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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LG ELECTRONICS INC., Plaintiff Below, Appellant/Cross-Appellee, v. INVENTION INVESTMENT FUND I, L.P., INVENTION INVESTMENT FUND II, LLC, INTELLECTUAL VENTURES I LLC, and INTELLECTUAL VENTURES II LLC, Defendants Below, Appellees/Cross-Appellants.	No. 243,2025 On Appeal from the Superior Court of the State of Delaware, C.A. No. N22C-11-145 SKR-CCLD **REDACTED PUBLIC VERSION FILED ON AUGUST 6, 2025**

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

In November 2022, LG Electronics Inc. ("LG") sued Invention Investment Fund I, L.P.; Invention Investment Fund II, LLC; Intellectual Ventures I LLC; and Intellectual Ventures II LLC (collectively, "IV") in the Superior Court. [D.I. 1.] LG's complaint alleged, *inter alia*, that IV breached the parties' Patent License Agreement ("Agreement") by filing patent infringement lawsuits against LG's customers—GM and Toyota—for using LG's products. [*Id*.]

In August and September 2024, the Superior Court granted-in-part and denied-in-part the parties' summary judgment motions. [D.I. 319, 331.] In its Memorandum Opinion (**Exhibit A**), the court, *inter alia*, capped LG's damages and IV's liability at $[redacted]. [A316-317.]

At the conclusion of a trial on October 14-18, 2024, [D.I. 454], the jury found that IV breached the Agreement and awarded $17,233,884 in damages to LG, [D.I. 408].

On May 15, 2025, the Superior Court issued four Memorandum Opinions addressing post-trial motions. Two of these opinions denied IV's post-trial motions on liability. [D.I. 468, 470.] A third opinion (**Exhibit B**) imposed a lower damages cap which reduced LG's damages from $17,233,884 to $[redacted]. [A597-608.] The fourth opinion (**Exhibit C**) denied LG's requests for prejudgment interest, costs,

[redacted]

and attorneys' fees, but granted post-judgment interest. [A583-596.]

On May 27, 2025, the Superior Court entered Final Judgment (**Exhibit D**). [A609-610.] LG timely appealed, and IV cross-appealed. [D.I. 480, 483.]

[redacted]

SUMMARY OF ARGUMENT

1. The Superior Court erred in imposing a $[redacted] damages cap under the Agreement's §9.6.

A. Because §9.6's damages cap is an affirmative defense, IV waived this defense by not raising it in IV's responsive pleadings or discovery responses. The Superior Court erred in concluding that a damages limitation is not an affirmative defense, because §9.6's damages cap meets the definition of an affirmative defense. Further, Delaware precedent treats defenses which reduce damages—including contributory negligence and failure to mitigate—as waivable affirmative defenses. Beyond Delaware, the majority of federal circuit courts treat damages caps as waived affirmative defenses if not pled. And IV's assertion of its §9.6 defense for the first time on summary judgment prejudiced LG by preventing it from seeking discovery, developing case strategy, and devoting resources to the issue. Because Superior Court Rule 8(c) requires affirmative defenses to be pled, IV waived this defense.

B. The Superior Court compounded its error by letting IV raise a new second damages cap of $[redacted] on the last business day before trial and by adopting this second cap post-trial—contrary to judicial estoppel, the law-of-the-case doctrine, and the Pretrial Stipulation. Judicial estoppel applies here because

[redacted]

IV's second cap contradicts its summary judgment position, which successfully induced the Superior Court to adopt a $[redacted] cap at that stage. Likewise, the adoption of a $[redacted] cap at that earlier stage should control later stages under the law-of-the-case doctrine, especially since the facts underlying the earlier ruling did not change. And IV waived its second damages cap by not raising it in the Pretrial Stipulation. Relying on IV's blanket reservations of rights, as the court did, undermines the purposes of Superior Court Rule 16. Adopting IV's second cap was thus legal error.

C. The Superior Court misinterpreted §9.6 to limit LG's damages to the value of "IVIL Payment" ($[redacted]). The term "Party" in §9.6 does not mean ***either*** IVIL or III. The Agreement's preamble, instead, defines "Party" as Licensor or Licensee; "Licensee" as LG; and "Licensor" as "IVIL and III ***together***[.]"[1] The Superior Court's misinterpretation ignores textual context and other provisions, leads to absurd results, and is inconsistent with its own cited contract provisions. This misinterpretation further rewrites §9.6 and disregards §9.6's use of the term "License Fee," which §5.1 defines as $[redacted]. Thus, if the damages cap is not waived, it should be $[redacted], not $[redacted].

[1] Unless otherwise indicated, all emphases have been added, and all internal citations and internal quotation marks have been omitted.

[redacted]

2. The Superior Court erred in denying prejudgment interest.

A. Although the Superior Court invoked its supposed discretion to deny interest, prejudgment interest is awarded as a matter of right, not discretion, in actions at law. This Court so held decades ago and has repeatedly reaffirmed this holding, including in contract cases. While the Court of Chancery has broad discretion over prejudgment interest, the Superior Court does not, except in an inapplicable circumstance.

B. The Superior Court incorrectly reasoned that, because LG had not [redacted] to its customers out-of-pocket, LG was not deprived of money and awarding interest would be a windfall. But the court's three cited opinions do not support its decision, as none denied prejudgment interest for lack of out-of-pocket payments. The only Delaware breach-of-contract case addressing this issue sustained a prejudgment interest award despite no out-of-pocket expenses. Other jurisdictions have also rejected out-of-pocket payments as prerequisites for prejudgment interest. This Court should conclude likewise.

C. Permitting IV to avoid paying interest would be a windfall for IV, which has benefited from its breach at LG's detriment. In contrast, awarding prejudgment interest forces IV to relinquish ill-gotten gains, compensates LG for its lost opportunities, and incentivizes settlements rather than delays.

[redacted]

3. The Superior Court erred in denying costs by equating them with incidental damages and then applying §9.6. Its interpretation of §9.6 as precluding costs renders other clauses—including §4.4 and §5.4 that address costs—superfluous, and contravenes precedent indicating that costs and interests are exempt from contractual liability limits. Further, its cited cases are inapplicable as they awarded costs, denied them due to sovereign immunity, or are mere *dictum*. Even if costs were incidental damages, LG's costs are not based on a theory of liability under the Agreement as required by §9.6, but arise from LG's status as the prevailing party.

This Court should reverse the Superior Court's challenged rulings.

[redacted]

STATEMENT OF FACTS

I. The Agreement

LG is a global company known for consumer electronics products like televisions and appliances. [A425-426 (T.105:10-106:11).] LG also makes vehicle components, including "telematics units." [A426-427 (T.106:12-107:1).] Automotive manufacturers, including GM and Toyota, incorporate LG's telematics units into their vehicles to provide cellular connectivity, GPS, and/or Wi-Fi functionalities. [A427-433 (T.107:2-113:21).]

The IV defendants are Delaware entities that acquire and monetize patents. [A512-514 (T.647:4-649:3); A539-540 (T.1501:10-1502:6).] IV has acquired hundreds of thousands of patents, and has generated billions in revenue by asserting and licensing these patents. [A524-526 (T.801:21-803:18); A543-545 (T.1569-1571).]

In 2016-2017, IV filed patent infringement lawsuits in Germany against LG's customers for their use of LG's products. [A434-436 (T.121:13-123:6); A505-507 (T.351:23-353:16).] Although IV did not sue LG, IV's lawsuits triggered LG's indemnification obligations to these customers. [*Id.*]

To resolve these German lawsuits, protect its current and future customers, and avoid future IV-triggered indemnification obligations, LG entered into the

[redacted]

Agreement. [A437-438 (T.128:2-129:12); A507-508 (T.353:17-354:9).] Although the Agreement's signatories are LG and two IV-related entities named IV International Licensing ("IVIL") and Intellectual Ventures-Invention Investment Ireland ("III"), there is no dispute that the contract binds IV itself. [A540 (T.1502:7-10); A341-342.] In the Agreement, LG "secured patent peace" for LG's products "under all of IV's patents" by paying $[redacted]. [A436 (T.123:7-13); A437 (T.128:2-10); A215 §5.1.]

The Agreement implemented this "patent peace" through three key provisions. First, IV granted LG a license for IV's "Licensed Patents" to, *inter alia*, make and sell "Licensed Offerings," including LG products. [A212 §2.1.] Second, IV released LG's customers for their "use of Licensed Offerings prior to the Effective Date and during the Term" of the Agreement. [A214 §4.3(b).] Third, IV promised not to "take any action or omit to take any action that would prevent or hinder the exercise by [LG] of the license rights granted under this Agreement." [A220 §9.4.6.] The Agreement became effective in October 2019. [A211.]

II. IV's Texas Lawsuits Against LG's Customers

Just two years later, in October 2021, IV breached the Agreement by suing two LG customers—GM and Toyota—in Texas for patent infringement. [A438-439 (T.129:13-130:14).] Asserting licensed patents, IV targeted LG's telematics units

[redacted]

in GM's and Toyota's vehicles, as IV's corporate witness admitted. [A440-446 (T.131:7-137:16); A527 (T.810:8-12); A528 (T.814:2-18); A529-530 (T.826:6-827:18); A531-533 (T.856:14-858:21).] Leaving no doubt, IV's infringement contentions even included a picture of an LG telematics unit:

[A944 (yellow circle added); A454-455 (T.145:12-146:19); A456-458 (T.148:19-150:18).] Within days of IV's complaint filings, Toyota and GM contacted LG and triggered LG's indemnification obligations. [A446-453 (T.137:21-144:13); A498-499 (T.222:3-223:13).]

For months, LG tried to convince IV to withdraw its improper allegations. [A459-466 (T.151:3-158:14); A467-471 (T.167:4-171:15).] Between April and July 2022, LG communicated with IV's counsel over 20 times, and repeatedly emphasized the telematics units' licensed status and IV's violations of the

[redacted]

Agreement. [*Id.*] IV did not deny it accused LG's telematics units, but refused to withdraw its allegations against LG's products. [A465-466 (T.157:13-158:14); A470-471 (T.170:17-171:1).]

III. The Superior Court Proceedings and Trial

Out of options, LG filed its November 2022 complaint in the Superior Court. [A471-472 (T.171:16-172:19).] IV, however, continued to pursue GM and Toyota into the first half of 2023, ultimately extracting [redacted], for a total of [redacted]. [A472-475 (T.172:23-175:14); A520-523 (T.783:15-786:1); A537-538 (T.1369:19-1370:14).]

Due to IV's lawsuit, GM requested [redacted] in indemnification to cover portions of GM's settlement amount and defense expenses. [A476-489 (T.180:7-185:8, T.190:5-193:3); A937-938.] Toyota separately sought [redacted] in indemnification. [A490-493 (T.210:13-213:12); A936.] [redacted] [A494-499 (T.218:18-219:4, T.222:16-223:13); A503-504 (T.336:1-337:12).]

In June 2024, the parties filed dispositive motions. [D.I. 234-238, 241, 244.] Buried in a single paragraph among IV's six dispositive motions, IV asserted—for the first time—a damages cap defense absent from its responsive pleadings and

[redacted]

discovery responses. [A194-195.] The Superior Court granted-in-part and denied-in-part the parties' dispositive motions, [A297-298; A299-324], including by refusing to find waiver of IV's new damages cap defense, adopting IV's interpretation of the Agreement's §9.6, and capping LG's damages and IV's liability at $[redacted], [A316-317].

During the September 2024 final pretrial conference, the Superior Court ruled that the jury would not be informed about the $[redacted] damages cap. [A412-413 (30:11-31:2).] The court then entered the parties' Pretrial Stipulation as its pretrial order. [A325-382.] Trial was scheduled to commence on Monday, October 14, 2024. [D.I. 329.]

On Friday, October 11, 2024, just one business day before trial, IV argued for the first time that §9.6 capped damages at a lower amount ($[redacted]), ***not*** the $[redacted] it successfully requested on summary judgment. [A563-566 (123:21-126:6).] Despite shifting excuses for its belated argument, [A565-566 (125:13-126:10)], IV eventually admitted it was "focused on the $[redacted] cap" at summary judgment and "***didn't analyze the implications***" of the Agreement's License Fee allocation until after the Superior Court adopted IV's $[redacted] cap. [A667-668 (57:3-58:6).]

A jury trial took place on October 14-18, 2024, on LG's breach-of-contract

[redacted]

claim. [D.I. 454.] On October 18, 2024, the jury found that IV breached the Agreement, awarding $17,233,884 in damages to LG. [A419-420.]

IV. The Superior Court's Post-Trial Rulings

On May 15, 2025, the Superior Court issued four Memorandum Opinions resolving the parties' post-trial motions. In two opinions, the Superior Court denied IV's motions for new trial and for judgment notwithstanding the verdict. [D.I. 468, 470.] The remaining two opinions, at issue in this appeal, reduced the jury verdict from $17,233,884 to $[redacted], [A597-608], and declined to award costs or prejudgment interest to LG, [A583-596].

In adopting IV's new second damages cap, [A608], the Superior Court first ruled that judicial estoppel and the law-of-the-case doctrine did not preclude the new cap, [A603-605], and that a blanket reservation of rights in the Pretrial Stipulation allowed IV to raise new issues, [A606]. The court then interpreted the term "Party" in §9.6 as referring to either IVIL or III, but not both. [A606-608.] Because IV is affiliated with IVIL, this misinterpretation led the court to limit damages to the $[redacted] that IVIL supposedly received. [*Id.*]

In its cost and interest opinion, the Superior Court granted LG's motion for post-judgment interest, but denied, *inter alia*, costs and prejudgment interest. [A583-596.] The Superior Court denied costs by equating them to incidental

[redacted]

damages and then subjecting them to §9.6's damages cap. [A585-589.] On interest, the court complied with *State Farm Mutual Automobile Insurance Co. v. Enrique*, 2011 WL 1004604, at *2 (Del. Mar. 22, 2011) (hereinafter *Enrique*), and declined to cap interest under §9.6. [A588-589.] The Superior Court also found that "LG's request is defensible," and "LG's request for prejudgment interest is not unreasonable given that prejudgment interest is a 'right' and the second public policy rational [*sic*] for awarding such interest exists even if the prevailing party was not deprived of money." [A591 & n.38.] Yet, it reasoned that, since LG had not yet [redacted], LG "was not deprived of any money" and awarding "pre-judgment interest would be a windfall" for LG. [A591-592.] The court, however, granted post-judgment interest at a non-compounding rate of 8.85%. [A592-593 & n.45.]

On May 27, 2025, the Superior Court entered final judgment. [A609-610.] LG timely appealed on June 4, 2025.

[redacted]

ARGUMENT

I. The Superior Court Erred in Adopting IV's Waived, Estopped, and Precluded "Damages Cap" Affirmative Defense to Reduce the Jury's Award from over $17 Million to about $[redacted]

A. Question Presented

Did the Superior Court err in adopting IV's "damages cap" argument under the Agreement's §9.6, even though (1) IV waived this affirmative defense by failing to raise §9.6 in its pleadings, [A316-317]; (2) judicial estoppel, the law-of-the-case doctrine, and the Pretrial Stipulation precluded IV's second, belated damages cap, [A601-606]; and (3) the Superior Court's interpretation of §9.6's phrase "License Fee received by a Party" renders portions of the Agreement superfluous and inconsistent, [A606-608]?

B. Scope of Review

Review of all sub-issues under this question is *de novo*. For Part I.C.1, *infra*, this Court "review[s] the Superior Court's grant or denial of a summary judgment motion *de novo*," *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011), and holds that "[t]he determination whether a defense is affirmative is a question of law to be reviewed *de novo* by this Court," *Am. Family Mortg. Corp. v. Acierno*, 1994 WL 144591, at *2 (Del. Mar. 28, 1994).

For Part I.C.2, *infra*, this Court reviews *de novo* decisions on judicial estoppel, law-of-the-case doctrine, and compliance with a pretrial stipulation. *Harris v. State*,

[redacted]

2023 WL 6220623, at *1 (Del. Sept. 26, 2023) ("Whether judicial estoppel applies is a question of law and is reviewed *de novo*."); *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 36 (Del. 2005) ("A trial court's application of the law of the case doctrine is … subject to *de novo* review."); *Backyard Works Inc. v. Parisi*, 2023 WL 7899381, at *2 (Del. Nov. 16, 2023) (reviewing alleged "fail[ure] to follow the pretrial stipulation and order … *de novo*.").

For Part I.C.3, *infra*, this Court "review[s] questions of contract interpretation *de novo*." *Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014).

C. Merits of Argument

The Superior Court erred by reducing the jury's award of $17,233,884 to $[redacted] based on §9.6 of the Agreement. First, §9.6's damages cap is an affirmative defense that IV never pled in its responsive pleadings. Yet, refusing to find waiver, the Superior Court's summary judgment ruling capped LG's damages and IV's liability at $[redacted]. [Part I.C.1, *infra*.] Second, even if this $[redacted] cap were not waived, the Superior Court improperly jettisoned its summary judgment cap by adopting IV's new, second cap of $[redacted] post-trial, despite judicial estoppel and the law-of-the-case doctrine precluding this second cap and despite IV's failure to raise it in the Pretrial Stipulation. [Part I.C.2, *infra*.] Third, even if the second cap were not estopped, precluded, or waived, the

[redacted]

Superior Court's adoption of the second cap rests on misinterpretations of the Agreement. [Part I.C.3, *infra.*]

1. Because §9.6's Damages Cap Is an Unpled Affirmative Defense, the Superior Court Incorrectly Found No Waiver

IV's Answer and Amended Answer did not assert any counterclaim and never advanced the Agreement's §9.6 as a defense. [A136-138; A160-163.] Nor did IV ever raise §9.6's damages cap as a contention during discovery, despite LG's interrogatories seeking, *inter alia*, "the bases for each of [IV's] affirmative defenses," [A227-236], and "the complete legal and factual basis for the amount of damages [IV] would owe LG" for IV's breach, [A240-243]. IV's sole mention of §9.6 in any interrogatory response pertained to its allegation of insufficient notice, [A248-249], which the Superior Court addressed separately from the damages cap, [A317-318]. Despite never presenting this damages cap defense in its pleadings or during discovery, IV asserted it for the first time in a single paragraph of its damages-related summary judgment motion. [A194-195.] The Superior Court's silence about any earlier assertion confirms IV's belated timing. [A316-317.]

The Superior Court, however, rejected LG's waiver argument by reasoning, ***without*** supporting authority, that "a damage limitation imposed by clear contractual language is not an affirmative defense." [A316.] The Superior Court then capped LG's recovery and IV's liability at $[redacted]. [A317.] This was legal error.

[redacted]

"An affirmative defense is a matter asserted by the defendant in a pleading which, assuming the complaint to be true, constitutes a defense to it." *Am. Family*, 1994 WL 144591, at *2 (citing *Black's Law Dictionary* 60 (6th ed. 1990)). IV's damages cap assertion meets this definition. This assertion does not contest IV's liability or LG's entitlement to damages. Rather, assuming liability and damages to be true, IV's assertion raises a separate contractual provision to defend IV from paying LG's fully-recoverable damages request. As it meets the definition, §9.6's damages cap is an affirmative defense. *Cf. Ed Fine Oldsmobile, Inc. v. Diamond State Tel. Co.*, 494 A.2d 636, 637 (Del. 1985) (referring to contractual damages limit as affirmative defense).

Although this Court has not directly addressed whether a damages cap is a waivable affirmative defense, Delaware authorities have treated other defenses which reduce recoverable damages as waivable affirmative defenses. For example, "[c]ontributory negligence is an affirmative defense … [that] must be pled or the defense is waived." *James v. Glazer*, 570 A.2d 1150, 1153 (Del. 1990) (nonetheless permitting defense under two tort-specific exceptions); *accord Marshall v. Payne*, 2018 WL 5308176, at *2 (Del. Super. Ct. Oct. 25, 2018) (applying *James* in finding waiver of unpled contributory negligence defense). Delaware lower courts also view the failure to mitigate damages as a waivable affirmative defense. *E.g., Richardson*

[redacted]

v. Christiana Care Health Servs., Inc., 2021 WL 2566736, at *7 (Del. Super. Ct. June 21, 2021) (finding waiver of unpled defense because "[f]ailure to mitigate damages is an affirmative defense"); *Munro v. Beazer Home Corp.*, 2011 WL 2651910, at *8 (Del. Com. Pl. June 23, 2011) (finding waiver of unpled damages mitigation defense). Since mitigation failure and contributory negligence have the same effect in reducing damages, there is no logical reason to treat a damages cap differently under Delaware law.

Beyond Delaware, "[t]he majority of federal circuits to address the question have held that a damages cap must be pled as an affirmative defense in federal court." *Racher v. Westlake Nursing Home Ltd. P'ship*, 871 F.3d 1152, 1163 (10th Cir. 2017). Because the responsive pleading did not raise any damages cap defense, the Tenth Circuit agreed the defense was waived. *See id.* at 1167. Other federal circuit courts have reached similar conclusions. *E.g.*, *In re Frescati Shipping Co., Ltd.*, 886 F.3d 291, 313-14 (3d Cir. 2018) (affirming waiver of unpled liability limitation affirmative defense); *Simon v. United States*, 891 F.2d 1154, 1156-57 (5th Cir. 1990) (holding damages limitation was waivable affirmative defense); *Jakobsen v. Mass. Port Auth.*, 520 F.2d 810, 813-16 (1st Cir. 1975) (affirming exclusion of unpled liability limitation); *accord S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co.*, 353 F.3d 367, 372-73 (4th Cir. 2003) (affirming waiver of unpled two-year

[redacted]

contractual liability limitation); *Terracciano v. McAlinden Const. Co.*, 485 F.2d 304, 307 (2d Cir. 1973) ("It is well settled that limitation of liability is an affirmative defense[.]"); *but cf. Taylor v. United States*, 821 F.2d 1428, 1433 (9th Cir. 1987) (ruling that California statute limiting damages was not affirmative defense, despite California appellate court ruling otherwise).

Because §9.6's damages cap is an affirmative defense, Superior Court Rule 8(c) required IV to present this defense in its responsive pleadings. Del. Sup. Ct. R. 8(c) ("[A] party shall set forth affirmatively … any other matter constituting an avoidance or affirmative defense."). IV did not. Nor did IV move to amend its pleadings to assert §9.6. Because "an affirmative defense must be pled or the defense is waived," *James*, 570 A.2d at 1153, IV waived this belated defense and the Superior Court's contrary decision cannot stand.

IV cannot avoid waiver by arguing, as it did below, that LG was not prejudiced. [A271.] Prejudice is not required for waiver of an unpled affirmative defense, *Marshall*, 2018 WL 5308176, at *2 (not considering prejudice in finding waiver), so the Superior Court rightfully ignored IV's no-prejudice argument, [A316-317]. Regardless, LG was greatly prejudiced. By waiting until summary judgment to raise this defense, IV deprived LG of the opportunity to seek discovery into the defense, account for §9.6 in developing case strategy, and devote appropriate

[redacted]

resources to the issue. IV compounded LG's prejudice by springing, on the eve of trial, a new and untimely damages cap argument that further significantly reduced LG's damages. The prejudice to LG is undeniable.

This Court should reverse the finding of no waiver and remand for entry of judgment on the jury's $17,233,884 damages award.

2. The Superior Court Erred by Letting IV Raise a New Second Damages Cap on the Eve of Trial

Despite convincing the Superior Court on summary judgment to impose a $[redacted] damages cap under §9.6, IV advanced a second damages cap theory one business day before trial by arguing—for the first time—that §9.6 further caps IV's liability at the lower value of "IVIL Payment," i.e., $[redacted]. [A564-566 (124:8-126:10), A568-572 (131:8-135:7).] The Superior Court ruled that judicial estoppel, the law-of-the-case doctrine, and the Pretrial Stipulation did not preclude IV's second damages cap theory. [A603-606.] This was error. Each doctrine alone bars IV's second damages cap.

a. Judicial Estoppel Precludes IV's Second Damages Cap

Judicial estoppel precludes IV's second damages cap theory. In Delaware, judicial estoppel applies "when a litigant's position 'contradicts another position that the litigant previously took and that the Court was successfully induced to adopt in

[redacted]

a judicial ruling.'" *Motors Liquidation Co. DIP Lenders Trust v. Allstate Ins. Co.*, 2018 WL 3360976, at *4 (Del. July 10, 2018).

Both prongs are met. Regarding the first prong, IV's post-trial argument contradicts its summary judgment position that §9.6's damages cap is $[redacted]. In its summary judgment brief, IV argued that §9.6 "limits the amount LG can seek []to the amount it paid in license fees, ***i.e., $***[redacted][.]" [A194.] In contrast, IV's post-trial motion argued that §9.6 "caps [LG's] damages at ***$***[redacted]" because IVIL, as IV's agent, supposedly only "received [redacted]% … of the License Fee LG paid." [A551.] Regarding the second prong, IV successfully induced the Superior Court to hold, on summary judgment, that "LG's maximum recoverable damages from IV under the License Agreement are $[redacted]." [A317.] Judicial estoppel thus precludes IV's second damages cap theory. *See Motors Liquidation*, 2018 WL 3360976, at *4 (enforcing judicial estoppel).

The Superior Court, however, rejected judicial estoppel by distinguishing LG's damages from IV's maximum liability. It reasoned that, although IV argued and the court agreed that §9.6 "caps *LG's damages* at $[redacted]," "Defendants took no position, and the Court made no ruling, concerning Defendants' maximum liability." [A603-604 (original italics).] This reasoning contradicts the record, as

[redacted]

both IV and the Superior Court equated IV's maximum liability with LG's damages on summary judgment.

IV's summary judgment arguments confirm this fact. Tracking its quote of §9.6's statement that "the ***aggregate liability*** … will not exceed the License Fee received by a Party under Paragraph 5.1," [A188-189],[2] IV's summary judgment brief argued that §9.6 "provides for ***limited recovery*** (i.e., limited to the license fee received by a party under ¶5.1)," [A178]. Citing these two passages, IV concluded that §9.6 "limits ***the amount LG can seek*** []to the amount it paid in license fees, ***i.e., $***[redacted][.]" [A194 (citing A178, A188-189).] IV's summary judgment reply's section titled "***LG's Damages*** Are Limited By §9.6" further emphasized that §9.6 "clearly cap[s] ***IV's potential liability***." [A272.] And at the summary judgment hearing, IV argued that "***LG's damages*** under 9.6 are limited" based on §9.6's "***limitation of liability***, which is limited to the amounts paid [and] cannot exceed the license fee" of $[redacted]. [A852-853 (108:21-109:12).]

Adopting IV's position, the Superior Court orally ruled that "the license agreement limits ***LG's damages*** to $[redacted]" because "[t]he plain language of the license agreement limits ***IV's liability*** thereunder to fees paid[.]" [A912-913 (168:23-169:5).] Its written opinion further explained "that IV's '[a]ggregate

[2] For ease of reading, §9.6's all-capitalization has been removed in this brief.

[redacted]

liabilities … will not exceed the License Fee received by a party" and that the "'Licensing Fee' [*sic*] is defined in Section 5.1 as ***$[redacted]***," so that "LG's maximum recoverable damages ***from IV*** … are ***$[redacted]***." [A316-317 (original first brackets; quoting §9.6).]

The Pretrial Stipulation leaves no doubt about the ruling and IV's position ***before*** IV invented its second damages cap theory. As ***IV*** itself wrote in its Nature-of-the-Action section of the Pretrial Stipulation, "***the Court has determined that IV's liability is limited to $[redacted] dollars***, the amount that LG paid for the License Agreement, pursuant to Section 9.6." [A340.] In its Issues-of-Law-that-Remain-to-Be-Decided section, IV asserted: "IV's position is that the Court has already limited LG's allegations to $[redacted]." [A361.] IV's own words confirm that its arguments and the Superior Court's decision on summary judgment equated IV's liability with LG's damages.

Because the Superior Court's sole basis for denying judicial estoppel is incorrect, that decision should be reversed.[3]

[3] The Superior Court misunderstood the parties' arguments about "indispensable party" and Rule 19. [A604.] IV (not LG) invoked Rule 19 to avoid judicial estoppel. [A552-553.] LG countered that an "indispensable party" argument cannot circumvent judicial estoppel. [A579 (citing *Swenson v. Bushman Inv. Props., Ltd.*, 2013 WL 3811825, at *18-19 (D. Idaho July 22, 2013)).] Regardless, as the Superior Court addressed judicial estoppel notwithstanding Rule 19, its Rule 19-related discussion is irrelevant. [A603-604.]

[redacted]

b. The Law-of-the-Case Doctrine Precluded IV's New Damages Cap

The law-of-the-case doctrine independently precludes IV's second damages cap theory. Under this doctrine, "a court's legal ruling at an earlier stage of proceedings controls later stages of those proceedings, provided the facts underlying the ruling do not change." *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 894-95 (Del. 2015) (reversing refusal to apply doctrine).

The law-of-the-case doctrine applies here. As discussed in Part I.C.2.a, *supra*, the summary judgment ruling interpreted §9.6 as capping IV's liability and LG's damages at $[redacted]. [A912-913 (168:23-169:5); A316-317.] This ruling at the summary judgment stage controls the post-trial stage. *See Taylor v. Jones*, 2006 WL 1510437, at *5-6 (Del. Ch. May 26, 2006) (applying doctrine under same procedural posture). Further, no facts underlying this ruling changed. As IV admitted, it did not raise its second damages cap theory earlier because it "***didn't analyze the implications***" of the Agreement's License Fee allocation until after the Superior Court adopted IV's $[redacted] cap. [A667-668 (57:3-58:6).] IV's belated request for a second damages cap was a creative, but untimely, request for reconsideration or reargument. *See Nationwide*, 112 A.3d at 894-95 (criticizing reconsideration as violating law-of-the-case doctrine); *Aranda v. Philip Morris USA Inc.*, 183 A.3d

[redacted]

1245, 1255 (Del. 2018) ("Motions for reargument … are not the appropriate method for a party to raise new arguments that it failed to present in a timely way.").

The Superior Court rejected the law-of-the-case doctrine for two erroneous reasons. First, it again split hairs by reasoning that "the Summary Judgment Decision decided LG's total possible recovery, ***not Defendants' maximum liability***." [A605.] As shown above in Part I.C.2.a, the summary judgment ruling decided that IV's maximum liability was $[redacted].

Second, the Superior Court asserted that the doctrine allows "reconsideration of a prior decision that is clearly wrong, produces an injustice, or should be revisited because of changed circumstances." [A605.] But it did not identify which of these conditions supposedly applied, because none did. There were no "changed circumstances" as shown above—IV merely conjured a new argument it should have raised earlier. Nor could the $[redacted] cap be "clearly wrong" or "produce[] an injustice" as to IV, since IV urged its adoption. In contrast, IV's new cap is "clearly wrong" as shown in Part I.C.3, *infra*, and "produces an injustice" for LG by further reducing its damages by $[redacted], with no opportunity to develop case strategy for this argument.

The Superior Court's law-of-the-case decision should therefore be reversed.

[redacted]

c. The Pretrial Stipulation Precluded IV's New Damages Cap

IV also waived its second damages cap theory by not raising it in the Pretrial Stipulation. In Delaware, a pretrial stipulation entered as a pretrial order "shall control the subsequent course of the action unless modified … to prevent manifest injustice." Del. Sup. Ct. R. 16(d)-(e). Any issue not raised in the pretrial stipulation is waived. *Alexander v. Cahill*, 829 A.2d 117, 128-29 (Del. 2003) (reversing permission to present at trial a defense not in pretrial stipulation); *Realty Enters., LLC v. Patterson-Woods*, 2010 WL 5093906, at *4 (Del. Dec. 13, 2010) ("A party waives a claim where the party does not plead it in the pretrial stipulation.").

This case's Pretrial Stipulation, entered as the pretrial order, did not include IV's second $[redacted] cap. [*See generally* A325-382.] Instead, IV's sections of the Pretrial Stipulation repeatedly invoked the original $[redacted] cap:

- "[T]he Court has determined that ***IV's liability is limited to $[redacted], the amount that LG paid*** for the License Agreement, pursuant to Section 9.6." [A340.]
- "IV's position is that the Court has already ***limited LG's allegations to $[redacted]***." [A361.]
- "IV further maintains the following defenses[:] … Damages are ***limited to the amount paid*** for the License Agreement." [A370.]

[redacted]

- "Pursuant to the License Agreement, ***LG paid IV*** the sum of ***$*** [redacted][.]" [A354.]

Besides never raising its lower $[redacted] cap in the Pretrial Stipulation, IV never moved to modify the Pretrial Stipulation and therefore waived its second cap. *See Alexander*, 829 A.2d at 128-29.

The Superior Court nevertheless entertained the second damages cap post-trial, [A606], by relying on blanket reservations of rights in the Pretrial Stipulation: "The parties reserve the right to identify additional issues … based on issues that may be raised prior to and/or during trial," [A343; A357]. A blanket reservation of rights cannot avoid waiver.

The Superior Court's three cited cases do not support adding issues based on a blanket reservation, because they all ***excluded*** issues not in pretrial stipulations. *Cuonzo v. Shore*, 958 A.2d 840, 845-46 (Del. 2008) (affirming exclusion of photographs not identified in pretrial stipulation); *Gannett Co. v. Bd. of Managers of the Del. Crim. Just. Info. Sys.*, 840 A.2d 1232, 1238 (Del. 2003) (vacating decision on issue not in pretrial stipulation); *Rexnord Indus., LLC v. RHI Holdings, Inc.*, 2009 WL 377180, at *5-6 (Del. Super. Ct. Feb. 13, 2009) (excluding statute-of-limitations defense not in pretrial stipulation).

[redacted]

In addition to disregarding precedent requiring waiver of issues not in pretrial stipulations, *Alexander*, 829 A.2d at 128-29, the Superior Court also ignored precedent holding that, "to deviate from a pretrial order, [IV] must show that modification of the order will prevent manifest injustice." *Cuonzo*, 958 A.2d at 845. As IV never moved to modify the pretrial order, it never made the required showing. By rejecting waiver under these facts, the Superior Court undermined Rule 16's goals of "familiariz[ing] the litigants with the issues in the case; reduc[ing] surprises at trial; and facilitat[ing] the overall litigation process." *Cebenka v. Upjohn Co.*, 559 A.2d 1219, 1222 (Del. 1989).

Not surprisingly, other courts have rejected reliance on blanket reservations of rights to avoid waiver. *E.g.*, *In re Caprock Wine Co., L.L.C.*, 2012 WL 1123230, at *9 (Bankr. N.D. Tex. Apr. 3, 2012) ("Condoning such a blanket reservation of rights in a pretrial order would undermine the purpose of a pretrial order"); *Coupled Prods., LLC v. Nobel Auto. Mexico, LLC*, 2010 WL 2035829, at *1 (W.D. La. May 14, 2010) (striking new issue because "if Plaintiff's argument is accepted at face value, litigants could circumvent deadlines for pretrial orders … simply by inserting a reservation of rights provision in those filings"). This Court should do likewise and reverse the refusal to apply waiver.

[redacted]

3. The Superior Court Misinterpreted the Agreement in Adopting IV's Second Damages Cap under §9.6

The Agreement's §9.6 states, in relevant part:

> [T]he aggregate liability for claims arising under this Agreement will not exceed ***the License Fee received by a Party under Parag[ra]ph 5.1*** as of the date that such Party has been notified of a claim; provided, however that this limitation will not apply to reduce or otherwise limit the amounts due and owing to each Licensor under this Agreement, including, under Section 5.

[A220 §9.6.] The Superior Court misinterpreted this provision as capping LG's damages at $[redacted], [A606-608], by incorrectly construing "Party" as either IVIL or III, not both; and disregarding §5.1's definition of "License Fee" received by IVIL alone.

a. IVIL and III Together Are One "Party"

The Agreement had three signatories: LG, IVIL, and III. The Agreement's preamble defines the term "Party"—as used in §9.6—as: "Licensor and Licensee are individually a 'Party' and collectively the 'Parties[.]'" [A211.] The preamble also defines "Licensee" as LG, making LG one "Party" to the Agreement. [*Id.*] The preamble also states: "IVIL ***and*** III ***together*** are, individually and solely for convenience, referred to as 'Licensor[.]'" [*Id.*] Thus, "Licensor" collectively refers to ***both*** "IVIL and III together" as the Agreement's other "Party." [*Id.*] The Superior Court misinterpreted the Agreement as a tripartite contract where LG, IVIL, and III

[redacted]

are each one Party. [A606-608.]

First, in addition to ignoring the definition of "Party" as Licensor or Licensee, [A211], the misinterpretation disregarded contractual provisions indicating a two-Party arrangement. For example, §9.1 repeatedly refers to "***either*** Party" and "***the other*** Party," while §9.17 similarly refers to "***either*** Party." [A218-219 §9.1; A222 §9.17.] If "Party" meant one of three entities, these provisions would not use qualifiers, like "either," that indicate a choice between two alternatives. As another example, §9.6's first sentence states that "[n]o Party will be liable to another Party for indirect damages[.]" [A220 §9.6.] The misinterpretation would permit IVIL to be the first "Party" and III to be the "another Party," or vice versa, even though IVIL and III made no promise to each other in the Agreement and even disclaimed any obligation arising from the other's "action or inaction[.]" [A222 §9.16.] This absurd result undermines the misinterpretation. *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1208 (Del. 2021) ("An interpretation is unreasonable if it 'produces an absurd result[.]'").

Second, the misinterpretation did not construe the term "Party," which §9.6 uses. Instead, it interpreted the secondary term "Licensor" by isolating the preamble's phrase "individually and solely for convenience," [A607], while disregarding the surrounding text stating "***IVIL and III together are***, individually

[redacted]

and solely for convenience, referred to as '***Licensor***[,]'" [A211]. Disregarding textual context is improper. *Bouchard v. Braidy Indus., Inc.*, 2020 WL 2036601, at *9 (Del. Ch. Apr. 28, 2020) ("As the whole-text canon instructs, context is the primary determinant of meaning.").

In contrast, interpreting "Licensor" as both IVIL and III "together" comports with other provisions. For example, the sentence immediately under the heading "AGREEMENT" says "Licensee and ***Licensor*** agree[.]" It would be unreasonable to read this sentence as stating "Licensee and [*IVIL or III, not both*] agree." Reading this sentence as stating "Licensee and [*IVIL and III together*] agree" is consistent with the Agreement being "entered into … by and among" all of IVIL, III, and LG. [A211; *see also, e.g.*, A213-221 §2.3(a), §5.3, §5.4, §7.3, §9.1, §9.4.6, §9.5.5, §9.7 (all using "Licensor" to refer to both IVIL and III).]

Third, the Superior Court's citation to provisions reciting "each Licensor" and "such Licensor" actually supports LG. [A607 n.63.] There would be no need to individually specify "each" or "such" if "Licensor" already refers to either IVIL or III, instead of both together. At best, these provisions show that "Licensor," when properly qualified by using "each" or "such," ***can*** refer to IVIL or III. But they cannot negate the preamble's express definition of "Licensor" as both "IVIL and III together."

[redacted]

Fourth, the Superior Court incorrectly concluded that LG's interpretation rendered another provision, §9.16, nonsensical. [A608.] As explained above, "Licensor"—when properly qualified—can refer to IVIL or III, thus being ***consistent*** with §9.16's statement that "III and IVIL are ***each*** independently ***a*** 'Licensor[.]'" [A222 §9.16.] There would be no reason to use "each" if "Licensor" is either III or IVIL alone. Nor does §9.16's isolation of one entity's "rights and obligations" from the other's "action or inaction," [*id.*], change the preamble's definition of "Licensor" as "IVIL and III together[.]" There is no inconsistency with these provisions.

Accordingly, §9.6's phrase "the License Fee received ***by a Party***" refers to the amount received by "IVIL and III together," not by either entity separately. [A211, A220.] The Superior Court's misinterpretation should be reversed.

b. §9.6's Damages Cap Refers to the "License Fee," Which the Agreement Defines as $[redacted]

Even if the Superior Court correctly interpreted "Party," its conclusion disregarded the meaning of "License Fee" in §9.6 and §5.1. [A606-608.]

Section 9.6 limits IV's aggregate liability to "***the License Fee*** received by a Party under ***Parag[ra]ph 5.1***[.]" [A220 §9.6.] In turn, §5.1 defines "License Fee" and two other terms:

- §5.1 defines "License Fee" as "$[redacted]," [A215 §5.1];

[redacted]

- §5.1(A) defines "IVIL Payment" as "[redacted]% of the License Fee … ($[redacted])," [A215 §5.1(A)]; and
- §5.1(B) defines "III Payment" as "[redacted]% of the License Fee … ($[redacted])," [A215 §5.1(B)].

Substituting §5.1's "License Fee" definition into §9.6, IV's aggregate liability is therefore $[redacted]. The Superior Court concluded so in its summary judgment ruling. [A316-317.]

Yet, it jettisoned its earlier interpretation post-trial, and effectively replaced §9.6's "License Fee" with "IVIL Payment." But §9.6 does not say "IVIL Payment"—it uses the defined term "License Fee," which §5.1 defines using words and numbers as $[redacted]. [A215 §5.1; A220 §9.6.] If the Agreement intended to cap damages at less than the License Fee, §9.6 would have used another terminology, such as "IVIL Payment." [A215 §5.1(A)-(B); *see also* A220 §9.6 (using distinct terminologies for "License Fee received by a Party under Parag[ra]ph 5.1" and "amounts due and owing to each Licensor under this Agreement").] But §9.6 did not. The Superior Court's interpretation, which disregarded a defined term, cannot stand. *See Mehiel v. Solo Cup Co.*, 2005 WL 5750634, at *5 (Del. Ch. May 13, 2005) (giving effect to defined term in interpreting contract).

The Superior Court justified its changed interpretation by italicizing four

[redacted]

words in §9.6's phrase "the License Fee *received by a party* under Paragraph 5.1" and criticizing LG's plain language position as "render[ing] the emphasized text superfluous[.]" [A607 n.61 (original emphasis; quoting §9.6).] By levying this criticism, the court implicitly understood the term "Party" in this phrase as either IVIL or III, but not both. As discussed in Part I.C.3.a, *supra*, this understanding is incorrect.

This understanding is also erroneous because it effectively rewrites §9.6's phrase to read "the [portion of the] License Fee received by a Party under Parag[ra]ph 5.1." This is improper. *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 355 (Del. 2020) ("[I]t is axiomatic that courts cannot rewrite contracts or supply omitted provisions."). In contrast, the Superior Court's original interpretation on summary judgment avoids this impropriety by recognizing that "License Fee" in §9.6 is $[redacted]. [A316.]

Moreover, LG's plain language position does not render the emphasized words superfluous under the Superior Court's interpretation of "Party." Indeed, §5.2 specified that LG "shall make payment under this Agreement … by wire transfer to the following account" of "Account Holder Name: IV International Licensing"—i.e., IVIL. [A215 §5.2.] LG thus paid $[redacted] to IVIL alone, so that IVIL alone "received" the entire License Fee. [A215 §§5.1-5.2; *see also* A354 (IV

[redacted]

acknowledging that "LG paid IV the sum of $[redacted]").] IVIL, according to the Superior Court, is an affiliate of IV. [A608 ("Defendants are only affiliated with IVIL[.]").] Under the Superior Court's ruling that the Agreement "caps Defendants' liability at the License Fee its [*sic*] affiliate received," [A608], IV's liability would be capped at the $[redacted] which IVIL received, not the lower $[redacted] "IVIL Payment."

Accordingly, because §9.6 refers to the defined "License Fee" of $[redacted] received by IVIL, the Superior Court's lower damages cap should be reversed.

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For these reasons, this Court should reverse the imposition of a $[redacted] damages cap.

[redacted]

II. The Superior Court Erred by Denying Prejudgment Interest

A. Question Presented

Did the Superior Court err in denying prejudgment interest, despite such interest being a right not subject to discretion in actions at law, despite having no legal support for requiring out-of-pocket payments as prerequisites for awarding prejudgment interest, and despite such denial undermining public policies while rewarding contract breaches? [A588-592.]

B. Scope of Review

In an action at law, the "Superior Court's denial of [a] motion for pre-judgment interest … is also reviewed *de novo*." *Chrysler Corp. (Del.) v. Chaplake Holdings, Ltd*., 822 A.2d 1024, 1037 (Del. 2003).

C. Merits of Argument

1. In Actions at Law, Prejudgment Interest Is a Right Not Subject to Discretion

Despite acknowledging that, "[i]n Delaware, prejudgment interest is awarded as a matter of right," the Superior Court invoked "its discretion" in refusing to award prejudgment interest. [A590-591.] A court of law, however, does not have such broad discretion.

This Court so held decades ago in a case where, after the Superior Court "denied antejudgment interest as a matter of discretion," the appellant argued that

[redacted]

"the inclusion of [prejudgment] interest is not discretionary but is a matter of right." *Metropolitan Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778, 779, 781 (Del. 1966). Because this Court "ha[d] never before had occasion to consider the question," it reviewed relevant cases from Delaware and other jurisdictions, and concluded that "the Delaware authorities have uniformly treated ***interest as a matter of right rather than discretion*** in cases like the present one." *Id.* at 781. As this Court explained, this "principle is firmly imbedded in our law and must be applied here." *Id.* at 781. Because the narrow exception for "long delay on the part of a plaintiff in prosecuting his action" did not apply, this Court "add[ed] interest upon the amount of" damages. *Id.* at 782; *accord Moskowitz v. Mayor & Council of Wilmington*, 391 A.2d 209, 210-11 (Del. 1978) (reversing prejudgment interest denial because "[i]nterest is awarded in Delaware as a matter of right and not of judicial discretion," but remanding to consider a "14 year inordinate delay").

Since *Metropolitan* was decided, this Court has repeatedly recognized this principle in Superior Court appeals, including in breach-of-contract cases. *E.g.*, *Delphi Petroleum, Inc. v. Magellan Terminal Holdings, L.P.*, 2017 WL 6371162, at *2 (Del. Dec. 12, 2017) ("Pre-judgment interest is awarded as a matter of right in a Delaware action based on breach of contract or debt."); *Delta Eta Corp. v. Univ. of Del.*, 2010 WL 2949632, at *2 (Del. July 29, 2010) ("In a Delaware action based on

[redacted]

breach of contract or debt, prejudgment interest is awarded as a matter of right.").

That is why, whenever the Superior Court refused prejudgment interest in contract disputes, this Court has reversed. For example, in *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482 (Del. 2011), this Court reversed the interest denial because the plaintiff "[wa]s entitled to recover prejudgment interest for the damages awarded for its breach of *contract* claim." *Id.* at 485 (original emphasis). As another example, this Court reversed a Superior Court denial in an indemnification contract dispute because "[i]n Delaware, prejudgment interest is awarded as a matter of right." *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992); *see also Chrysler*, 822 A.2d at 1037-38 (reversing denial because "pre-judgment interest is awarded as a matter of right, and not by judicial discretion").

Ignoring these controlling cases, the Superior Court here cited *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988), to justify its exercise of discretion. [A591 & n.39.] But *Summa* is inapposite, as it did not implicate a ***denial*** of prejudgment interest; it instead addressed the rate used by the Chancery Court to ***award*** prejudgment interest. 540 A.2d at 409. *Summa* is further inapt because it turned on the Chancery Court's equitable discretion to choose a rate. *Id.* (explaining that "a court of equity has broad discretion, subject to principles of fairness, in fixing the rate to be applied"). As the Superior Court recognized decades

[redacted]

ago, the principles governing a prejudgment interest award differ between a court of law and a court of equity. *Rollins Envtl. Servs., Inc. v. WSMW Indus., Inc.*, 426 A.2d 1363, 1366-67 (Del. Super. Ct. 1980). Because "a claim for damages based upon breach of contract … falls squarely within the class of cases for which a suit is entertained in a court of law[,]" the Superior Court faced with such a claim has "no basis for exercising the flexibility in determining pre-judgment interest which is utilized in the Court of Chancery." *Id.* at 1367. That bedrock principle holds true today.

The Superior Court therefore erred in adopting the Chancery Court's equitable discretion. If the issue was such "a close call," [A591], the Superior Court should have awarded prejudgment interest to uphold LG's right.

2. The Superior Court Incorrectly Conditioned Prejudgment Interest on Out-of-Pocket Payments

Despite recognizing that "LG's request for prejudgment interest is not unreasonable," [A591 n.38], the Superior Court denied the request because LG has not yet [redacted] to GM and Toyota, [A590-592]. Without any out-of-pocket payments by LG, the Superior Court reasoned that LG "was not deprived of any money" and would receive a "windfall" if prejudgment interest were awarded. [A591-592.] This ruling is legally erroneous.

[redacted]

a. The Superior Court's Cited Chancery Court Opinions Are Inapt

The Superior Court's three cited Court of Chancery opinions do not support its out-of-pocket requirement. [A591 nn.36-37.] In *Fleet*, the court did not deny prejudgment interest—it was selecting a set-off method to compute already awarded prejudgment interest. *Fleet Fin. Grp., Inc. v. Advanta Corp.*, 2003 WL 22707336, at *1 (Del. Ch. Nov. 7, 2003). In "perform[ing] its function as a court of equity," the Chancery Court selected the "Interest-on-Balance" method as consistent with the parties' transaction in which Fleet received net payments from Advanta after offset. *Id.* at *4-5. Because Advanta received no net payment from Fleet and could not have earned any interest, Advanta "has not been deprived of any funds," such that "there [wa]s no lost opportunity cost for Advanta" to justify a computation method other than Interest-on-Balance. *Id.* at *5.

In both *Levey* and *Gentile*, the Chancery Court did not deny prejudgment interest—it instead addressed whether to use fixed or floating interest rates. *Levey v. Browstone Asset Mgmt., LP*, 2014 WL 4290192, at *1 (Del. Ch. Aug. 29, 2014); *Gentile v. Rossette*, 2010 WL 3582453, at *1 (Del. Ch. Sept. 10, 2010). Exercising its "broad discretion," the *Levey* court rejected the higher fixed rate which would over-compensate the plaintiff while penalizing the defendant. *Levey*, 2014 WL 4290192, at *1. Likewise, the *Gentile* court rejected the higher fixed rate as unfair

[redacted]

given the parties' relationship and as inconsistent with principles underlying statutory appraisal actions. *Gentile*, 2010 WL 3582453, at *1.

Thus, *Fleet*, *Levey*, and *Gentile* did not deny prejudgment interest for lack of out-of-pocket payments; they just set the rate used to compute prejudgment interest.

b. Caselaw Addressing Similar Facts Undermines the Superior Court's Denial

As the Superior Court acknowledged, Delaware caselaw is "sparse" on this issue. [A591.] The only Delaware breach-of-contract case that LG found on this issue sustained a prejudgment interest award, even though "Plaintiff incurred no out of pocket expenses regarding the [disputed] stone veneer." *Gray v. Ashburn Homes, Inc.*, 2020 WL 6146302, at *2 (Del. Com. Pl. Aug. 28, 2020). As *Gray* explained, "Plaintiff was not required to incur a debt in order to obtain a legal remedy" that included interest. *Id.*; *cf. Brandywine*, 34 A.3d at 486 (distinguishing, as "conceptually separate and distinct," prejudgment interest from "out-of-pocket interest expenses" awarded as damages).

Outside of Delaware, other jurisdictions reject out-of-pocket payments as a prerequisite for prejudgment interest. Cases applying Florida, Massachusetts, and California law illustrate this approach.

Lumbermens Mutual Casualty Co. v. Percefull, 653 So.2d 389, 389-90 (Fla. 1995), exemplifies Florida's approach. In *Percefull*'s contract dispute, the lower

[redacted]

court ruled that "entitle[ment] to prejudgment interest [attached] only if Percefull had actually paid the claims to the [third-party] health care providers." *Id.* After clarifying its precedent, the Florida Supreme Court rejected both the lower court's out-of-pocket rule and Lumbermens's characterization of prejudgment interest as a "windfall," because "[w]hether Percefull uses this money to pay medical bills or for some other purpose does not change the fact that a debt has been created." *Id.* at 390. Accordingly, the Florida high court "granted … prejudgment interest on the debt created by Percefull's contract with Lumbermens without requiring proof that Percefull had incurred any out-of-pocket expenses." *Id.*; *see also Venn v. St. Paul Fire & Marine Ins. Co.*, 99 F.3d 1058, 1066-68 (11th Cir. 1996) (applying *Percefull* in reversing prejudgment interest denial for failure to pay out-of-pocket).

Massachusetts law likewise does not require out-of-pocket payments to award prejudgment interest. In *Johnson v. Settino*, 219 N.E.3d 293, 303 (Mass. App. Ct. 2023), Settino sued for contract breach after Johnson refused to pay for promised dental implants. Despite Settino foregoing the implants and not making out-of-pocket payments, the Massachusetts appellate court ruled that "the award of prejudgment interest was appropriate" because Johnson should not benefit from his breach and had "unlawfully detained money (as it rightfully belonged to [Settino]) and [Settino] suffered the loss of use of money (to pay for dental implant surgery)."

[redacted]

Id.; *see also SiOnyx LLC v. Hamamatsu Photonics K.K.*, 981 F.3d 1339, 1348 (Fed. Cir. 2020) (applying Massachusetts law in affirming interest award for contract breach despite lack of financial harm, and rejecting arguments that plaintiff was not "deprived of funds" and that interest was "an undeserved windfall").

California law also awards prejudgment interest without requiring out-of-pocket payments. In *Ultra Coachbuilders, Inc. v. Gen. Sec. Ins. Co.*, 229 F. Supp. 2d 284, 288 (S.D.N.Y. 2002), the defendant argued that, because the plaintiff "has not fully paid for its defense" and "has not been deprived of the use of funds, it does not need interest to make it whole." Applying California law, the court awarded interest because the California statute governing interest "does not require that the claimant be out-of-pocket in order to recover interest on the unpaid debt." *Id.*

As these cases show, the weight of authorities neither requires out-of-pocket payments to receive prejudgment interest, nor views an interest award as a windfall.

3. Prejudgment Interest Denial Undermines Public Policies and Rewards Contract Breaches

In its denial, the Superior Court disregarded LG's injury and contradicted the policies for awarding prejudgment interest.

"[A]n obligation to indemnify is an 'injury in fact,'" as the Superior Court recognized, [A591], and [redacted] are palpable injuries. *See Connorex-Lucinda, LLC v. Rex Res Holdings, LLC*, 2022 WL 17543209, at *5 (Del.

[redacted]

Super. Ct. Nov. 29, 2022) (finding debt to third party constitutes harm). Here, IV's breach caused GM and Toyota to demand significant indemnification from LG, resulting in [redacted]. [A486-489 (T.190:5-193:3); A490-493 (T.210:13-213:12); A494-499 (T.218:18-223:13); A936; A938.] These [redacted] are no less significant or real merely because [redacted]. *See Lumbermens*, 653 So.2d at 389-90 (rejecting out-of-pocket rule and awarding interest where "a debt has been created"). LG is thus the injured party, rather than a "pass-through entity" as the Superior Court incorrectly reasoned. [A591.]

Further, although IV and the Superior Court characterized prejudgment interest as a windfall for LG, permitting IV to avoid paying interest would be a windfall for IV, which has benefited from its breach for years at LG's detriment. LG's injury materialized contemporaneously with IV's October 19, 2021 breach when, within ten and thirty days of this date, Toyota and GM respectively triggered LG's indemnification obligations and caused [redacted] to accrue. [A446-452 (T.137:17-143:9).] These [redacted] have festered since then, while IV retained and enjoyed the $[redacted] extracted from GM and Toyota through its breach. [A515 (T.678:11-13); A519 (T.711:19-21).] To permit IV to retain this money and any earned interest would reward the breaching party with a windfall and condone its

[redacted]

unjust enrichment. In contrast, "forc[ing] the defendant to relinquish any benefit that it [] received by retaining plaintiff's money in the interim" furthers public policy, as the Superior Court admitted, "even if the prevailing party was not deprived of money." [A591 & n.38 (original second brackets).]

Awarding prejudgment interest also "compensates the plaintiff for the loss of the use of his or her money[.]" *Brandywine*, 34 A.3d at 486. Because IV has controlled for years the funds awarded as damages, LG did not have the opportunity to use these funds to [redacted] or to invest these funds toward [redacted]. Without the benefit of the time value of money embodied by prejudgment interest, the awarded remedy would not put LG in the same position as if IV had not breached. *See Moskowitz*, 391 A.2d at 210 ("[F]ull compensation requires an allowance for the detention of the compensation awarded and interest is used as a basis for measuring that allowance.").

And adopting the Superior Court's out-of-pocket rule would unfairly force breach victims to pay and absorb expenses just to preserve their prejudgment interest right, while rewarding breaching parties. This rule would also incentivize breaching parties to avoid settlements and delay cases just to retain ill-gotten gains with no risk other than having to ultimately pay damages. *See Enrique*, 2011 WL 1004604, at *2 n.10 ("[P]rejudgment interest ... provides an additional incentive to settle a

[redacted]

lawsuit and avoid a trial in certain cases by imposing an increased penalty upon a nonsettling litigant." (original ellipsis)).

Rather than providing LG any windfall, prejudgment interest advances public policies by compensating LG for its lost opportunities while forcing IV to relinquish its ill-gotten gains.

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Because the Superior Court erred in denying prejudgment interest, this Court should reverse this denial.

[redacted]

III. The Superior Court Erred by Denying Costs

A. Question Presented

Did the Superior Court err in denying costs based on the Agreement's §9.6, even though its contract interpretation renders other contract clauses superfluous, ignores precedent exempting costs from contractual caps, and incorrectly treats costs as incidental damages? [A584-589.]

B. Scope of Review

This Court reviews decisions on cost awards for an abuse of discretion, but reviews underlying errors of law, including contract interpretation, *de novo*. *Cooke v. Murphy*, 2014 WL 3764177, at *2 (Del. July 30, 2014).

C. Merits of Argument

"Although awarding costs is a matter of judicial discretion, the prevailing party in an action at law generally is entitled to costs as a matter of right."[4] *Phelps v. West*, 2018 WL 1341704 (Del. Super. Ct. Mar. 15, 2018). The Superior Court did not, however, invoke its discretion to deny costs. [A584-589.] It instead interpreted §9.6's bar of incidental damages as precluding costs. [*Id.*] This was error for four reasons.

[4] The Superior Court held that "LG is the prevailing party[.]" [A584 n.3.]

First, interpreting §9.6—which never mentions costs—as precluding cost awards renders superfluous two other contractual provisions expressly mentioning costs. [A220 §9.6.] Section 4.4, which addresses the dismissal of IV's German lawsuits, requires each party to "bear ***its own cost*** incurred with the aforementioned [German] proceedings … and refrain from any ***request for cost*** reimbursement against each other." [A214-215 §4.4.] Section 4.4's preclusion of costs would be unnecessary if §9.6 already precludes costs. The other provision, §5.4, permits "the prevailing party … to recover ***its reasonable costs*** and expenses" in "any action or proceeding to enforce any right or remedy for payment of monies owed by Licensee under this Agreement." [A216 §5.4.] This cost-shifting provision, however, is nullified if §9.6 bars all costs. Because it renders §4.4 and §5.4 mere surplusage, the Superior Court's interpretation is incorrect. *See Kuhn Constr., Inc. v. Diamond State Port Corp*., 990 A.2d 393, 396-97 (Del. 2010) ("[W]e will give each provision and term effect, so as not to render any part of the contract mere surplusage.").

Second, this Court's precedent exempts costs from contractual damages caps. *See Enrique*, 2011 WL 1004604. In affirming a prejudgment interest award above an insurance policy limit, *Enrique* reasoned that "prejudgment interest is ***a litigation cost*** and not an element of damages," such that "the uninsured motorist policy's coverage limits do not cap the award." *Id.* at *1. Analogizing prejudgment interest

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to costs, this Court explained that, "[j]ust as [defendant] must pay ordinary court costs and fees which are beyond the limits of liability," a contracted damages limit "***does not set the cap for recovery on litigation costs*** and fees, which may include expert witness fees, witness fees, and court reporter fees." *Id.* at *2. If "prejudgment interest is a litigation cost" exempt from contractual limits as *Enrique* decided, *id.* at *1, capping costs based on contractual damages limits would undermine *Enrique*'s foundation and holding.

Third, the Superior Court's five cited cases do not support its conflation of costs and incidental damages. The four trial court-level opinions, [A587 n.15], did not deny costs or equate them to incidental damages—these opinions instead ***awarded*** costs. *In re Bracket Holding Corp. Litig.*, 2020 WL 764148, at *11 (Del. Super. Ct. Feb. 7, 2020); *Harrison v. Dixon*, 2015 WL 757819, at *5 (Del. Ch. Feb. 20, 2015); *Dewey Beach Lions Club v. Longacre*, 2006 WL 2987052, at *1 (Del. Ch. Oct. 11, 2006); *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at *4 (Del. Ch. Apr. 27, 2004). *Donovan v. Delaware Water & Air Resources Commission* is also inapposite because the costs there were barred by sovereign immunity and improperly imposed on a prevailing party. 358 A.2d 717, 722-23 (Del. 1976).

The Superior Court cited these opinions because they quoted the following language from *Peyton v. William C. Peyton Corp.*: "Costs are allowances in the

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nature of incidental damages awarded by law to reimburse the prevailing party for expenses necessarily incurred in the assertion of his rights in court." 8 A.2d 89, 91 (Del. 1939). But *Peyton*'s holding did not turn on whether costs were incidental damages—it turned on whether the applicable statute and rules allowed the taxing of certain court costs. *Id.* at 91-93. As the quoted language had no effect on *Peyton*'s outcome, it is *dictum* without precedential effect. *See In re Fox Corp.*, 312 A.3d 636, 650 n.75 (Del. 2024) (explaining test for *dictum*); *see also Heliflight, Inc. v. Bell/Agusta Aerospace Co., LLC*, 2007 WL 4373259, at *2-3 (N.D. Tex. Dec. 12, 2007) (rejecting defendant's reliance on *dictum* equating fees to incidental damages and on contract provision barring incidental damages). The Superior Court thus incorrectly denied costs based on *dictum*.

Finally, even if costs were considered "incidental damages," there is no finding or showing that LG's costs are based, as §9.6 requires, on a "theory of liability ***arising out of*** this Agreement." [A220 §9.6.] Rather, LG's costs arise from LG's status as the prevailing party and as an incident to the judgment, not from IV's breach. *See Folsom v. Butte Cty. Ass'n of Gov'ts*, 652 P.2d 437, 444 (Cal. 1982) ("[C]osts are allowed solely as an incident of the judgment given upon the issues in the action." (cleaned up)).

For these reasons, the Superior Court's denial of costs should be reversed.

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CONCLUSION

For the reasons above, the Court should reverse the imposition of a damages cap, the denial of prejudgment interest, and the denial of costs.

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