



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 September 4, 2025

**APPELLEES/CROSS-APPELLANTS' RESPONSE AND OPENING BRIEF**

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Dated: August 21, 2025

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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 alleging breach of a Patent License Agreement (“Agreement”). [B0001-0027], [A209-224]. LG claimed that IV breached the Agreement by “filing patent infringement lawsuits” against GM and Toyota allegedly on LG Licensed Offerings, specifically telematics units. *Id.*; *see also* LG Opening Brief at 1.<sup>1</sup> IV countered, *inter alia*, that LG had not proven any indemnity obligation, and the telematics units manufactured for GM and Toyota were Foundry Products, excluded from Licensed Offerings, hence, IV did not breach.

On summary judgment, the Superior Court capped damages ([A299, A316], LG Br. 1), and granted summary judgment that the accused telematics units were *not* Foundry Products. [A309-311]. The Agreement defines Foundry Products as products “manufactured” by LG “for or on behalf of a third party, solely according to such third party’s proprietary design specifications, ...,” excluding them from Licensed Offerings. [A211-212]; *see also* LG Brf. 1.

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<sup>1</sup> LG Brf. #.

At trial, the jury found that IV breached the agreement and awarded damages of \$ [REDACTED]. In the May 15, 2025 decision on post-trial motions, the Superior Court imposed a damages cap of \$ [REDACTED], denied prejudgment interest, and denied costs, all based on a plain reading of the Agreement. [A583-596], [A597-608], LG Br. 1. LG appealed those issues.

Also in the May 15, 2025 post-trial decision, the Superior Court denied IV's post-trial motions that, *inter alia*, (1) LG failed to prove indemnity liability (Exhibit 1, [B1205-1219]), and (2) LG failed to prove specifically it suffered damages (Exhibit 2, [B1220-1259]).

IV's cross appeal addresses the Superior Court's (1) summary judgment decision that the telematics units are not Foundry Products, (2) denial of IV's post-trial motion that LG failed to present specific evidence of damages, and (3) denial of IV's post-trial motion the LG failed to prove it owes any indemnity obligation.

## **SUMMARY OF ARGUMENT**

### **LG's Issues on Appeal**

1. IV denies LG's position that the Superior Court erred in applying the Agreement's plain language damages cap. The Superior Court properly held, based on the plain meaning of the Agreement, that LG's damages are capped at \$ [REDACTED] million<sup>2</sup>.

Each of LG's arguments on appeal ask this Court to deviate from the Agreement's plain meaning and is therefore improper. LG's forced interpretation that the Agreement §§9.6 and 5.1 require separate companies, IV International Licensing ("IVIL") and Intellectual Ventures – Invention Investment Fund Ireland ("III"), to be treated as one contradicts the Agreement as a whole because, in several places, the Agreement specifies that they should be treated separately. *See, e.g.*, [A213-222 (¶¶2.4, 3.2, 3.4, 4.2, 5.5, 7.2, 8, 9.3, 9.4, 9.45, 9.16)]. Because this issue turns on the plain reading of the Agreement, is a legal issue, was argued in in summary judgment and pre-trial motions, and was not provided to the jury, LG's arguments about an affirmative defense, judicial estoppel, law of the case, and waiver are inapplicable.

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<sup>2</sup> The specific value of IL's capped damages will be referred to as "\$ [REDACTED]"

**2 & 3.** IV Denies LG’s position that the Superior Court erred in applying the plain language of the Agreement to deny pre-judgment interest and costs. LG’s arguments for pre-judgment interest and costs are also against application of the Agreement’s plain language and fail because LG has not suffered injury. First, pre-judgment interest is a type of damages, and the Agreement §9.6 precludes liability for “indirect damages, including lost profits or other incremental or consequential, exemplary or special damages,” [A220], making an award of pre-judgment interest improper here. Additionally, pre-judgment interest is designed to reimburse a party who has been wrongfully deprived of money, but LG admits that to date has never paid any money to GM or Toyota, hence awarding LG interest would provide LG with an unjust windfall. Second, LG’s arguments for costs also fail because the Agreement §9.6 precludes both “incidental damages” and other costs that exceed the liability/damages cap. The issues LG appeals should be affirmed.

#### **IV’s Issues on Appeal**

1. IV appeals the Superior Court’s grant of summary judgment that the telematics units manufactured for GM and Toyota are not “Foundry Products.” LG manufactures the telematics products entirely pursuant to GM and Toyota’s design and control. Hence, the district court erred in determining as a matter of law that the telematics units are not Foundry Products excluded from Agreement coverage. At the

very least, under LG's stilted interpretation, material fact issues exists, requiring remand.

2. IV also appeals the Superior Court's denial of its JMOL that the uncorroborated letters from GM and Toyota, admitted only for receipt of "notice" of indemnification, were insufficient evidence of LG's purported damages.

3. IV appeals the Superior Court's denial of its motion for JMOL that LG failed to present corroborated evidence that it owed the purported indemnity obligations or that those obligations were ripe, especially when even today LG has paid nothing to GM or Toyota.

The decisions IV cross appeals should be reversed.

## STATEMENT OF FACTS

### I. The Agreement between IVIL, III, and LG

In 2019, LG, IVIL and III, entered into a Patent License Agreement to settle ongoing disputes. [A210-224]. The Agreement consistently provides for IV and III separately. [A210-211], [A212], [A214-215], [A218], [A224].

#### A. Section 1 “Licensed Offering(s)” and “Foundry Products”

The Agreement §1 restricts the licensed products, called “Licensed Offering(s)” to cover LG technology. *See generally* [A211-212]. The term “Licensed Offerings” means:

all of Licensee’s and each Licensee Subsidiary’s current and future products, processes, services or technologies that are:

- (a) made or used by Licensee or any Licensee Subsidiary; or
- (b) provided to Licensee or any Licensee Subsidiary by a third party ... and sold or distributed by Licensee ... under a mark or trade indicia of Licensee ...

Notwithstanding the forgoing, Licensed Offering(s) shall not include Foundry Products. “Foundry Products” shall mean products manufactured by Licensee or any Licensee Subsidiary for or on behalf of a third party, solely according to such third party’s proprietary design specifications, ... whereby such third party sells or distributes such products as its own products under its own mark or trade indicia.

Id.

Thus, “Licensed Offerings” must be products (a) “made or used by Licensee” or (b) “sold or distributed by Licensee” under its mark. [A211]. Even if a product meets one of those two criteria, the Agreement specifically excludes “Foundry Products,” which are manufactured by Licensee for a third party, solely according to the third party’s proprietary design specifications. [A211-212].

**B. Section 5.1 “Licensee Fee and Payment”**

Agreement §5.1 sets the total Licensee Fee and Payment to be made by LG at \$ [REDACTED] (the “Licensee Fee”). [A215]. Subsections (A) and (B) specify precisely what portion of that payment is to be made to each of the two Licensors:

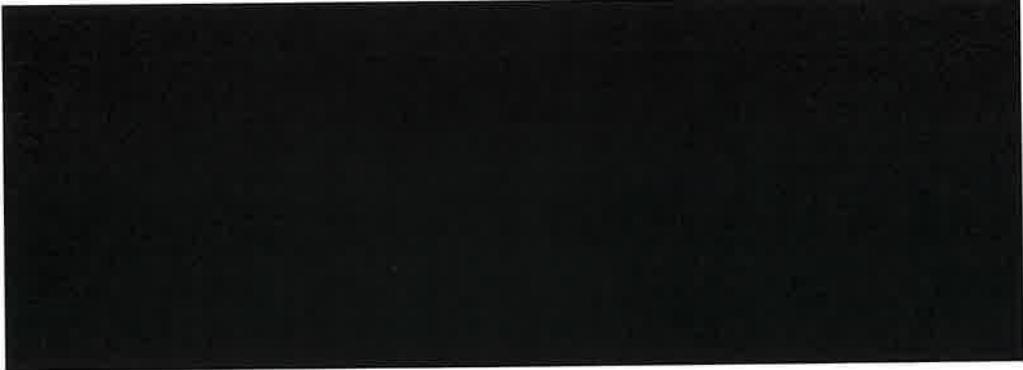
- (A) IVIL Payment: [REDACTED] % of the License Fee; [REDACTED] [REDACTED] shall be paid, in United States Dollars, to IVIL (“*IVIL Payment*”).
- (B) III Payment: [REDACTED] % of the License Fee; [REDACTED] [REDACTED] shall be paid, in United States Dollars, to III (“*III Payment*”).

[A215].

**C. Section 9.6 “Limitation of Liability; Damages”**

As the title of §9.6 suggests, it provides limits on the total liability that can arise from a breach of the Agreement. Section 9.6 provides:

[REDACTED]



[A220] (emphasis added). These limits include: (1) the prohibition on “indirect damages, including any lost profits or other incidental or consequential, exemplary or special damages,” and (2) a cap on the “aggregate liability,” which “shall not exceed the License Fee received by a Party ....” [A220].

The Agreement stipulates that “IVIL and III together are, individually and solely for convenience, referred to as ‘Licensor.’” [A211]. And, additionally, that “Licensor and Licensee are individually a ‘Party’ and collectively ‘Parties.’” *Id.*

## **II. The Texas Lawsuits Against GM and Toyota**

In October 2021, IV sued Toyota and GM for infringement of twelve patents relating to different features present in GM and Toyota vehicles. [B0014], [B0015]. LG asserted that IV breached the Agreement by filing the lawsuit. [B0023]. LG admits that it “never asserted that *vehicles* are ‘Licensed Offerings.’” (emphasis original). [B0209], [B0324]. Additionally, LG and IV disputed whether LG’s telematics units or additional hardware and software from third parties were

responsible for the patented features accused in the GM and Toyota automobiles.

*Id.*

The litigations continued for about a year-and-a-half with Toyota and GM settling in March and April 2023, respectively. Both GM and Toyota entered into portfolio licensing agreements with IV, [REDACTED] for the license to over 5,000 patents. [A345], [A515], [A519].

### **III. LG's Litigation Against IV**

In November 2022, before the IV's litigations against Toyota and GM were resolved, LG sued IV for breach of the Agreement. The entities LG sued here, collectively are referred to IV and are related to IVIL, a Licensor of the Agreement. LG did not sue III, the other Licensor to the Agreement, nor was III a party to the GM and Toyota lawsuits.

LG contended that the telematic units it sold to GM and Toyota for use in the accused vehicles were Licensed Offerings. [B0324]. LG alleged that IV had breached §§2.1, 4.3(b), and 9.4.6 of the Agreement. [B0439] (alleging IV violated §9.4.6 by “IV filing a lawsuit pointing to LG’s *licensed offering*” (emphasis in original)). However, LG also recognized that “[i]f what LG provides is not a *licensed offering*, then there’s no claim here.” [B0486 (emphasis added)].

IV filed a Rule 12(b)(1) motion to dismiss, asserting that LG lacked standing and that the case was unripe because LG had not suffered any injury as

indemnification payments had not been made, shown to be due, or owed by LG. [B0110], [B0143]. While not deciding IV's motion to dismiss on the merits, the court allowed LG to file an amended complaint.

#### **A. Foundry Products**

The parties do not dispute that, according to Agreement, "Licensed Offerings" exclude "Foundry Products." [A211-212]. Thus, there can be no breach of contract if LG's telematic units are "Foundry products."

LG's position is that the telematic units manufactured for GM/Toyota are not Foundry Products because LG authored proprietary design documents, hence telematics units are not manufactured "solely according to [GM/Toyota's] proprietary designs specifications." *See* [B0009, B0498, B0581, B0692].

However, IV argued that no genuine factual issue existed that Foundry Products, which requires LG to "manufacture[]" products "solely according to such third party's proprietary designs specification" [A211-212], was satisfied. According to IV, the evidence was undisputed that GM and Toyota solely controlled the manufacture. [B0169]. And that interpretation does not prevent LG, from creating design documents that implement its customers' "proprietary design specifications." [B009], [B0046]. For example:

a licensing professional, analyzing the Agreement under licensing custom and practice, would not interpret 'solely according to such third party's design specifications' to mean that merely because LG creates

design documents that implement GM and Toyota's instructions, such telematics units would fall outside the definition of a Foundry Product

[B0167-0168], [B0690 (IV's licensing expert, James Malackowski, explaining that the word "solely" in the License Agreement is meant to distinguish foundry products from both types of Licensed Products set forth earlier in the definition as (a) "designed and manufactured by LG" and at (b) "designed by LG and manufactured by a third party")].

However, the jury did not have the opportunity to determine whether telematics units were Foundry Products. Prior to trial, the Superior Court granted summary judgment to LG that the telematics units were not Foundry Products. [A309-312]. Therefore, the jury heard only that the telematics units were Licensed Offerings.

#### **B. The Agreement's Damages Caps**

On summary judgment, IV asserted that the Agreement limits LG's maximum recovery to the amount it paid as a license, *i.e.*, [REDACTED] and the court agreed. A316. The court determined that LG does not "seriously dispute this reading of the plain language." *Id.* The court held "LG's maximum recoverable damages from IV under the License Agreement are \$ [REDACTED] A317. In a hearing on October 11, 2024, IV raised that the Agreement limited IV's damages to the amount received by IVIL of \$ [REDACTED]. [A563]. The court did not decide the issue but ruled that

the jury would not consider the damages cap issues and that the parties could file post-trial motions on the proper interpretation of the Agreement. [A566].

**C. LG's Unfulfilled, Unproven Indemnification Responsibilities and Damages**

LG originally asserted that it “*had to make substantial payments* to its customers pursuant to the indemnification agreements.” [B0017], [B0082], [B0103], [B0137]. Because this was inaccurate, LG was forced to amend its complaint where it argued that it “has suffered harm, including pecuniary harm from *having to provide substantial financial indemnification to its customers* due to Intellectual Ventures’ specious claims of infringement.” [B0016], [B0053] (emphasis added)]. However, at trial, in response to being asked “has LG already paid GM and Toyota?” LG’s Mr. Yoo testified “No. LG Electronics Inc. has not yet paid.” [B0927]. Even now, years after its alleged indemnification obligations arose, LG does not dispute that it has not made any indemnification payments to either GM or Toyota. *Id.*; LG Br. 10. LG also does not reasonably dispute that neither GM nor Toyota properly notified it of its purported indemnity obligations prior LG’s filing of this lawsuit. [A936], [A397].

**1. GM**

To support its purported indemnification obligations to GM, LG first relied on a November 18, 2021 letter from GM notifying LG that it received a “Demand Letter” from IV on 12 patents. [B1260]. However, letter does not identify any LG

product that may be involved, nor does it provide support for LG's claims that indemnification payments were owed, or actually made. The letter merely requests "LG's position ...." *Id.*

On October 3, 2023, eleven months after LG filed the instant lawsuit, LG disclosed a second letter, dated just three days prior. This second letter claimed that "GM has requested indemnification from LG in the amount of \$ [REDACTED]." [A937-938]. GM reached that amount by stating LG owed it [REDACTED] % of both its total legal expenses (fees and costs) plus [REDACTED] % of the price it paid for a portfolio license of over 5000 patents. [A515, A937].

LG presented no evidence of the breakdown of the amounts GM requested between expenses related to the telematics units and those unrelated to LG's products. [B1123, B1154]. LG could only "guess" at what GM meant by the [REDACTED] % request in its indemnification letter. [B0638-0639]. LG provided no details besides the October 2023 letter about the indemnification request, much less when, or if, it was accepted. [A937-938].

## 2. Toyota

While originally falsely asserting that LG "had to make substantial payments" [B0017], then revising that to an assertion that LG purportedly "owes" payments [B0054], LG eventually admitted that, as of the filing of its lawsuit, Toyota had not even sought indemnification: "Toyota *may seek indemnification* from LG ...."

[B0289]. After IV filed its motion to dismiss, LG produced a letter dated October 25, 2023, almost a year after the instant suit was filed, in which Toyota “requested reimbursement” of approximately \$ [REDACTED]. [A936].

As with GM, LG had no evidence regarding the specifics of Toyota’s request for indemnification, much less when LG accepted it. [B0652-0653 (288:8-289:21)]. LG could not link specific indemnification amounts to IV’s purported conduct or to any licensed products because LG did not request that information from Toyota. [B0657-0658 (293:22-294:11)], [B0660 (296:12-18)], [B0662 (298:4-15)].

The Superior Court denied IV’s summary judgment motion, holding that LG only needed to have given “notice” of damages. [A313 (citation omitted)]. The court ruled that the 2023 letters from GM and Toyota could be admitted under D.R.E. 902(11) and 902(12) as business records and noted “Delaware law is clear, however, that ‘a parent-subsidiary relationship, without more, cannot render a parent corporation liable for the obligations of its subsidiaries ....’” [A315], *see also* [A410]. The court set those issues for trial.

#### **D. Superior Court Trial and Judgment**

This case was tried to a jury in October of 2024. The jury found that IV breached the Agreement by suing Toyota and GM and awarded LG its full damages request of \$ [REDACTED]. [B1221]. Both Parties submitted post-trial motions.

IV moved for judgment notwithstanding the verdict and for a new trial. Both motions were denied. The court held that a reasonable jury could find that LG had an obligation to indemnify Toyota and GM, that LG proved damages with reasonable certainty, and that the products at issue in IV's suits against Toyota and GM were "Licensed Offerings." [B1207].

IV also filed a Motion to Apply Contractual Damages Caps that IV had raised in a pre-trial hearing. [A549], [A563]. Specifically, IV argued that "the express terms of the License Agreement caps [LG's recoverable] damages at \$ [REDACTED], because LG sued the IV entities that were Plaintiffs in the [Patent Suits] instead of the parties to the License Agreement." [A600]. The court agreed and reduced LG's damages award to \$ [REDACTED]. [A608] Lastly, the court found that there was no legal error requiring a new trial under Rule 59(a). [B1249].

Separately, LG filed a Motion for "an award of (1) costs incurred in prosecuting this case; (2) prejudgment and post-judgment interest on the damages awarded; and (3) attorneys' fees." The court denied costs [A585-588], court granted post-judgment interest, but denied prejudgment interest. [A588-592], and denied LG's request for attorneys' fees. [A593-595]. LG appealed the denials of cost and prejudgment interest. LG Br. 36, 47.

Ultimately, the court entered a final judgment on May 27, 2025, incorporating the above referenced opinions. [A609-610].

## ARGUMENT RESPONDING TO APPEAL

### I. The Superior Court Properly Interpreted the Plain Language of the Agreement to Apply the \$ [REDACTED] Damages Cap

#### A. Question Presented

Did the Superior Court err in adopting the plain reading of the damages cap in the Agreement when (1) read as a whole, the Agreement supports only that interpretation [A215 (§5.1), A220 (§9.6)], [A601], [A551-553], [A606-608], [B1197]; (2) waiver does not apply because a damages limitation imposed by the plain contractual language is not an affirmative defense required to be pled [A316-317], [B1199]; (3) none of judicial estoppel [A551-553], [A603-604], [B1198-1199], law-of-the-case [A605], [B1199], or the Pretrial Stipulation [A551-553] [A606], [B1200], precluded IV from arguing that at most it was liable for the amount of the damages applicable to IVIL, \$ [REDACTED]

#### B. Scope of Review

IV agrees that this Court reviews decisions on post-trial motions and contract interpretation *de novo*. LG Br. 14-15. This Court reviews a court's application of law of the case *de novo*. *Frederick-Conaway v. Baird*, 159 A.3d 285, 296 (Del. 2017). However, this Court reviews a Superior Court's decision whether to apply waiver based on the pre-trial stipulation for abuse of discretion. *Realty Enter., LLC v. Patterson-Woods & Assocs., LLC*, 2010 Del. LEXIS 636, at \*9 (Del. Dec. 13, 2010); *accord Alexander v. Cahill*, 829 A.2d 117, 128-29 (Del. 2003).

### **C. Merits Argument**

As set forth in IV's Cross Appeal Arguments, *infra*, because IV did not breach the Agreement, no damages are owed. However, for responding to LG's "Damages Cap" arguments here, the Superior Court properly applied the Agreement's plain language to reduce the jury's award to about \$ [REDACTED] the amount LG paid to IVIL. Licensor IVIL is related to the IV entities sued here, whereas Licensor III is not a party here or related to a party here, and was not served notice of breach.

#### **1. The Superior Court Properly Interpreted the Agreement's Plain Language to Apply the \$ [REDACTED] Damages Cap to IV**

The Agreement contains two provisions in §5.1 that set forth the maximum IVIL received, and hence, the maximum for which IV can now be liable. [A215]. First, the License Fee and Payment is \$ [REDACTED] ("License Fee"). *Id.* Second, two specific payments making up that \$ [REDACTED] that IVIL and III received:

- (A) IVIL Payment: [REDACTED] % of the License Fee, ...  
\$ [REDACTED] USD.
- (B) III Payment: [REDACTED] % of the License Fee, ...  
\$ [REDACTED] USD.

[A215]. The Agreement further details that "[t]he Parties agree that [REDACTED] % of the wire transfer is for payment to III in consideration of the license and other rights granted to III by Licensee pursuant to the Agreement." *Id.* Each payment is specific to each entity, limiting the amount it received under the Agreement. Therefore,

Defendant IVIL's liability is also limited to the Licensee Fee it received, [REDACTED] % of the total License Fee, or about \$ [REDACTED]

Agreement "§9.6 Limitation of Liability; Damages," echoes this plain language: "THE AGGREGATE LIABILITY FOR CLAIMS ARISING UNDER THIS AGREEMENT WILL NOT EXCEED THE LICENSE FEE RECEIVED BY A PARTY UNDER PARAGRAPH 5.1 ...." [A220]. Hence, the result is that the aggregate or total liability that IV can incur will not "exceed the license fee received" by IVIL, about \$ [REDACTED] [A215 (§5.1)], [A220 (§9.6)].

Other sections confirm the plain meaning. For example, §9.16 explains that

With respect to *each Licensor* and *its* respective rights and obligations pursuant to this Agreement, such rights and obligations of *III* are solely with respect to the *III* Licensed Patents and such rights and obligations of *IVIL* are solely with respect to the *IIF* Licensed Patents, as applicable. Additionally, *III and IVIL are each independently a "Licensor" and, under no circumstances, shall any action or inaction of IVIL affect any rights, obligation or undertakings of III*, including with respect to the *III* Licensed Patents, *nor shall any action or inaction of III affect any rights, obligations or undertakings of IVIL*, including with respect to the *IIF* Licensed patents.

[A222] (emphasis added). The rest of the Agreement are in accord. [A213-222 (¶¶2.4, 3.2, 3.4, 4.2, 5.5, 7.2, 8, 9.3, 9.4, 9.45, 9.16)]. The law is not in dispute:

Clear and unambiguous language ... should be given its ordinary and usual meaning. Absent some ambiguity, Delaware courts will not destroy or twist policy

language under the guise of construing it. When the language of a ... contract is clear and unequivocal ....

*Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2005) (internal quotes omitted) (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992)).

The plain meaning of the Agreement provides that maximum amount for which IV can be liable to LG is the amount LG paid to IVIL.

## **2. LG’s Forced Interpretations Fail to Consider the Agreement as a Whole**

LG makes an illogical argument that the court’s plain reading of §9.6’s text “received by a party” must mean “received by [both IV and III].” LG Br. 29-32, 33-34. First, the plain meaning of “a party” is singular. Second, the Agreement stipulates that “IVIL and III together are, individually and solely for convenience, referred to as ‘Licensor.’” [A211]. Indeed, IVIL and III’s separate party status is reflected by the Agreement’s repeated references to “each Licensor,” “such Licensor,” “the applicable Licensor,” and “a Licensor.” [A213-222 (¶¶2.4, 3.2, 3.4, 4.2, 5.5, 7.2, 8, 9.3, 9.4, 9.45, 9.16)].

For example, §9.16 provides that “III and IVIL are each independently a ‘Licensor’” and the actions of one shall not “affect the rights, obligations or undertakings of” the other. LG’s interpretation of §9.6 renders §9.16 nonsensical, violating fundamental contract interpretation principles. *Am. Gen. Holdings LLC v.*

*Reno Group, Inc.*, 2020 Del. Ch. LEXIS 223, at \*10 (Del. Ch. June 26, 2020) (“it is firmly established that this Court should ‘interpret contracts as a whole … [to] give each provision and term effect, so as not to render any part of the contract mere surplusage, and [] not read a contract to render a provision or term meaningless or illusory.’” (quoting *In re Shorenstein Hay-Nederlander Theatre LLC Appeals*, 213 A.3d 39, 56 (Del. 2019) (edits in original)).

Additionally, the Agreement specifies that “Licensor and Licensee are individually a ‘Party’ and collectively ‘Parties.’” *Id.* Therefore the term “Licensor” can mean either IV or III, individually, or both IV and III together, depending on the context. The Agreement’s explanation of the term “Party” further confirms that §9.6’s stipulation that “the aggregate liability for claims arising under this Agreement will not exceed the License Fee received by a Party under Paragraph 5.1 as of the date that such Party has been notified of a claim” refers to either IVIL or III because it would not make sense for the “aggregate liability” of a Party to be dependent on notification of both parties of a claim. *See* [A221 §9.15]. Indeed, in this case III has not been notified of the claim, so under that interpretation, LG is owed nothing. As such, §9.6’s reference to “the License Fee received by a Party,” pertains to IVIL and III, individually. [A607].

LG’s other argument, that the term “License Fee” refers only to the entire \$ [REDACTED] also lacks support when read in view of the Agreement as a whole. LG

Brf. 32. As LG notes, §5.1 also separately defines the “IVIL Payment” and “III Payment.” *Id.* §5.1(A)-(B). So, according to LG, when the Agreement speaks about individual liability, it refers to that as either “IVIL Payment” or “III Payment.” LG Br. 32-33. However, LG argues §9.6’s reference to “the License Fee,” must mean either party owes the entire \$ [REDACTED] not only IVIL or III Payments. *Id.* 33.

This argument, however, ignores the full text of §9.6, which limits a Party’s aggregate liability to “the License Fee *received by a party* under Paragraph 5.1.” [A220] (emphasis added). LG’s position renders the emphasized text superfluous, violating basic contract interpretation principles. *Ray Beyond Corp. v. Trimaran Fund Mgmt., L.L.C.*, 2019 Del Ch. LEXIS 36, at \*14 (Del. Ch. Jan. 29, 2019) (“[a]s part of a whole-text analysis, the court must avoid interpreting legal text in a manner that renders provisions superfluous ....” (citing *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)). Additionally, LG’s argument devolves into the same problem as its argument that “Party” must always be both IVIL and III—because III has not been notified if the “aggregate liability” must be \$ [REDACTED] [REDACTED] nothing is owed to LG. *See* [A212 (§9.15)]. On appeal, LG fails to address the inconsistency resulting from its interpretation, even though the Superior Court

pointed it out. [A607 n.61]. As such, LG's attempted limitation of "Licensee Fee" to only mean \$ [REDACTED] fails.<sup>3</sup>

Finally, LG argues that because IVIL received the entire amount of LG's payment into its bank account and then transferred III's portion out to III, the aggregate Licensee Fee, namely the \$ [REDACTED] was received by IVIL, and IVIL should be responsible in damages for all of it. LG Br. 34-35. Yet again, such a reading violates other sections of the Agreement, for example §9.7 Requires that "[n]o Party has any express or implied right or authority to assume or create any obligations on behalf of the other." [A220]. Such an interpretation would create an obligation on behalf of IVIL to be responsible for the entire potential liability of III, and that certainly cannot be the Parties' intent, especially when the Agreement repeatedly enforces the separateness of IVIL and III. *See, e.g.*, [A213-222 (¶¶2.4, 3.2, 3.4, 4.2, 5.5, 7.2, 8, 9.3, 9.4, 9.45, 9.16)].

LG's forced arguments should be disregarded.

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<sup>3</sup> LG weakly asserts that the Superior Court's interpretation of "License Fee" in its decision on JMOL contradicts its prior interpretation in its Summary Judgment decision. LG Br. 33. LG provides no specifics; however, on Summary Judgment the Superior Court specifically pointed out that *LG's recoverable damages cap was \$ [REDACTED]* and defined the "Licensing Fee" in §5.1. [A316]. However, that is not at odds with §9.6, which specifies "the License Fee received by a party under Paragraph 5.1."

### **3. LG’s Procedural Arguments Fail**

LG constructs a myriad of supposed procedural barriers to application of the plain meaning of the Agreement. However, each of LG’s barriers lacks support and collapses under the weight of the Agreement’s plain language.

#### **a. Interpretation of Clear Contractual Language Is Not an Unpled Affirmative Defense**

Contrary to LG’s assertions, the Superior Court was correct the Agreement’s “damage limitation imposed by clear contractual language is not an affirmative defense.” [A316]. *See e.g., Hyman Reiver & Co. v. Rose*, 147 A.2d 500, 504 (Del. 1958) (holding that amount recoverable under the contract “did not constitute an affirmative defense … Rule 8(c) is inapplicable.”). For example, in *New Castle County v. Hersha Hospital Management L.P.*, 2025 Del. Super. LEXIS 213 (Del. Super. Ct. Apr. 25, 2025), defendant moved to amend his pleadings to add an affirmative defense including a contractual damages limitation and plaintiff objected, the Superior Court held that “Delaware law requires courts to enforce the plain and unambiguous terms of a contract as the binding expression of the parties’ intent.” *Id.* 2025 Del. Super. LEXIS at \*12. Based on that principle, a “damages limitation imposed by clear contractual language is not an affirmative defense.” *Id.* 12-13 (citing *LG Elecs. Inc. v. Invention Inv. Fund I L.P.*, 2024 Del. Super. LEXIS 831, at \*17-18 (Del. Super. Ct. Sept. 25, 2024)).

Faced with case law directly against it on this issue, LG looks to purported analogous affirmative defenses in an attempt to support its waiver argument, but none of its cases deals with the legal issue here, where the “damages limitation” was “imposed a clear contractual language.” *Id.* 17-18. Both *James v. Glazer*, 570 A.2d 1150 (Del. 1990) and *Marshall v. Payne*, 2018 Del. Super. LEXIS 1142 (Del. Super. Ct. Oct. 25, 2018), relied upon by LG deal with contributory negligence, a factually specific issue, specified as an affirmative defense Rule 8(c). *James*, 570 A.2d at 1153; *Marshall*, 2018 Del. Super. LEXIS at \*5.

Indeed, LG’s purported analogy to the failure to mitigate damages belies its overall flaw. Mitigation of damages is factual determination for the jury. *Mizel v. Xenonics, Inc.*, 2007 Del. Super. LEXIS 400, at \*21 (Del. Super. Ct. Oct. 25, 2007) (“Under Delaware law, questions regarding mitigation of damages are factual and therefore properly determined by the trier of fact.”). Indeed, LG’s cases exclude unpled mitigation “testimony, comments, questions, arguments, and suggestions . . .” from trial to avoid unfair prejudice. *Richardson v. Christiana Care Health Servs.*, 2021 Del. Super. LEXIS 485, at \*15-16 (Del. Super. Ct. June 21, 2021). By contrast, contractual interpretation is a legal issue for the court. *Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 249 A.2d 106, 117 (Del. 2012) (The Court reviews questions of law, including contract determination, *de novo*.). And the court here excluded the damages cap issue from the jury. [A566] LG fails to address that its Delaware

waiver cases rely on the need for development of factual issues; however, a plain reading of the Agreement does not require such development. *See, e.g., Monzo*, 249 A.2d at 117. Therefore, LG’s cases dealing unpled factual issues fail to be even analogous.

LG’s non-Delaware cases do not fare any better because they all deal with the failure to raise statutory damages limit defense before trial. *See Racher v. Westlake Nursing Home Ltd.*, 871 F.3d 1152, 1161-62 (10th Cir. 2017) (holding failure to raise *statutory* damages cap prior to trial, waived the affirmative defense, but noting that this is an area where different circuits have reached conflicting results); *Jakobsen v. Mass. Port Auth.*, 520 F.2d 810, 813 (1st Cir. 1975) (finding waiver where statutory damages limit for Port Authority only raised *after* evidence presentation in motion for directed verdict); *United States v. CITGO Asphalt Ref. Co., (In re Frescati Shipping)*, 886 F.3d 291, 298 (3d Cir. 2017) (finding waiver where defendant requested damages limitation *after* a first trial and an appeal); *Simon v. U.S.*, 891 F.2d 1154, 1157 (5th Cir. 1990) (affirming district court’s refusal to amend the verdict *after* trial to incorporate statutory malpractice damages limitation, but noting that where the defendant raises the issue at a “practically sufficient time,” and plaintiff is not prejudiced in its ability to respond there is no

waiver).<sup>4</sup> Here, in contrast to each of LG’s non-Delaware cases, the damages cap is in the plain language of the contract, was IV raised it before trial, LG had a chance to respond, and there was no jury prejudice against LG.

If the Court upholds the liability determination, which IV argues it should not, *see* Cross-Appeal Arguments, *infra*, the Court should affirm application of the Agreement’s \$ [REDACTED] damages cap.

**b. Judicial Estoppel is Inapplicable**

Judicial estoppel is intended to preclude a party from arguing a position that is inconsistent with a position taken by the court in the same or earlier legal proceeding. *La Grange Cmtys., LLC v. Cornell Glasgow, LLC*, No. 56, 2013 Del. LEXIS 455, at \*14-15 (Del. Sept. 9, 2013) (holding judicial estoppel inapplicable where party’s prior position, adopted by the court, that agreement’s Sales Projection Schedule provided that “all houses would be sold within eleven quarters (2 ¾ years)” was not inconsistent with the party’s subsequent position that the “Sales Projection Schedule in the Agreement was not a firm deadline.”). Here, LG asserts that this Court should apply judicial estoppel because IV’s prior argument on summary

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<sup>4</sup> LG’s other cases are not on point. *See S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co.*, 353 F.3d 367, 372-73 (4th Cir. 2003) (affirming decision that contractual limitations period waived because not raised); *Terracciano v. McAlinden Const. Co.*, 485 F.2d 304, 307-08 (2d Cir. 1973) (reviewing factual limitation on liability due to lack of privity or knowledge).

judgment that LG's maximum recovery is capped at \$ [REDACTED] is inconsistent with the Superior Court's decision that IV's liability shall not exceed the "License Fee Received by a Party," here IVIL. LG Br. 33; A220. LG's reliance on *Motors Liquidation Co. DIP Lenders Trust v. Allstate Insurance Co.*, 2018 Del. LEXIS 324, at \*13 (Del. July 10, 2018), actually supports IV. In *Motors Liquidation*, the court relied on representations made by GM to grant a stay in an earlier, related case. "General Motors admitted that it would be estopped" from arguing otherwise. *Id.* at \*12. Here, by contrast, IV has made no inconsistent arguments or admitted estoppel, and judicial estoppel is inapplicable.

First, the cap on what LG can receive is different than the cap on what IV owes. As shown, §5.1 discusses the payment made from LG to IVIL and III, the "License Fee and Payment" is \$ [REDACTED] and the "IVIL Payment" portion is set at about \$ [REDACTED] [A215]. From that, the Superior Court held on summary judgment that "LG's maximum recoverable damages from IV under the License Agreement are \$ [REDACTED] [A317]. Then, §9.6 specifies what happens in case of liability stemming from a breach of the Agreement. [A220]. "The aggregate liability for claims arising under this Agreement will not exceed the *License Fee received by a Party* under paragraph 5.1 ...." *Id.* There is no dispute that the License Fee received by IVIL is about \$ [REDACTED] [A215]. Hence, IV's pre-trial position that the max IVIL can be liable for is \$ [REDACTED] is not inconsistent with the position

it took on summary judgment that the maximum LG can be awarded is \$ [REDACTED]

It's just more specific, stemming from the plain terms of the Agreement. Where positions are not inconsistent, judicial estoppel is inapplicable. *See La Grange*, 2013 Del. LEXIS 455, at \*14-15.

LG makes much of "tracking" IV's summary judgment brief. LG Br. 22. However, nothing in the cited passages of IV's summary judgment brief contradicts its arguments in its post-trial motion. In the context of the higher cap \$ [REDACTED] IV discusses limiting "aggregate liability," "limiting recovery," and limiting the "amount LG can seek." *Id.* However, nothing in that discussion states that LG can receive \$ [REDACTED] *and no less*. To the contrary, at all times IV has maintained the LG is not entitled to *any* damages because there is no breach. *See* Cross-Appeal Argument, *infra*. Finally, even an inconsistent position alone does not create estoppel unless the court relied on it. *Whittington v. Dragon*, 2011 Del. Ch. LEXIS 63, at \*33 (Del. Ch. Apr. 15, 2011) (for judicial estoppel to apply the contradictory statement must have been accepted by the court and relied upon). Here on summary judgment, the court "determined that IV's liability is limited to \$ [REDACTED] [A340]. The Superior Court certainly didn't hold that, if damages were applicable, they would be *no less than* \$ [REDACTED] *Nationwide Emerging Managers, LLC v.*

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<sup>5</sup> In LG's footnote 3, it argues about "indispensable party" and Rule 19, but concludes the discussion is irrelevant. LG Br. 23. IV concurs.

*NorthPointe Holdings, LLC*, 112 A.3d 878, 889 (Del. Mar. 18, 2015) (discussing a damages remedy “capped” at \$3.5 million and remanding “for a determination of what, if any, termination fee is due,” confirming the cap is a maximum, not a floor). As the Superior Court recognized, judicial estoppel is inapplicable.

**c. Law of the Case Is Inapplicable**

LG ignores that application of the law of the case “does not act as a legal bar to a court’s reconsideration of its own decision before entry of final judgment.” *See Moses v. State Farm Fire & Casualty Ins. Co.*, 1992 Del. Super. LEXIS 315, at \*4-5 (Del. Super. Ct. June 25, 1992); LG Br. 24. Law of the case is established when a “specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation.” *Frederick-Conaway*, 159 A.3d at 297 (citation omitted).

Indeed, LG admits that “IV’s belated request for a second damages cap was a creative, ..., request for reconsideration or reargument.” LG Brf. 24 (citation omitted). Yet, that is precisely the point. The Superior Court can revisit contract interpretation in order to ensure that the intention of the parties to the contract is properly considered. *See Lorillard*, 903 A.2d at 739-40 (“When interpreting a contract, the role of the court is to effectuate the parties’ intent,” and the court “must accept and apply the plain meaning of an unambiguous term” in context.).

LG takes issue with the Superior Court's statement of the law of the case that allows "reconsideration of a prior decision that is clearly wrong, produces an injustice, or should be revisited because of changed circumstances." [A605 (quoting *Hoskins v State*, 102 A.3d 724, 729 (Del. 2014) (citation omitted))]. However, LG again ignores that, for law of the case to even be applicable, there must be an inconsistency between the decisions (which there is not here). However, if the prior decision was interpreted such that LG could be awarded \$ [REDACTED] and nothing less, which seems to be what LG intends, then it was clearly wrong based on the plain reading of the Agreement. *See, e.g.*, [A220] ("the Aggregate Liability ...will not exceed the License Fee received by a Party. ...."); *see also Arizona v. California*, 460 U.S. 605, 618 n.8 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power," and a court may depart from a prior holding if it is "clearly erroneous and would work a manifest injustice."). Because law of the case doctrine does not bar the court's reconsideration of its own decisions, and correct contract interpretation takes primacy, this Court should affirm the Superior Court's refusal to apply LG's law of the case theory to the damages cap.

**d. The Pretrial Stipulation Did not Preclude the Agreement's Plain Reading**

As LG's final attempt to erect a procedural hurdle, LG asserts that IV violated the Pretrial Stipulation. LG Br. 26. LG claims that "any issue" not raised in the pretrial stipulation is waived. *Id.* (citing *Alexander*, 829 A.2d at 128-29; *Realty*

*Enters.*, 2010 Del. LEXIS at \*9). Yet the cases LG relies upon did not find waiver of just “any issue.” In *Alexander*, for example, the Court held that defendant had waived the affirmative defense of duress. *Alexander*, 829 A.2d at 128. The court determined that, because the trial court allowed unexpected testimony that raised the defense of duress, “plaintiffs were not put on notice that they needed to prepare to meet the inferences to be drawn from the facts supporting the defense.” *Id.* Nothing of the sort happened here. Indeed, LG was on notice *before trial* of IV’s assertion of the \$ [REDACTED] damages cap, and that the issue would be part of post-trial motions. [A563]. Because the Superior Court excluded from trial evidence of any damages cap, the jury certainly was not prejudiced into lowering its damages. To the contrary, IV argued post-trial that the jury was prejudiced into awarding too high a damages number because it did not know about the Agreement’s contractual limits. [B1026-1027].

In *Realty Enters.*, also relied upon by LG, appellant Realty asserted that the Superior Court erred in dismissing its third-party complaint. 2010 Del. LEXIS at \*9. However, Realty did not raise any claims from the third party complaint as part of the pretrial stipulation. *Id.* The Court held that the Superior Court did not abuse its discretion in dismissing Realty’s third-party complaint. *Id.* Contrary to *Realty*, LG does not argue that IV failed to raise a cause of action, and LG does not argue that IV improperly raised the damages cap at trial without notice.

LG's argument that IV never moved to modify the Pretrial Stipulation begs the question: If the damages cap issue was excluded from the jury trial, what is LG's prejudice from no formal modification to the Pretrial Stipulation? All the cases LG relies upon for waiver dealt with surprise and prejudicial trial issues. *Realty*, 2010 Del LEXIS at \*9; *Alexander*, 829 A.2d at 128. In sharp contrast, at a pretrial hearing, the parties argued the \$ [REDACTED] cap, the court heard the issue, took it under advisement, informed the parties that the court was not going to rule on the issue before trial, and that the parties could raise it again in post-trial motions. [A567]. This is hardly surprise or in any way prejudicial to LG. LG's reliance on Rule 16's goals of "[1] familiariz[ing] the litigants with the issues in the case; [2] reduc[ing] surprises at trial; and [3] facilitate[ing] the overall litigation process" track what happened here. LG Brf. 28 (citing *Cebenka v. Upjohn Co.*, 559 A.2d 1219, 122 (Del. 1989)). LG was (1) familiar with the \$ [REDACTED] cap issue from at least a pre-trial hearing; (2) all cap issues were excluded from trial, so no surprises, and (3) the Superior Court's handling of the legal issue through post-trial motions facilitated the overall litigation process. There is no waiver, and LG's cases about blanket waiver are inapposite. LG has failed to show the Superior Court abused its discretion on this issue.

## **II. The Superior Court Properly Denied Prejudgment Interest**

### **A. Question Presented**

Did the Superior Court correctly deny prejudgment interest when the Agreement §9.6 [A220] excludes such interest, and awarding LG interest would provide it with an unjust windfall, as LG does not dispute that it has never paid any money to GM or Toyota. [A588-592].

### **B. Scope of Review**

IV agrees that this Court reviews contract interpretation and the denial of prejudgment interest *de novo*. LG Br. 36.

### **C. Merits Argument**

1. As the Superior Court Properly concluded, prejudgment interest is inappropriate because LG has still not paid any money allegedly owed, and as such LG was not deprived of any money. Prejudgment interest is designed to “compensate the plaintiff for additional losses resulting from being deprived of the use of the money during the period between the injury and payment.” *O’Riley v. Rogers*, 2013 Del. Super. LEXIS 383, at \*3 (Del. Super. Ct. Sept. 4, 2013) (citations omitted). It is not, however, intended to be a means to obtain a financial windfall. *Moskowitz v. Wilmington*, 391 A.2d 209, 211 (Del. 1978). Accordingly, prejudgment interest should reflect the “amount that most closely parallels the loss [plaintiff] suffered by being deprived during the damage period of the money

eventually awarded it.” *Trans-World Airlines, Inc. v. Summa Corp.*, 1987 Del. Ch. LEXIS 373, at \*3 (Del. Ch. Jan. 21, 1987). Here, that amount is zero.

LG has not paid any money to either GM or Toyota, as the Superior Court properly concluded. Indeed, LG admits it has *never paid anything* to GM and Toyota [B0927 (T.0217:21-22)], *i.e.*, it was never deprived of or lost the use of *any money* between the date of IV’s alleged breach and the ultimate date of (non-existent) payment. *See also* [B1167 (¶8)]. There is, therefore, no basis on which to award LG interest.

In fact, doing so would provide LG an unjust windfall, as LG would: (i) have the benefit of the interest on the money it seeks in damages but has not paid out; and (ii) *also* obtain millions of dollars in *additional* interest on money *it has controlled and used* throughout. *See, e.g., Deane v. Maginn*, 2024 Del. Ch. LEXIS 233, at \*5 (Del. Ch. June 18, 2024) (“[p]re-judgment interest accruing before trial would also generate a windfall for the plaintiffs” and plaintiffs were not “deprived of their own funds” during the pretrial period); *Salt Meadows Homeowners Ass’n v. Zonko Builders, Inc.*, 2023 Del. Super. LEXIS 51, at \*22-23 (Del. Super. Ct. Oct. 27, 2022) (refusing to award interest for period when plaintiffs had full use of property).

2. Additionally, because pre-judgment interest is a type of damages, and the Agreement §9.6 precludes liability for “indirect damages, including lost

profits or other incremental or consequential, exemplary or special damages,”

[A220], an award of pre-judgment interest is not appropriate here.

LG’s reliance on *State Farm Mutual Automobile Insurance Co. v. Enrique*, 2011 Del. LEXIS 163 (Del. 2011) is inapplicable. That case involved whether interest could be limited based on automobile coverage limits of an insurance policy, where a statutory provision requires “in any tort action … interest shall be added to any final judgment” *if* “prior to trial the trial plaintiff had extended to defendant a written settlement demand …” that ends up being “an amount less than the amount of damages upon which the judgment was entered.” 6 Del. C 2301(d). Yet, LG’s causes of action here are not based in Delaware statutory provision for prejudgment interest in tort, nor did it make a written settlement demand that ended up being less than the amount of damages awarded.

By contrast, the plain meaning of the Agreement prohibits damages over the stated cap. The *State Farm* Court noted that “capping State Farm’s liability on prejudgment interest to the policy limit would strip section 2301 of its purpose ....” *Id.* at \*9. Similarly, disregarding the parties’ intent in drafting the Agreement would strip away the plain meaning of the Agreement, especially where there is no contradictory statutory provision.

This Court should affirm the Superior Court’s denial of pre-trial interest.

### **III. The Superior Court Properly Denied Costs**

#### **A. Question Presented**

Did the Superior Court err in denying LG costs based on the Agreement §9.6 that precludes both “incidental damages” and other costs that exceed the liability/damages cap? [A585-589].

#### **B. Scope of Review**

IV agrees that this Court reviews decisions on cost awards for abuse of discretion, and underlying legal positions *de novo*. LG Brf. 47; *see also Cooke v. Murphy*, 2014 Del. LEXIS 349, at \*4 (Del. July 30, 2014).

#### **C. Merits Argument**

Contrary to LG’s argument, the Superior Court’s decision denying an award of costs is within the plain meaning of §9.6 and consistent with the Agreement as a whole. LG Br. 48, [A220 (§9.6)]. Section 9.6 provides damages limitations damages such that incidental damages, are not recoverable. [A220]. Additionally, §9.6 provides that the “aggregate liability for claims arising under this agreement will not exceed the license fee received by a party under paragraph 5.1 ....” *Id.* Therefore, §9.6 provides two plain language reasons why LG’s costs are not recoverable.

Also contrary to LG’s argument, precluding an award of costs hardly renders either §4.4 or §5.1 superfluous. LG Br. 48. Section 4.4 covers the specific instance of the lawsuits in Germany as distinct from the damages limitations provided in §9.6.

[A215]; *see Salamone v. Gorman*, 106 A.3d 354, 357 (Del. 2014) (affirming differences in contract sections where one section adopted per-share voting while another adopted per-capita). Section 5.1 provides the overall License Fee and the percentage of the License Fee that was received per IVIL and III, and based on this section determines the cap. [A215]. Indeed, it is difficult to understand how section §5.1 provides for costs to be excluded from the plain language damages cap provided by §9.6.

Second, LG is wrong that the Court should apply precedent exempting costs. LG Br. 48. It's reliance on again on *State Farm v. Enrique*, 2011 Del. LEXIS 163 (Del. 2011) is inapplicable for the same reason it was inapplicable to the pre-judgment interest issues, *supra*. Even assuming LG's analogy of pre-judgment interests here to costs, *Enrique* was based on specific statute that required pre-judgment interest *if* "prior to trial the trial plaintiff had extended to defendant a written settlement demand ..." that ends up being "an amount less than the amount of damages upon which the judgment was entered." 6 Del. C 2301(d). LG's causes of action here are not based in Delaware statutory provision for pre-judgment interest or costs in tort. By contrast, they are based in the plain meaning of the Agreement.

Third, contrary to LG's assertion, the Superior Court did not conflate costs with incidental damages. LG Br. 49. Instead, the court recognized that "[c]osts are

allowances in the nature of incidental damages ...," A587, and noted the case law that supports that interpretation.

The Court should affirm the issues raised by LG on appeal.

## **ARGUMENT ON CROSS-APPEAL**

### **I. Contrary to the Superior Court's Summary Judgment Decision, LG's Telematic Units are Foundry Products, thus Excluding them from Licensed Offerings**

#### **A. Question Presented**

Did the Superior Court err in granting summary judgment that the telematic units LG manufactured for GM and Toyota were *not* Foundry Products, even though they satisfy the Agreement's definition of Foundry Products, thus excluding them from Licensed Offerings [B0168-0176]; or at the very least, under LG's unworkable interpretation of Foundry Products, genuine issues of material fact exist about whether the telematic units were Foundry Products. [A309-312], [A211], [B0328-0331].

#### **B. Brief Answer**

Yes, this Court should reverse the Superior Court's grant of summary judgment, and hold that the telematics *are* Foundry Products, thus excluding them from Licensed Offerings. Specifically, the Agreement defines Foundry Products as items "manufactured by [LG] ... solely according to [a] third party's proprietary design specifications." [A211-212]. Because GM and Toyota dictated the specifications and features of the telematics units required for manufacture, they are by definition Foundry Products. Nevertheless, the court erroneously concluded otherwise. [A309-312]. This legal error should be reversed.

However, if the Court accepts LG's flawed interpretation of Foundry Products that if LG is involved in "any way" in the design, that removes the telematics units from being Foundry Products [A210], genuine issues exist as to whether the telematics units are Foundry Products, requiring remand.

### **C. Scope of Review**

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). However, the Court "must view the evidence in the light most favorable to the non-moving party." *O'Leary v. Telecom Res. Serv., LLC*, 2011 Del. Super. LEXIS 326, at \*8 (Del. Super. Ct. July 25, 2011). And "[i]f a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law, summary judgment is inappropriate." *Id.*

### **D. Merits Argument**

1. The Superior Court erred by denying IV's motion for summary judgment that the telematics units are Foundry Products even though all of the evidence, including LG's corporate witnesses and GM/Toyota's design documents, show that GM/Toyota alone controlled the manufacture of the telematics units. [A301].

2. The Superior Court also legally erred by adopting LG's flawed and impractical interpretation of Foundry Products to mean that, if LG has "any input," such as preparing documents based on GM/Toyota's designs, the telematics units

are not Foundry Products. However, the Agreement doesn't say that "any input" from LG voids the Foundry Produce designation. Instead, Foundry is defined positively with respect to being "manufactured ... solely according to [GM/Toyota's] proprietary design specifications" [A211-A212], and LG presented no evidence that such input had any effect on such manufacturing.

However, if LG's flawed interpretation allowing "any input" is accepted, genuine issues of fact exist as to whether LG's purported input negated the Foundry Products classification, despite that any such input had to be approved by GM/Toyota before it could effect "manufacturing," and LG presented no such evidence.

#### **1. Under IV's Interpretation, No Genuine Issue of Fact Exists that the Telematics Units Are Foundry Products**

The grant of the License Agreement is limited to "Licensed Offerings," and Foundry Products are an exclusion from Licensed Offerings. [A211]. "Licensed Offering" are defined as LG's "products, processes, services, or technologies" made or used by LG. [A211].

"Foundry Products," by contrast, are products "manufactured for or on behalf of a third party, solely according to such third-party's proprietary design specifications." [A211-212]. Based on this plain meaning, LG's corporate technical witness, Mr. Changsik Woo, confirmed that the customers (e.g., GM and Toyota) control the design of the telematic units. Mr. Woo testified that LG's customers

each provide separate technical specifications (“CTS”) that govern the design of the customers’ telematic units. [B0728-0729 (24:2-25:22)], *accord* [B0768-0769 (64:25-65:3)] [B0762 (58:17-25)], [B0764 (60:9-16)], [B0768 (64:4-10)]. Each customer provides different functionality for LG to implement. [B0731-0732 (27:20-28:7)].

For example, the GM CTS document sets the specifications by which LG manufactures. [B1261]. Changes may only be made and approved by GM. [B1264]. Indeed, LG’s customers control, not only the initial design, but also all changes made to manufacture of the telematic unit. The GM and Toyota agreements explain that LG *must* implement changes made by its customers, and “*promptly implement such changes as directed by Buyer without delay*” or “promptly make such changes.” *See* [B0822 (GM Agreement) (emphasis added)].<sup>6</sup> Toyota’s agreement with LG is no different, requiring that “[d]rawings, specifications, technical standards, … created by Toyota” are “loaned to LG,” and drawings or specifications LG creates must “have been approved by Toyota.” [B1252]. Hence, GM’s and Toyota’s agreements with LG are clear that manufacture of the telematics

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<sup>6</sup> GM confirmed that it was responsible for the design, development, and implementation of all accused features in the Texas case. [B0587], [B0816 (“GM’s development, design, coding, and planning of these [accused] technologies largely, if not exclusively, are handled by GM’s Global Product Development organization”)].

units is controlled solely by GM/Toyota, making such telematics units Foundry Products under the Agreement. [A211-212].

**2. Even under LG’s Flawed Interpretation, Genuine Issue of Fact Exist about Whether the Telematics Units Are Foundry Products**

**a. “Foundry” is a Specialized Term**

The parties primarily dispute the use of the word “solely” in the Foundry Products exclusion. LG unreasonably reads “solely” as excluding from the Foundry Products definition any product whose production LG is “involved with in any way,” even products manufactured according to a customer’s proprietary design specifications. [B1341], [B1343], *see also* [B0210] (“if LG is involved in any way in designing a product it is not a ‘Foundry Product.’”) (citing Agreement, emphasis added). Indeed, according to LG, its telematics units are not “Foundry Products” because “LG is at least involved in the design of its telematics units, thus negating the ‘solely’ requirement.” [B0211]. Yet, that is not what the Agreement says. Rather, Agreement requires that the product is “manufactured … solely according to …third party’s proprietary design specifications.” [A211]. This language simply cannot be reconciled with LG’s argument that “if LG is involved in any way in designing a product it is not a ‘Foundry Product.’” [B0210]. Additionally, whether LG is involved in “designing a product” says nothing about

whether the product is “manufactured … solely according to … third party’s proprietary design specifications.” [A211].

Indeed, under LG’s interpretation of the word “solely,” which ignores the terms around it, makes the interpretation of Foundry Products at least ambiguous, if not meaningless. However, the term ‘Foundry’ is a specialized industry term that comes with predetermined industry understanding. [B0863-0887]. “In the typical foundry arrangement, the buyer approaches the foundry with a request for manufacturing services. The buyer provides the design for the product which the foundry is to manufacture.” *Id.* at 869; *see also* [B0167-0168] (expert testimony confirming how Agreement’s Foundry Products provision would be understood in industry). The facts here show that is precisely what occurs.

Contrary to LG’s stilted interpretation, the word “solely” in the Agreement distinguishes Foundry Products from both products “(a) made or used by” LG and products “(b) provided to [LG] by a third party … and sold or distributed by [LG] ....,” as set forth above the Foundry Product exclusion. [A211]. Such an interpretation is in accord with at least the GM and Toyota agreements with LG to manufacture GM/Toyota’s telematics units based on the customer’s specifications, and only for those customers’ own use. [B0693 (“parts manufactured based on Buyer’s drawings and/or specifications may not be used for its own use or sold to third parties ....,” and “Good manufactured based on Buyer’s drawings, designs,

and/or specifications as well as any software code or models provided by Buyer may not be used for Seller's own use ...." (quoting agreements between GM/Toyota and LG where GM/Toyota are the Buyers and LG is the Seller)].

Under LG's interpretation that "solely" means LG is not involved "in any way" [B210], the court must view the evidence in the light most favorable to the non-moving party, here IV. Hence, the contradictory testimony of Dr. Malackowski, as well as the abundance of evidence that GM and Toyota control every aspect of manufacture of the telematics units at least creates genuine factual issues that should have prevented the Superior Court from granting summary judgment in favor of LG.

*See, e.g., O'Leary, 2011 Del. Super. LEXIS at \*8.*

**b. The Way LG Read's the Agreement, No LG Product Would Ever Qualify as a Foundry Product**

LG's interpretation also makes no practical sense because if LG contributes "in any way," no product manufactured by LG would ever be classified as a Foundry Product when the stated purpose of Foundry Product is to allow LG to manufacture on behalf of a third party. [A211-212]; *see GMG Cap. Invs., LLC v. Athenian Venture Ptrs. I, LP*, 36 A.3d 776, 779 (Del. 2012) (reversing summary judgment because the "meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement's overall scheme or plan.").

Indeed, there is no dispute that the telematics units here incorporate GM/Toyota technology, while Licensed Offerings must include LG Technology. [A211]. The telematics units here are manufactured from GM/Toyota specifications that are not provided to LG “for its own use or” to sell them to third parties. [B1349], [B0828]. LG must promptly make any and all changes specified by GM or Toyota. [B0822], [B0835-0838]. Based on this evidence, IV’s expert Dr. Malackowski concluded that LG had failed to demonstrate that the telematics units were not Foundry Products. [B0694]. Additionally, GM averred in the Texas litigation that the “technologies largely, if not exclusively … [were] handled by GM’s Global Product Development organization.” [B0342-0343]. All reasonably leading to the telematics units being Foundry Products.

By contrast, LG’s Mr. Woo did not know any information about the functionalities accused in the Texas cases. [B0779 (109:21-23)], [B0777-0778 (107:3-108:9)], [B0791 (129:15-20)], [B0805 (180:13-24)]. If the accused functionalities in the Texas cases were LG technology, LG surely would be familiar with them, but its corporate representative was not. [B0751 (47:16-25)] (confirming no access to software documents and never requested access), [B0771 (67:9-16) (confirming access to CTS documents only with regards to hardware)], [B0799-0800 (174:19-175:8) (confirming no authority to look at software documents)]. Accordingly, there are no facts, let alone a genuine dispute of fact, that the telematic

units were manufactured based on anything other than design specifications provided by GM/Toyota. Indeed, LG has no claims against IV if the telematics units it supplies to GM/Toyota are Foundry Products because such products are excluded from the license grant altogether. [B0136-0137], [B0593-0595].

**c. IV's Interpretation Requires Reversal and LG's Requires Remand**

Under IV's correct interpretation, no genuine issues exist that the telematics units are Foundry Products, requiring reversal of the Superior Court's summary judgment determination. However, even under LG's flawed and unreasonable interpretation, genuine issues of fact exist as to whether the telematics products were "manufactured ... solely" according GM/Toyota's design specifications, requiring the Superior Court's decision on summary judgment to be vacated and the issue remanded.

## **II. LG Failed to Prove its Purported Damages with Sufficient Certainty**

### **A. Question Presented**

Did the Superior Court err in denying IV's post-trial motion for judgment as a matter of law when LG presented no evidence of how it reached its damages numbers other than two unverified letters from its customers, admitted into evidence to show "notice" but not for the "truth of the matter"? [A314], [B1152-1156], [B1185-1186], [B1214-1217].

### **B. Scope of Review**

This Court reviews the Superior Court's denial of a motion for judgment as a matter of law *de novo*. *Glaxo Grp. Ltd. v. Drit LP*, 248 A.3d 911, 918 (Del. 2021).

### **C. Merits Argument**

#### **1. The Superior Court Erred in Permitting the Jury to Weigh the Uncorroborated Letters from GM and Toyota**

##### **a. The Letters Were Only Admitted to show Receipt of "Notice"**

LG's only evidence of its purported damages are uncorroborated and correspondence from GM and Toyota, requesting reimbursement. [A936-938]. IV raised this issue on summary judgment and in a motion in limine, and the court held that the letters could be admitted under D.R.E. 902(11) and (12) as business records. [A315]. During trial IV again objected to their general admission [A476-477], [A491], and LG agreed that their consideration would be limited to receipt of

“notice” of indemnity. Indeed, the court did not admit the GM and Toyota letters to support the value of LG’s damages claim:

MR. SCHWENTKER: Your Honor, *we’re not offering PTX-496 for the truth of the matter asserted. We’re offering it to -- for its effect on the recipient that they received notice from their customer.*

THE COURT: Mr. Waldrop?

MR. WALDROP: Your Honor, if we’re going to allow documents in for the effect of the listener, that’s Court’s rule, we’re fine with that.

THE COURT: So this is not being offered for the truth of the matter asserted, but it’s being offered for another permissible basis, notice, demonstration of notice; is that correct?

MR. SCHWENTKER: Yes.

[A451 (T.0142:8-22)], [B1260 (PTX-496)], *accord* [A491 (211:1-7)], [A936 (PTX-469)], [A476-477 (T.0180:17-T.0181:4)], [A937 (PTX-485)].

The jury awarded LG its full damages request of \$ [REDACTED] [B1072], the total amount requested in the GM and Toyota letters. [A936, A937-938]. However, the letters were only admitted for receipt of “notice” of indemnity requests and not “for the truth of the matter,” hence, it was not proper for the jury to rely on them for the amount of damages. Indeed, LG admitted that the jury must have considered the letters for the truth of the matter: “That the jury found the indemnification letters more convincing than IV’s proffered testimony does not mean no reasonable jury could conclude LG proved its damages.” [B1233]. That is precisely the point. The

letters were not admitted to prove damages, and without the purported value of the damages stated in the letters, there is no other evidence. LG admits as much. [B0955-0956], [B0964-0965]. Therefore, the Superior Court legally erred in denying IV's motion for judgment as a matter of law because LG presented no evidence to support the value (or any value) of its damages. Del. Sup. Ct. R. 50(a)(1).

**b. Even if Considered, the Letters are Entirely Uncorroborated**

The GM and Toyota correspondence does not detail how the requested indemnity amounts are proximately connected, if at all, to IV's alleged breach of the Agreement with LG. [A936], [A937-938]. To be sure, GM and Toyota took a license from IV for over 5,000 patents, and LG provides zero evidence of how the money it now alleges it owes to GM and Toyota for settling infringement allegations over 12 patents has any relation to the amount GM and Toyota paid to IV. LG admitted that it has made no independent determination of damages from the GM and Toyota correspondence, much less any apportionment of the totals provided by GM and Toyota. It simply asserts that IV owes LG the amounts set forth by GM and Toyota.

This Court should rule as a matter of law that LG's damages evidence was insufficient to submit to the jury, much less to support the jury's verdict. While the Superior Court recognized that "Plaintiff did not present – or even seek – underlying

evidence supporting the amounts GM or Toyota claim or how they relate to Plaintiff's claims.” [B1214-1215] (citing [B0947], [B0956-0957]), the Superior Court determined that because IV presented its expert, Walter Bratic, who testified about the flaws with LG's damages claim, the jury was qualified to weigh all of the evidence and render a decision. [B1214]. However, that is not the law. Where there is no corroboration or supporting documentation, it is error to send that evidence to the jury. *LCT Cap., LLC v. NGL Energy Partners. LP*, 249 A.3d 77, 98 (Del. 2021) (holding error to submit a claim to the jury where plaintiff offered no independent damages evidence to support the claim.).

Delaware law also specifically prohibits speculative damages. *See, e.g., Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 571 (Del. Super. Ct.), *aff'd* 886 A.2d 1278 (Del. 2005). In *Interim Healthcare*, the court rejected Plaintiff's damages on a similar fact pattern, holding that “[p]laintiffs made no effort to secure a breakdown or itemization of the specific claims that were part of the global settlement or the specific dollar amounts attributed to each claim.” Hence, the court held that the damages were too speculative, not subject to “a reasonable basis for computation,” and denied the Plaintiff's indemnification claim. *Id.* at 170-171. The Superior Court's criticism of IV's reliance on *Interim Healthcare* rings hollow. The court postulated that “IV never argued that LG's indemnification obligations towards Toyota or GM were contractually limited such that an itemization was

necessarily required.” [B1215].<sup>7</sup> Yet, some form of corroboration of unsupported numbers is required. *See, LCT Cap.*, 249 A.3d at 98. LG did none. Indeed, one would not accept an I.O.U. for *e.g.*, \$ [REDACTED], even from a trusted friend, without some backup that indeed the amount was actually owed.

Yet, the Superior Court ignored that LG simply took GM’s and Toyota’s word for its supposed damages, in allowing those numbers to be presented to the jury. [B0947 (T.0269:5:18)], [B0956-0957 (T.0278:18-T0279:11)]. Certainly, LG has an obligation to determine whether GM’s and Toyota’s reimbursement assertions are tied to a real-world damage calculations. *See Ware v. Rodale Press, Inc.*, 322 F.3d 218, 226 (3rd Cir. 2003) (affirming dismissal where plaintiff did not provide supporting documentation for claimed damages). By contrast, IV’s expert Mr. Bratic presented uncontroverted testimony that LG did *not* show causation because LG *never paid* and there was insufficient detail in the indemnification requests to support the damages claimed. [B1006-1009], [B1041-1044], [B1051-1053].

It was LG’s the burden to prove both corroboration and causation of its damages allegations. *SIGA Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1110-

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<sup>7</sup> The Superior Court’s reasoning raises the question of how IV could be held responsible for purported generalities in agreements between LG and its customers to which IV was not a party.

11 (Del. 2015) (requiring proof of damages with reasonable certainty and explaining that the proof must “flow from the breach” and not just speculation.). However, LG submitted no evidence even attempting to do so. *Duncan v. STTCPL, LLC*, 2020 Del. Super. LEXIS 91, at \*27 (Del. Super. Ct. Feb. 19, 2020) (holding that a party’s proof of damages cannot be speculative and must permit a jury to assess damages to a reasonable degree of certainty (citation omitted))

Here LG did not present—or even ask—for underlying evidence supporting the amounts GM and Toyota claim or how they relate to LG’s case:

Q: Now, GM does not provide any supporting documents with this letter, correct?

A. No, there are no additional documents.

Q. And you didn’t ask GM for documents to support its claim that nine of the 12 patents relate to telematic units, correct?

A. No, I did not ask GM for that.

[B0947 (T.0269:8-13)].

Q. Toyota does not provide any calculations of how it reached its \$ [REDACTED] figure, does it?

A. No.

Q. And Toyota doesn’t enclose any documents in support of its request for \$ [REDACTED], correct?

A. It did not.

Q. And LG doesn’t know exactly what’s included in that \$ [REDACTED], correct?

A. We don't.

Q. And LG never asked Toyota for documents to support its request for \$ [REDACTED]?

A. That's correct.

[B0956-0957 (T.0278:18-0279:6)], *see also* [B0964-0965 (T.0286:4-0287:1)]

(Yoon “never requested” or reviewed legal bills from Toyota or GM and claims Plaintiff just accepted blindly their requests; Toyota did not even break down its request to reflect fees). And LG presented no expert testimony supporting its claimed damages.

Because LG’s proof of damages cannot be speculative and must permit the jury to assess damages to a reasonable degree of certainty, which it could not do here, it was error to allow the bald letters from GM and Toyota to go to the jury. *See Duncan*, 2020 Del. Super. LEXIS at \*27. Additionally, because the letters were completely uncorroborated and unsupported, no reasonable jury could have returned a verdict in the amount requested in those letters.

## **2. Allowing Uncorroborated Damages Sets a Dangerous Precedent for Indemnity Cases**

Here, all the proof of damages that LG presented was uncorroborated letters from its customers GM and Toyota that they “requested indemnification.” [A936], [A937]. However, LG never followed-up to confirm if those requests were indeed true or even accurate and never did its own analysis to determine any damages attribution for its own allegedly licensed offerings. [B0948], [B0955-0956],

[B0964-0965]. Certainly, if LG itself was responsible for paying GM and Toyota, it would have done its diligence, which of course explains why it has not paid anything to date. Allowing LG to obtain indemnity from IV without strict evidentiary requirements sets a dangerous precedent and encourages exaggerated or even false indemnity demands. *See e.g., United States v. Garrett*, 2025 U.S. Dist. LEXIS 138727, at \*18-19 (D.S.D. Jul. 17, 2025) (noting that defendant's scheme of submitting false indemnity requests covered 2 years and allowed them millions of dollars in which they were not entitled, resulting in harm to the indemnitor, the United States, both monetary and to the integrity of the Risk Management Agency and the U.S. Department of Agriculture). Here, allowing plaintiff to go to the jury with uncorroborated evidence provides an undue advantage to those seeking indemnification in the future, including encouraging exaggerated or false indemnity claims.

The Superior Court's decision to let the uncorroborated and unsupported damages letters go to the jury, was therefore, error requiring reversal.

### **III. LG Has Not Proved it Owes any Indemnity Obligation to GM or Toyota**

#### **A. Question Presented**

Did the Superior Court err in denying IV's motion for judgment as a matter of law [B1208-1209] when: (1) neither GM nor Toyota had requested indemnification from LG when the lawsuit was filed; (2) there is no evidence when formal indemnification was requested by GM/Toyota, much less any evidence that LG accepted that request, and; (3) LG admits that it is not formally bound to, and to date has not, paid anything to either GM or Toyota? [B1147-1152], [B1183-1185].

#### **B. Scope of Review**

This Court reviews the Superior Court's denial of a motion for judgment as a matter of law *de novo*. *Glaxo Grp.*, 248 A.3d at 918.

#### **C. Merits Argument**

Because LG has not made any payment to indemnify GM or Toyota, and admits that there is nothing in writing binding it to pay [B0934 ("not a shred of paper")], LG's claims are not ripe for a decision. *See XL Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1217-18 (Del. 2014) (dismissing as unripe where the claim is based on "uncertain or contingent events" that may not occur). To the contrary, LG admitted at trial that it has not paid GM or Toyota, merely that it intends to do so at some later date. [B0927-0928 ("we thought it was appropriate to pursue this case before paying.")].

## **1. LG Cannot Cure Ripeness by Manufacturing an Indemnification Obligation *After* the Litigation Was Filed**

In order to support its claim that its customers GM and Toyota have triggered the indemnification provisions of their respective agreements, LG relies on letters that were provided to it almost a year *after* the instant litigation was filed. [A936-938].

- **November 29, 2022** – LG’s original complaint, asserting that it “had to make substantial payments to its customers pursuant to the indemnification agreements [LG has with GM and Toyota].” [B0017 ¶62].
- **September 29, 2023** – LG requested IV’s non-opposition to amend its complaint. [B0132].
- **October 3, 2023** – GM requested indemnification. [A937-938].
- **October 6, 2023** – LG filed its motion to amend the complaint. [B0030].
- **October 25, 2023** – Toyota requested indemnification. [A936].

However, breach of contract actions require injury before they are ripe. *See, e.g., XL Specialty Ins.*, 93 A.3d at 1217-18, 1224-25.

LG’s further concession that it has never made indemnification payments to GM and Toyota means that LG’s claims are based on prospective damages that may never be incurred. *Id.; Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 480-81 (Del. 1989) (courts will act only when “litigation sooner or later appears to be unavoidable” and the material facts are static rather than future or contingent.); *see also Lima USA, Inc. v. Mahfouz*, 2021 Del. Super. LEXIS 688, at \*19 (Del. Super.

Ct. Aug. 31, 2021) (“a threat [of third-party litigation], without more, neither renders litigation unavoidable nor establishes static material facts” warranting judicial intervention).

Here, as LG admits, its customers tendered the October 2023 letters on which LG now relies for indemnity months *after* LG filed this action. [B0927 (Yoon identifying GM’s indemnity letter of October 3, 2023)], [B1010], [B1012-1013] (Yoon confirming Toyota’s October 25, 2023 indemnity letter and explaining “by this time we had already filed a breach of contract claim.”)]. LG’s purported injuries did not exist at the time it filed the complaint in November 2022, causing the complaint to fail the test for case or controversy. *Id.* The law is well settled when contingent events must occur before a plaintiff has suffered injury, the complaint is not ripe. *See e.g., Lima*, 2021 Del. Super. LEXIS at \*19.

In *Lima* the court dismissed the case because it determined that “there were at least three ‘contingent events that may not occur,’ but must occur, before Lima may seek indemnification from Sellers. First, and most obviously, Zimmer must sue. Second, Zimmer must win. And third, Sellers must refuse payment.” *Id.* at \*19. This case is similar. When LG filed the complaint here: (1) LG’s customers had not demanded indemnification, (2) LG had not agreed to pay, nor had it paid, (3) LG had not asked IV to reimburse it under the Agreement, and (4) IV had not refused to do so, making the case unripe. While LG may assert that there certainly is a case or

controversy now, the law is well settled, that a lack of case or controversy cannot be cured subsequent to filing the complaint. *See XL Specialty Ins. Co*, 93 A.3d at 1217-18.

**2. LG Admits that it Has Not Paid Anything to GM or Toyota Nor has it Proved it has a Duty to do So**

LG admits that it has not paid anything to GM or Toyota to cure its purported indemnity obligations. [B0927 (Yoon responding, “No. LG Electronics Inc. has not yet paid.”)]. And the Superior Court properly held that, if LG is not the party that owes the indemnity obligations to GM or Toyota, it cannot “voluntarily decide[] to assume the indemnification obligations of its subsidiaries, that is not ‘damage’ related to IV’s breach—that is a choice LG [would have] made.” A316. The facts show that the purported indemnity agreements with GM and Toyota are not with the plaintiff LG entity here.

Indeed, GM’s agreement does not state with whom it applies [B0826] and Toyota’s agreement is with LG Japan. [B0841] Delaware law is clear that “a parent-subsidiary relationship, without more, cannot render a parent corporation liable for the obligations of its subsidiaries ....” *CL Investments, L.P. v. Farbenfabriken Bayer Aktiengesellschaft*, 154 A.2d 684, 686-87 (Del. 1959) (parent and wholly owned subsidiary are separate legal entities; absent fraud, the corporate veil will not be disregarded); *CL Investments, L.P. v. Adv’d Radio Telecom Corp.*, 2000 Del. Ch. LEXIS 178, \*25-26 (Del. Ch. Dec. 15, 2000); *see also* [A315-316]. LG cannot

therefore impose on IV its voluntary assumption to pay indemnification amounts, particularly when the subsidiary who may have an obligation to pay is not a party to the litigation. *Id.*

### **3. GM and Toyota's Agreements Setting Forth Indemnity Obligations are not with the LG Party Here**

The GM and Toyota's agreements that purportedly trigger indemnification are not with the LG entity here, LG Electronics, Inc., a Korean company. [B0004], [A539]. Indeed, the letters "request[ing] reimbursement" relied upon by LG are both addressed to LG Electronics U.S.A., Inc. (LGE), a subsidiary of LG Korea, and not a party here. [A936], [A937], [B0944 (20:1-8)].

#### **a. LG Failed to Show that It Has an Indemnity Obligation to GM**

Even if indemnity was ripe, LG's evidence fails to show that *it* (as opposed to its subsidiary) is obligated to indemnify GM. At trial, LG based its contentions on the GM General Terms and Conditions document (GT&C). [B0820-0833]. But, as LG concedes, that document is unsigned, and does not indicate to which products it relates or who the "Seller" and "Buyer" are supposedly bound by its terms. [B0935-0936 (11:20-12:6)]. Indeed, there is no identifying information on the GT&C as to which, if any, LG entity is a party. [B0820-0833].

Additionally, the October 2023 letter from GM requesting indemnity, is not addressed to LG Korea, the plaintiff here. [A937-938]. Instead, it is addressed to

LG Electronics, USA (“LGE”), a subsidiary of the plaintiff here. [A937]. Mr. Yoon testified that it was his “understanding” the LG entity to which GM was referring to in its October 2023 letter [A937] addressed to LGE, was nevertheless, the party here, LG Korea. [B0892-0903 (182:20-193.4)]. However, Mr. Yoon is not competent to testify as to what GM meant when the face of the GM letter is addressed to LGE, and no GM witness appeared. *Edminsten v. Greyhound Lines, Inc. (In re Asbestos Litig.)*, 2012 Del. LEXIS 424, \* 3 (Del. Aug. 13, 2012) (uncorroborated and speculative testimony cannot create a triable issue); *see also Trievel v. Sabo*, 1997 Del. Super. LEXIS 110, at \*3 (Del. Super. Ct. May 16, 1998) (JMOL proper where “there is no way, on the plaintiffs’ evidence alone, that a reasonable jury could find” defendants’ conduct primary cause of injury); *see also* [B1101-1105 (collecting LG testimony showing lack of obligation to indemnify GM)].

**b. LG Failed to Show that It Has an Indemnity Obligation to Toyota**

The October 2023 letter from Toyota that “requests reimbursement” also is directed to LGE USA and references an agreement with yet another LG entity that is not a party, “LG Electronics Japan Inc.” [A936]. LG conceded at trial that Toyota’s indemnification request rests solely on the 2016 Basic Parts Supply Agreement. [B1250-1259], [B1001 (96:10-15)], [B0996 (91:2-6)]. However, that Basic Parts Supply Agreement expressly applies only to Toyota and *LGE Japan*, thus only obligating *LGE Japan* to indemnify Toyota. [B1250] The Korean LG entity

here is not obligated to indemnify Toyota under that 2016 agreement. [B0978] (“Q: Let’s look at the documents that you were relying on for indemnification from Toyota. And that’s PTX-486 [B1250-1259]. A: Okay. Q: And look at the cover page. That’s between LG Electronics Japan and Toyota Motor Corporation, correct? A: That’s correct.”).

In contrast to Toyota’s October 2023 letter specifying it seeks reimbursement under an agreement with LG Electronics Japan, at trial LG attempted to rely instead on a 2020 indemnification agreement, to which Toyota and LG are parties. [B0835-0838]. However, LG was forced to concede that the 2020 agreement also did not apply. [B1001].

However, even if it did apply, that agreement includes prerequisites for indemnification that did not occur here. First, section 3(c) requires that LG control the “defense and resolution of any such claim” for which Toyota seeks indemnification. [B0838]. Even though it knew about the Texas litigation against Toyota, LG presented no evidence that it “controlled” the “defense and resolution” of the Texas litigation. Second, section 3(d) states that “Toyota shall not settle, admit liability, or otherwise compromise the defense against such claim without LG[’s] consent.” *Id.* LG presented no evidence that Toyota ever sought, let alone obtained LG’s consent to settle the Texas case. In fact, LG admitted it did *not* consent to Toyota’s settlement of the Texas case. [B0957 (T. 0279)]. Even absent LG’s

concession that Toyota did not invoke this agreement, its express terms undisputedly show it does not impose an indemnification obligation on LG here. *see also* [B1100-1101 (collecting LG testimony showing lack of obligation to indemnify Toyota)].

LG simply provided no proof of its indemnity obligations to Toyota.

#### **4. The Superior Court Incorrectly Held that Contract Interpretation Should be Determined by the Jury**

Because LG provided no facts under which a reasonable jury could have determined that it owed an indemnity obligation to either GM or Toyota, the Superior Court erred in denying IV's motion for Judgment as a Matter of Law. [B0245]. The Superior Court recognized the various legal contract interpretations and undisputed facts required to determine whether there was an indemnity obligation. [B0243-0244]. However, the court erred by allowing the jury to make the ultimate decision on indemnification when there were no facts for the jury to decide because the issues boiled down to the legal issues of ripeness and contract interpretation. *Frederick-Conaway*, 159 A.3d at 293 (reviewing "questions of law, including the Court of Chancery's interpretation of written agreements *de novo*"). Because there are no factual disputes regarding whether LG is required to indemnify GM or Toyota under the relevant contracts, this case should be reversed.

## **5. Allowing Indemnity Litigation to Proceed without Evidence of Actual Obligation Creates a Slippery Slope**

Allowing a plaintiff to sue on an indemnity theory without proof of an actual, existing obligation invites advisory litigation and sandbagging, *i.e.*, anyone could declare an intent to indemnify a third party and thereby hale a defendant into court without concrete injury or measure exposure. Delaware law rejects that result: courts “will act only when ‘litigation sooner or later appears to be unavoidable’ and the material facts are static rather than future or contingent,” and breach of contract claims that rest on contingent events are unripe. *Stroud*, 552 A.2d at 480-81.

## CONCLUSION

For the foregoing reasons, IV requests the Court deny LG's appeal, reverse the Superior Court's summary judgment ruling that the telematics units are not Foundry Products, and/or hold LG's damages and indemnification were unripe and too speculative to present to the jury, requiring judgement in IV's favor.

Dated: August 21, 2025

Respectfully submitted,

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