiary presumption.” AB 53. It isn’t. It is a function of the Agreement’s terms, which are incorporated into §4.28.

demand...giving rise to any Liability” (itself broadly defined to include “any...loss...cost or expense”), Reddwerks breached the §4.28 warranty, and was liable to indemnify Dematic under §7.1(a) for the cost of the PTL repairs.

Fortis’ response—which already gives away the game by conceding that the court misapplied the controlling contractual standard for Knowledge—is high on rhetoric but bereft of substance.

First, Fortis claims that the PTL counterclaim was not preserved at the trial court level. To the contrary, although the court asserted that Dematic had not articulated the argument as clearly as it could, Dematic squarely raised the arguments at trial and in its post-trial briefing, A2729-A2730. That is sufficient to preserve the argument. *See Holifield v. XRI Inv. Holdings LLC*, 2023 WL 5761367, at *31 (Del. Sept. 7, 2023) (holding that claims are preserved where, as here, the party making the claim “noted the issue in its operative complaint and in post-trial briefing and argument”). Notably, the court itself clearly *did not* find the argument waived; it expressly addressed and rejected Dematic’s §4.28 argument on the merits. Op. 69-70. As this Court has explained, Rule 8’s preservation “rule is based on the notion 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.’” *Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017) (quoting 5 Am. Jur. 2D *Appellate Review* § 618 (2016)). But here, the trial court was given ample opportunity to consider

Dematic's counterclaim, and did so in detail. It would be decidedly unfair to litigants if a trial court's criticism of the litigant's briefing could immunize the court's merits analysis from appellate review.

Forced to confront Dematic's argument on the merits, Fortis (once again) tries to divert attention from the contractual language by misconstruing it. Fortis argues that the court held that Dematic failed to establish that Reddwerks had "any material Liability or material obligation for replacement or repair." But that holding related only to Dematic's claim under §4.7(d), not §4.28. In §4.28, Reddwerks promised that, to its Knowledge, "*there is no basis* for any present or future...charge, complaint, claim, or demand...giving rise to any Liability[] for replacement or repair of any Company Product or other damages in connection therewith" A156 (emphasis added). Fortis contends that to trigger the warranty, Dematic needed (and failed) to prove that the PTL defect "*is* a basis for and *will* result" in such a future claim. AB 56 (emphasis added). Fortis has it backwards. Because Fortis promised that there was *no basis* for such a claim, all Dematic needed to show is that Reddwerks Knew facts that *could be* a basis for such a future claim. The PTL defect meets that standard.

The remainder of Fortis' opposition amounts to a plea for a remand rather than an outright reversal. Because the trial court plainly relied on the incorrect premise that actual knowledge *vel non* was required under the Agreement, the PTL defect—

if substantiated and found subject to Reddwerks’ constructive Knowledge—would render the §4.28 warranty false. So Fortis argues that the trial court merely assumed—but never concluded—that the PTL was in fact defective. Although true, that does not support affirmance, both because the record is replete with evidence upon which this Court can rely that establishes the existence of the PTL defect,²⁰ and because the court likewise never found there was *no* defect. Of the same piece, Fortis contends that the trial court never found the PTL defect to be discoverable upon reasonable inquiry. AB 55. Again, this argument—while similarly incorrect²¹—only identifies yet another finding that the court should have, but failed, to make before rejecting Dematic’s counterclaim. Finally, the same reasoning responds to Fortis’ argument that the trial court never concluded that the over \$5

²⁰ A1303-04; A2641; A2730; A1244-A1245.

²¹ The record abundantly evidences that the defect was obvious upon reasonable inquiry. Dematic’s Opening Brief cited uncontroverted evidence showing that Dematic’s engineers identified the defect mere months after closing, on their first facility visit. OB 10; *see* A2730; A1244-A1245. Fortis’ response is simply to ask rhetorically why Dematic did not find this defect during due diligence. AB 55. But the only evidence Fortis cites regarding Dematic’s diligence access does not support Fortis’ claim that Dematic had the necessary access to identify these defects. Fortis references trial testimony by Dyke Rogers, Reddwerks’ Board chairman, who was not personally involved in the diligence. *Tr. II* 65:15-66:20 (B443). Rogers merely testified that he *thought* Dematic looked at the PTL “test racks in our offices” (not in the facilities) and *thought* Dematic “looked at everything” and “s[aw] the actual layout and operation of the light system” at “customer locations.” *Tr. II* 67-68 (B443-444). He does not testify that Dematic actually got to inspect customer locations, or that he had personal knowledge of those inspections.

million Dematic had to spend to repair the PTL defect was causally related to the PTL defect that breached the warranty. Although the evidence is more than sufficient to establish the necessary nexus,²² Fortis' argument at most is a plea for a remand; in no event can it support affirmance.

Because this Court may decide based on its own review of the record, *Gamles Corp. v. Gibson*, 939 A.2d 1269, 1274 (Del. 2007), it should reverse and enter judgment for Dematic for the \$5 million in indemnification. But should the Court have any doubts, Fortis' arguments preclude affirmance, and require remand for further fact development.

²² A2619; A1245-1246; *Tr. V (Vanderwiel)* 78:18-21 (B653); R. Carlson Dep Tr. 211:12-212:10, 214:2-14 (AR050-053).

ARGUMENT ON CROSS-APPEAL

V. THE SUPERIOR COURT DID NOT ERR WHEN IT GRANTED A SETOFF TO INDEMNIFY DEMATIC FOR LOSSES IT INCURRED IN CONNECTION WITH THE STOCKHOLDER APPRAISAL SUIT.

A. Question Presented

Did the Superior Court err by placing the burden of proof on the wrong party and granting a setoff to indemnify Dematic for losses it incurred in connection with the *D'Angela* stockholder appraisal suit?

B. Scope of Review

The Court “review[s] questions of contract interpretation *de novo*.” *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 760 (Del. 2022). Findings of fact are reviewed for clear error. *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

C. Merits of the Argument

Fortis incorrectly argues that the Superior Court placed the burden on Fortis to prove that the setoff was unreasonable, rather than on Dematic to prove that it was reasonable. Although the court did not expressly impose the burden on Dematic, its analysis clearly relied upon evidence presented by Dematic in concluding that the amount was reasonable, establishing that Dematic carried whatever burden it may have had to prove that the setoff was reasonable.²³ The fact that the court mentioned

²³ Fortis is doubly wrong that the Agreement imposed a reasonableness standard on the *D'Angela* loss. AB 58-59. First, §7.1(a) requires that legal fees and expenses be reasonable, not the settlement consideration itself. (A163). And Fortis does not dispute that the Agreement gives Dematic “sole discretion” to “to defend and settle”

Fortis's failure to offer evidence to the contrary does not constitute an erroneous burden shift.

Fortis further argues that Dematic failed to offer evidence of the reasonableness of the legal fees paid in connection with the *D'Angela* stockholder appraisal suit. Fortis is mistaken. In its Opinion, the court cited testimony sufficient to support the conclusion that the settlement amount and associated attorneys' fees were reasonable, and Fortis's own brief references evidence offered by Dematic in support of the setoff for legal fees.

1. The Trial Court Did Not Misplace the Burden of Proof on Fortis, and Any Misstatement of Burden Allocation Was Harmless Error Because the Record Supports That the Fees Were Reasonable.

Section 7.1(a)(iii) of the Agreement entitles Dematic to indemnification for "any loss..., Liability..., damage or expense (including reasonable legal, accounting, and professional services expenses and costs incurred in the

the *D'Angela* litigation. §7.3(b) (A167); *Tr. II (Rogers)* 225:5-14 (B483) (recognizing same). Second, the parties agreed that Fortis had "no right to and shall not dispute" Dematic's claim of loss for that litigation, A199 (Escrow Agreement §1.4(b)), and the cross-referenced sections of the Agreement and Escrow Agreement addressing this issue must be read together. Fortis' contention that it is only restrained from challenging the settlement if Dematic sought reimbursement from the escrow is inconsistent with the Agreement, which recognizes Dematic's right to seek recovery from either Earn-Out or escrow. §7.6 (A170). It makes no sense that Fortis' right to challenge reasonableness would turn on what pool of money Dematic claimed indemnification from.

investigation, defense or settlement thereof....)” incurred as a result of “any Action asserted or brought against [Fortis] or [Dematic]” arising from “the exercise of any appraisal rights pursuant to the [Delaware General Corporation Law].” (A163).

The Superior Court did not explicitly state that Dematic had the burden to establish the reasonableness of the costs associated with the *D’Angela* Litigation. Op. 62-64. And although the court referenced Fortis’s failure to prove “by a preponderance of the evidence that the settlement amount was unreasonable,” Op. 64, it did not impose the burden of proof on Fortis. Rather, the court correctly placed the burden on Dematic to prove that the setoff amount was reasonable, and further explained that Fortis did not develop any evidence to rebut that sufficient showing. Op. 64.

Courts routinely find that even misstating a legal standard is a harmless error so long as the correct legal standard is applied. *See, e.g., Wainaina v. Bayshore Ford Truck, Inc.*, 2013 WL 5755636, at *1 (Del. Super. Oct. 10, 2013) (“[T]he court’s] error in recitation was harmless...as it did not affect the Court’s analysis. It is evident from the body of the order that this Court applied the correct...standard of review.”); *Briones v. Conagra/Perdue Farms*, 1998 WL 110094, at *1 (Del. Super. Jan. 7, 1998) (concluding that the application of the incorrect legal standard was harmless because there was a substantial factual and legal basis to support the Board’s factual findings).

Here, the court’s error, if it can even be called that, is merely one of omission: it failed to expressly state the (obvious) point that Dematic bears the burden of proof associated with its own claim related to the *D’Angela* Litigation. The Opinion makes plain, however, that the court was cognizant of this allocation, as its analysis relied on affirmative trial testimony from Matthew Carlson, Dematic’s senior director of global accounting, in concluding that Dematic was “entitled to indemnification in the total amount of the settlement and associated attorneys’ fees.” Op. 64. Carlson testified “that he authorized the settlement amount in consultation with Dematic’s executives and lawyers and that the amount authorized was consistent with Dematic’s estimates during due diligence regarding the likely cost of resolving the *D’Angela* Litigation.” *Id.* (citing *Tr. V* 158-166 (B673-675)). Only thereafter did the court observe that “Fortis did nothing to rebut this testimony” and had “not proved by a preponderance of the evidence that the settlement amount was unreasonable,” *id.* 64-65, a statement that did not impact its conclusion that Dematic put forward sufficient evidence to support the reasonableness of the setoff.

Fortis’ argument that reversal is warranted because Dematic did not offer specific categories of evidence set forth in Delaware Lawyers Rule of Professional Conduct 1.5(a) is incorrect and hardly constitutes error. AB 62-63; *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 878-79 (Del. 2015). A court need only “consider the Rule 1.5(a) factors as a guide and then exercise its discretion in

reaching a reasonable fee award, acknowledging that ‘mathematical precision’ is neither necessary nor readily achievable.” *Macrophage Therapeutics, Inc. v. Goldberg*, 2021 WL 5863461, at *2 (Del. Ch. Dec. 10, 2021). Here, Dematic adequately supported the reasonableness of what, in the context of stockholder suits, was a modest settlement in *D’Angela*. In fact, Carlson explicitly testified that, in consultation with “a team of professionals” with whom he “discuss[ed] this settlement,” he concluded that similar claims typically settle for “2 to 3 million,” making the \$1.5 million total (including legal fees) Dematic spent to settle *D’Angela* reasonable and appropriate. *Tr. V* 163, 165 (B674-75). Moreover, as Fortis itself notes, Dematic further offered billing statements at trial, establishing that its legal fees were “actually paid or incurred.” *Creel v. Ecolab, Inc.*, 2018 WL 5733382, at *10 (Del. Ch. Oct. 31, 2018). Based on the record, the trial court acted clearly within its discretion in concluding that the setoff amount was reasonable. Because Fortis has not and cannot show clear error, the Court should affirm the trial court’s setoff.

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Dated: October 16, 2023

CERTIFICATE OF SERVICE

I, Lakshmi A. Muthu, Esquire, hereby certify that on October 16, 2023
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