EFiled: Jul 22 2025 10:57AM EDT
Filing ID 76702431
Case Number 230,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

F.A.M.E. LLC d/b/a Falk Associates Management Enterprises a/k/a FAME,	)	REDACTED - PUBLIC VERSION FILED JULY 22, 2025
	)	No. 230,2025
Appellant/ Plaintiff-Below,	)	Court Below: Superior Court of the State of Delaware
v.	)	
EMTURN LLC and EVAN TURNER,	)	C.A. No. N22C-12-003-PAW-CCLD
Appellee/ Defendants-Below.	)	

APPELLANT'S CORRECTED OPENING BRIEF

Dated: July 16, 2025

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TABLE OF CONTENTS

Page

EXHIBITS **TAB**

TABLE OF AUTHORITIES

Page(s)

State Cases

State Statutes

NATURE OF PROCEEDINGS

Evan Turner ("Turner") was the 2010 basketball College Player of the Year. After turning professional, Turner engaged David Falk ("Falk"), then the most famous sports agent in the United States. Falk negotiated a lucrative shoe endorsement deal for Turner to receive cash and stock that vested over five years. Now, Turner does not wish to pay Falk the 20% commission owed for the stock that Turner has liquidated.

On summary judgment, the Trial Court first ruled that the controlling contract was ambiguous as to when Turner owed Falk the commission on the stock. But the court then incorrectly and improperly ruled that "course of performance" showed that Turner owed the commission at the time the stock vested, rather than when Turner monetized the stock. The Trial Court thus ruled that Falk's breach of contract claim was timed barred.

The Trial Court was wrong. The opinion below rests solely upon a misapplied quote from Turner's financial advisor, which the Trial Court got exactly backwards. Contrary to the ruling below, the record presented is that the parties' course of performance was that the commission would be owed only after Turner received cash for the stock. Falk stated that his practice was to invoice only upon receipt of cash (not non-cash) by his client, Falk's agency in fact only invoiced upon receipt

of that cash, and Falk contemporaneously documented the parties understanding via pre-dispute email, uncontested by Turner or his financial advisor. But at a minimum, the fact issue is disputed, and summary judgment was improperly granted.

Appellant respectfully requests that this Court reverse the Trial Court's summary judgment order and remand for a trial to determine the disputed fact of when Turner owed the stock commission.

SUMMARY OF ARGUMENT

1. Questions of disputed fact are for the jury. The Trial Court erred in granting summary judgment by making findings of genuinely disputed fact regarding the parties' course of performance, and thus holding that the statute of limitations barred FAME's breach of contract claims. This Court should vacate the Trial Court's determinations regarding course of performance and the application of the statute of limitations, and remand so that the parties can conduct a trial on the disputed facts.

STATEMENT OF FACTS

A. Turner Seeks Out Falk.

In 2009, top NBA sports agents recruited Turner to leave the Ohio State University to enter the NBA draft.[1] Turner used his brother, college coaches, and a basketball consultant to filter the agents.[2]

Falk is the most well-known sports agent in NBA history, famously negotiating Michael Jordan's Nike Air Jordan deal and professional sports' first $100 million contract. A Turner-family friend asked if Falk thought Turner should enter the draft.[3] Falk was not familiar with Turner, but after some research, urged Turner to stay in school.[4] Falk was the only agent to tell Turner to stay in school, which Turner appreciated.[5] Turner took Falk's advice.[6] Falk's advice was correct; Turner was the 2010 College Player of the Year and was the second overall NBA draft pick in 2010.[7]

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[1] A365 at 21:10-15; A366 at 22:1-4; A220 at 30:12-31:16.
[2] A220 at 31:20-32:2; A365 at 20:19-21:7.
[3] A220 at 30:6-18.
[4] A220 at 30:19-31:7; A366 at 25:1-16; *see also* A705.
[5] A220 at 31:7-16, A232 at 77:12-20.
[6] A367 at 26:5-8.
[7] A368 at 30:10-12.

After Turner announced his entry into the NBA draft, Turner and his advisors continued meeting with agents, including Falk.[8] Turner eventually signed with Falk's agency, F.A.M.E. LLC ("FAME"). Turner pushed hard for Falk to reduce his fees on his rookie NBA contract and marketing deals.[9] Falk waived the 4% fee on Turner's rookie player contract[10] and sent Turner a draft agreement between FAME and Turner stating that "[f]or negotiating your Marketing Contracts, FAME shall receive a fee of twenty percent (20%) (the 'Marketing Fee') on all endorsement income from leads initially generated by FAME."[11] Turner did not sign the draft instead requesting further reduction of the Marketing Fee. The parties continued negotiating the Marketing Fee.[12]

Falk reduced the Marketing Fee to 15% on "all marketing income" under $2,000,000 annually.[13] If marketing income in a year was $2,000,000 or more, the

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[8] A368 at 30:16-31:4, A369 at 36:4-37:25, A370 at 39:9-16, A377 at 68:12-16; *see* A720.
[9] A372 at 48:22-49:13, A373 at 52:17, A377 at 67:7-12, A377 at 68:17-24, A377 at 69:19-A378 at 71:13, A379 at 75:22-76:14, A379 at 77:21-A380 at 78:13; A708; ET002358; A255 at 171:5-13, A259 at 186:12-20.
[10] A377 at 69:19-A378 at 70:13, A379 at 77:21-A380 at 78:13; A259 at 186:12-20.
[11] A728.
[12] A381 at 84:22-85:2, 113:17-115:4.
[13] A725; *see also* A381 at 85:8-19, A385 at 101:10-21, A390 at 121:1-24, A390 at 124:16-20.

Marketing Fee was 20%.[14] In May 2010, Turner orally agreed to the terms of the marketing agreement and FAME began pursuing endorsements for Turner.[15]

B. Falk Wins Turner a Lucrative Endorsement Deal with Li-Ning.

Falk advised that Turner's best chance at a lucrative shoe deal would be Li-Ning, a Chinese brand. Falk knew that Li-Ning would pay a premium to sign a high-profile American basketball player.[16] Li-Ning proposed paying Turner $10,500,000 as Guaranteed Minimum Compensation over six years, a 3% royalty after the first year, and annual performance bonuses of up to $200,000.[17]

FAME negotiated for weeks[18] to increase the guaranteed minimum compensation[19] and to add stock to bridge the gap.[20] EmTurn, LLC ("EmTurn") (Turner's LLC) and Li-Ning signed an endorsement agreement on August 23, 2010 (the "Li-Ning Contract").[21]

The Li-Ning Contract provided Turner the following compensation under Section 4, titled "**COMPENSATION**":

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[14] Id.
[15] A134 at 184:11-A135 at 187:17; A267 at 218:6-219:20.
[16] A216 at 14:14-21.
[17] A728.
[18] *See, e.g.*, A731; A735.
[19] A216 at 16:12-16.
[20] A268 at 224:11-A269 at 225:5.
[21] A741.

(a) "Guaranteed Minimum Compensation" totaling $15,000,000 over 6 years;

(b) "Royalties" of 3.5% of the net sales of certain products featuring Turner's likeness;

(c) "Bonuses" of up to $250,000 if Turner met certain performance related criteria; and

(d) "Stock" totaling 1,000,000 restricted shares vesting once a year starting July 1, 2011.[22]

On September 3, 2010, Li-Ning and EmTurn entered a Consulting Agreement whereby, under Section 6 (titled "**THE COMPENSATION**") Turner provided marketing services to Li-Ning and, in exchange, EmTurn received the Stock under the Li-Ning Contract.[23]

C. The Parties Sign the FAME Agreement.

As of August 31, 2010, FAME and EmTurn entered into a definitive letter agreement designating FAME as EmTurn's exclusive marketing agent for "all Marketing Contracts that utilize the services of EmT's corporate employee, Evan Turner" (the "FAME Agreement").[24] Falk encouraged Turner to have an outside

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[22] A744-A747.

[23] A767.

[24] A773-A774. Although formally entered into after the Li-Ning Contract, the parties agree that the FAME Agreement applies to the Li-Ning Contract. *See* A410 at 198:5-18, A414 at 214:18-21.

advisor review the agreement pre-signing.[25] Turner retained an attorney with whom Falk had several calls.[26] The FAME Agreement was identical in all material respects to the earlier draft, providing "FAME shall receive a Marketing Fee of 15% on "all marketing income" unless "the total amount of marketing income [EmTurn] receives in any year is equal to or greater than [$2 million]" in which case "the Marketing Fee shall be [20%] on all marketing income...."[27] The Marketing Fee is owed "***regardless of when [EmTurn] receives the compensation*** for such contracts."[28] "marketing income" and "compensation" are synonymous and used interchangeably.[29]

D. Turner Pays the Marketing Fee for Guaranteed Minimum Cash Compensation, Royalty Compensation, and Performance Bonus Compensation.

From 2010 to 2016, Turner received (i) Guaranteed Minimum Compensation of $15 million; (ii) Royalties of $55,903.71; and Bonuses of $49,980.[30] EmTurn's

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[25] A257 at 174:21-176:19.
[26] A219 at 28:9-11, A245 at 130:10-14, A270 at 229:4-15. *But see* A408 at 192:21-A409 at194:20.
[27] A773-A774.
[28] *Id.* (emphasis added).
[29] A648; A230 at 70:17-18, A240 at 112:3-8.
[30] *See* A776; A779; A787; A794-A796.

financial advisor at Merrill Lynch, Steven Vujevich ("Vujevich"), was responsible for ensuring that FAME was paid its Marketing Fees.[31]

The parties created a process for each payment of a Marketing Fee. First, Vujevich ensured that EmTurn received the appropriate cash payment from Li-Ning.[32] Second, Vujevich notified FAME of the cash payment. Third, FAME issued an invoice for its Marketing Fee.[33] Fourth, FAME sent the invoice directly to Vujevich.[34] Fifth, Vujevich sent the invoice to Turner for approval.[35] Finally, Vujevich caused EmTurn to pay FAME the Marketing Fee.[36] FAME never invoiced EmTurn (through Vujevich) before EmTurn received cash, e.g., FAME never invoiced EmTurn for "phantom" non-cash income.[37]

E. The Li-Ning Stock.

Pursuant to Section 4 and Schedule C of the Li-Ning Contract, EmTurn's restricted Stock vested on July 1 each year from 2011 through 2016.[38] The parties did not apply the same process for the Stock as they did for cash. FAME did not

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[31] A412 at 209:5-11, 272:25-273:2 (Vujevich was hired in 2010).
[32] A415 at 218:9-21.
[33] A415 at 219:20-220:2; A556 at 78:6-12.
[34] *See, e.g.*, A794; A800; A415 at 219:5-10; A229 at 65:14-20; A126 at 149:13-150:2; A548 at 47:16-22, A558 at 89:7-10.
[35] A545 at 37:1-10, A548 at 48:4-49:8.
[36] A548 at 48:4-49:5.
[37] A556 at 78:17-20.
[38] A745-A746, A764.

invoice for any Marketing Fee for the Stock at vesting from 2011 to 2016 because FAME's policy is to "always charge clients at the time that they sell...equity the same way [they] charge clients at the time that they receive full compensation for cash deals."[39] Commissioning equity at the time of liquidation perfectly aligns the agent's interests with the player's.[40]

Forcing athletes to pay cash commission without receiving cash compensation is "[j]ust not the way [Falk] do[es] business."[41] As Falk explained,

> It's your stock. I negotiated for you. You decide what you want to do with it. Whatever you decide to do, I will respect. Not going to – not going to induce you to do something.... I think it's better for the client to be in control.... Exercise the control, talk to smart people around you who know about disposing of stock, and the tax treatment of stock...whatever is best for you, I'm happy to take our fee based on that decision. I don't want to influence your decision one iota based on what's good for me.[42]

Similarly, it would not make sense to receive commission at the time of the stock vesting, that type of arrangement could get an agent fired.[43] If an agent bills a player when the stock vests and the stock later goes down, "you are going to get

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[39] A281 at 275:13-17. *See also* A548 at 48:13-23.
[40] A283 at 284:3-8, A284 at 285:22-286:16.
[41] A233 at 82:14.
[42] A233 at 82:16-83:12.
[43] A232 at 79:1-22.

fired because it looks like you are putting your own interest ahead of the player's, you are trying to get the fee early."[44]

F. Turner Fires FAME and FAME Reminds Turner and Vujevich About the Marketing Fee on the Stock.

In May 2016, Turner terminated FAME because Falk declined to drop the fee on his player contracts from 4% to 2%.[45]

In June 2016, Falk called Vujevich to remind him of Turner's contractual obligation[46] to pay the Marketing Fee when Turner sold the Stock.[47] Vujevich said he would speak with Turner about it.[48] Falk had Danielle Cantor ("Cantor") send Vujevich a confirming email:

> Per your conversation with David, when Evan receives this last 220,000 shares of Restricted Stock from Li Ning [on July 1, 2016], he will have received the full 1,000,000 shares David negotiated for him in his Li Ning contract. The stock price is quite low now, approximately $0.40 per share. *We need to determine when Evan will sell these shares and pay FAME its 20% fee of their value.*[49]

Vujevich forwarded that email to Turner, writing "FYI regarding Li Ning shares."[50] Neither Vujevich nor Turner objected to the process statement in the

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[44] A232 at 80:12-21. *See also* A232 at 80:22-A233 at 81:12.
[45] A705; A827.
[46] A773.
[47] A229 at 66:13-67:1, 244:11-22; A145 at 225:15-22.
[48] A274 at 245:1-4.
[49] A704.
[50] A704.

email.[51] Having heard no objection to the confirmation, Falk reasonably thought Turner agreed that the Marketing Fee was due at the time of sale of the Stock.[52]

G. Turner Makes An Additional $7.2 Million Off Falk's Negotiated Deal But Refuses To Pay The Commission.

On June 29, 2021, Turner text messaged Falk and Cantor stating that "Li-Ning stock is at 10M…Truly appreciate you all…I'll be sending you all a gift sooner than later!"[53] The next day, Falk text messaged Cantor reminding her that "[FAME] should get a fee from ET for stock!!....If it's worth $10 mil, he would owe us $1.35million[.] That's more than a gift. Actually he would owe $1.5."[54] Although Cantor had forgotten about the Marketing Fee on the Stock, Falk reminded Cantor that they even confirmed the commission after Turner fired FAME, as described above.[55]

From August 2021 through April 2022, Turner sold 649,200 shares of Li-Ning Stock, totaling $6,495,230.66.[56] Turner later sold another 190,400 shares, totaling 839,600 shares of Li-Ning Stock for $7,222,863.30.[57] Contrary to past practice,

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[51] A429 at 276:13-277:22; A558 at 87:1-89:4, A559 at 91:20-92:1.
[52] A229 at 67:10-68:2.
[53] A804.
[54] A806.
[55] A806.
[56] A77-A79 at Resp. 21.
[57] A77-A79 at Resp. 21.

neither Turner nor Vujevich contemporaneously told FAME those sales.[58] Falk did not learn of the sales until 2022.[59] FAME then invoiced EmTurn for FAME's Marketing Fee on the Stock.[60] Turner refused to approve payment of the Marketing Fee, [redacted][61]

H. Summary Judgment.

FAME filed this action in December 2022, within one year of Vujevich notifying FAME of the stock sales per the parties' payment process.[62] Defendants filed an answer and counterclaims on July 27, 2023.[63] On October 31, 2023, Defendants filed an amended counterclaim requesting a jury trial of 12.[64] On November 8, 2023, FAME answered the amended counterclaim.[65] The parties cross-moved for summary judgment.[66] In their opening brief, Defendants argued without

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[58] *See* A810(text messages between Falk and Turner dated between June 8, 2020 through October 27, 2022).
[59] A275 at 250:7-13, A279 at 268:22-A280 at 269:8; A823.
[60] A824; A776.
[61] A867.
[62] A28 at D.I. 1 and A26 at D.I. 21.
[63] A23 at D.I. 46.
[64] A18 at D.I. 75.
[65] A18 at D.I. 77.
[66] A6 at D.I. 163, A5 at 165.

support that, if the Stock was "marketing income" under the FAME Agreement, then FAME's Marketing Fees were due when the Stock vested from 2011 through 2016.[67] FAME argued that the breach did not accrue until the Stock sales in 2021 and 2022.[68] FAME further argued that the FAME Agreement is at least ambiguous as to when the Stock was subject to the Marketing Fee, and that the extrinsic evidence proves the commission was due at sale, i.e., when Turner received cash from which to pay the commission.[69] Given the parties' disagreement about when the Marketing Fee on the Stock was due, "there are questions of fact as to when the Marketing Fee on stock was due."[70]

At the January 30, 2025 oral argument, FAME reiterated that "it's important that the jury be able to look at what the performance of the parties was with respect to the contract [to determine when the Marketing Fee came due on the Stock]."[71] "[T]here is clearly an ambiguity that can't be resolved as a matter of law on when the breach of contract occurred. And I think there are multiple factors that a jury can look at to make that determination…."[72] That issue affects "when the statute of

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[67] A645 at 22.
[68] A35 at ¶21.
[69] A698-A701.
[70] A701.
[71] A856 at 29:5-9.
[72] A858 at 31:16-22.

[limitations] begins to run, [which] is an issue that a jury should be able to determine based on the performance of the parties, which is that no fee was ever paid to Mr. Falk until an invoice was sent."[73]

On April 25, 2025, the Trial Court granted Defendants' motion for summary judgment and denied FAME's motion for summary judgment (the "Opinion").[74] First, the Trial Court found that the Stock is "marketing income" under the FAME Agreement.[75] Second, the Trial Court determined that FAME's breach of contract claims are barred by the statute of limitations.[76] That determination "hinges on when the Stock first became commissionable."[77]

The Trial Court adopted Defendants' argument that FAME's right to the Marketing Fee accrued when the Stock vested.[78] At first, the Trial Court agreed with

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[73] A860 at 33:12-19; *see also* A861 at 34:1-10; A866 at 39:14-19 ("So the contract is silent on the time as to when the breach occurs. And because of that, we think there's an ambiguity and that it cannot be decided as a matter of law when the stock vested."); A867 at 40:4-12 ("Which is why this is a jury determination, and why a jury should make a determination based on listening to Mr. Falk testify as to the reasonableness of why the breach occurred and why he invoiced at the time he did, and why he believes that it was actually in Mr. Turner's best interest for him to do it that way."); A867 at 40:20-22 ("And so it's our position that that should be for a jury to determine based on the evidence.").

[74] A1 at D.I. 193 ("Exhibit A ").

[75] Exhibit A at 12-16. FAME does not challenge this aspect of the trial court's Opinion.

[76] Exhibit A at 16-22.

[77] Exhibit A at 16.

[78] Exhibit A at 16.

FAME's argument that the FAME Agreement is ambiguous as to when the Stock became commissionable.[79] The Trial Court further found that "FAME always invoiced its Marketing Fees when Defendants actually received *cash compensation*[]"[80] and "Falk reminded Defendants that the Stock Marketing Fee was due when Turner sells his shares."[81] Accordingly, "FAME maintains it is reasonable to interpret the FAME Agreements such that the Stock was commissionable at the time of sale, not the vesting date."[82] But then, without explanation and contradicting its own findings, the Trial Court went on to say that these facts "do not demonstrate a material factual dispute regarding when FAME's breach claims accrued. Rather,

[79] Exhibit A at 17.
[80] Exhibit A at 17 (emphasis added).
[81] Exhibit A at 17.
[82] Exhibit A at 17.

the parties' course of dealings [*sic*][83] demonstrates FAME's right to a Marketing Fee first arose when the Stock vested."[84]

The Trial Court agreed with FAME that the FAME Agreement is ambiguous and requires extrinsic evidence, such as course of performance, to resolve the ambiguity.[85] However, the Trial Court ignored the overwhelming evidence presented by FAME of the parties' course of performance to rule that the case advances no genuine disputes of fact. Instead, the Trial Court relied solely on deposition testimony from a single witness, which the court misinterpreted, to determine that the obligation to pay the Marketing Fee arose at vesting rather than monetization.[86]

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[83] Presumably the court meant course of performance rather than course of dealing as there are not prior transactions to refer to, solely the transaction at issue (i.e., the FAME Agreement). *Compare* 6 *Del. C.* §1-303(a) ("A 'course of performance' is a sequence of conduct between the parties to a particular transaction that exists if: (1) [t]he agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) [t]he other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.") *with id.* §1-303(b) ("A 'course of dealing' is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing common basis of understanding for interpreting their expressions and other conduct.").

[84] Exhibit A at 17-18.

[85] Exhibit A at 19.

[86] Exhibit A at 19, n.107 (citing Vujevich Deposition); *id.* at 20.

ARGUMENT

I. THE TRIAL COURT ERRED BY RESOLVING A GENUINE DISPUTE OF MATERIAL FACT AT SUMMARY JUDGMENT.

A. Question Presented

Whether the lower court erred by resolving genuine disputes of fact regarding course of performance, which should be determined by a jury. A854 at 27:11-A861 at 34:10, A867 at 40:04-22; Exhibit A at 16-22.

B. Scope of Review

The Supreme Court reviews a grant or denial of a motion for summary judgment *de novo*. *Ferrellgas Partners L.P. v. Zurich American Ins. Co.*, 319 A.3d 849, 865 (Del. 2024). The Court's "review of the formulation and application of legal principles…is plenary and requires no deference." *In re Tesla Motors S'holder Litig.*, 298 A.3d 667, 699 (Del. 2023) (quoting *Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 84 (Del. 1995)).

C. Merits of Argument

After correctly determining that the Li-Ning Stock is marketing income under the FAME Agreement, the Trial Court erred by holding that FAME's contract claims were time barred, by making findings of disputed fact regarding the parties' course of performance. Genuine disputes of material of fact exist that cannot be resolved at summary judgment.

1. *The Trial Court misunderstood selective quotes of the record on course of performance.*

If a contract is ambiguous, the Court may consider extrinsic evidence, such as course of performance, to resolve the ambiguity. *ArchKey Intermediate Hldgs. Inc. v. Mona*, 302 A.3d 975, 988-89 (Del. Ch. 2023). "Course of performance is a sequence of conduct where: (1) the agreement of the parties involves repeated occasions for performance by a party, and (2) the other party knowingly accepts the performance or acquiesces in it without objection." *Motors Liquidation Co., DIP Lenders Trust v. Allianz Ins. Co.*, 2013 WL 7095859, at *5 (Del. Super. Dec. 31, 2013), *aff'd*, 191 A.3d 1109 (Del. 2018) (TABLE). "[C]ourse of performance is given great weight in contract interpretation." *Id.* (internal quotations omitted); *see also Person. Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *5 (Del. Ch. May 5, 2008) ("The Restatement of Contracts (Second) tells us that, after plain meaning, the most persuasive evidence of the parties' agreement is the course of its performance."), *aff'd*, 970 A.2d 256 (Del. 2009); *Julian v. Julian*, 2010 WL 1068192, at *7 (Del. Ch. Mar. 22, 2010) ("While backward-looking evidence gathered after the time of contracting is not always helpful in determining the parties' contractual intent, the parties' course of performance may be some of the most persuasive evidence of the meaning of the parties' agreement.") (internal quotations and footnotes omitted).

The Trial Court here made limited factual findings that (i) "the parties' course of performance shows Defendants paid commission on the Li-Ning Contract, when Li-Ning compensated Turner[;]"[87] and (ii) "FAME always sent its Marketing Fee invoice when Turner received compensation from Li-Ning."[88] Those two findings led the court to the conclusion that "[t]he parties' course of performance shows that Defendants' obligation to pay the Marketing Fee on the Stock, arose when the Stock vested."[89] In support of these factual findings, the court cited only Vujevich's deposition and statements made by FAME's counsel at oral argument.[90] The Trial Court grievously misinterpreted those statements. In reality, those *exact same statements* support FAME's position that the Marketing Fee was due at the time the Stock was sold.[91]

The Opinion cites the following two portions of Vujevich's deposition:

> Q. Okay. Was there ever a time when [Turner] did not authorize the payment of any F.A.M.E. invoice?
>
> A. No.
>
> Q. Okay. Was there ever a time when [Turner] questioned a F.A.M.E. invoice that came in?

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[87] Exhibit A at 19.
[88] Exhibit A at 19.
[89] Exhibit A at 19-20.
[90] Exhibit A at 19 nn. 107, 108.
[91] Exhibit A at 17, n.95.

A. Not to my recollection.[92]

....

Q. Okay. Did F.A.M.E. ever invoice [Turner] for any amounts under the Li Ning deal before [Turner] received the actual money?

A. I'm not aware.[93]

To the extent this testimony relates to the issue of when Turner owed the Marketing Fee on the Stock at all, it supports the conclusion that Turner only owed Fame the Marketing Fee once Turner received "the actual money", i.e., the cash. Further, the testimony surrounding that excerpt makes clear that the Marketing Fee was due when Turner received cash.[94] Vujevich was specifically asked:

Q. In your experience, would that be -- have you ever had a client where -- a professional athlete client -- where the agent invoiced the client for money that the client hadn't yet received?

...A. Not that I am aware.

Q. Okay. Would that be irregular in your opinion?

A. Probably.

Q. Ok. Why would that be irregular?

A. You hadn't received it yet.[95]

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[92] A548 at 49:9-14.
[93] A556 at 78:17-20.
[94] A547 at 44:2-A549 at 50:18; A553 at 69:7-A556 at 79:7.
[95] A556 at 78:21-79:7. *See also* A554 at 71:21-74:4 (noting experience with stock component of endorsement deals and not yet seeing invoices).

The portions of the oral argument transcript similarly support FAME's position:

> THE COURT: Okay. So the only thing we have to show their course of dealing is that Mr. Falk sent an email -- well, FAME invoiced EmTurn, after EmTurn received compensation for the marketing ventures, correct?
>
> MR. KAHN: Yes. When Mr. Turner received the royalties, then an invoice was issued for the royalties that Mr. Turner received.
>
> When Mr. Turner actually received the cash, not when he had the entitlement to the cash, but when he received the cash, that's when an invoice was sent to Mr. Turner. When Mr. Turner sold the stock, that's when the invoice was sent to Mr. Turner.[96]
>
> ....
>
> THE COURT: Was he invoiced for them?
>
> MR KAHN: He was invoiced for them and his financial advisor did pay those invoices.
>
> THE COURT: He was invoiced for them after he received the compensation?
>
> MR. KAHN: Yes.[97]

The Trial Court incorrectly applied these quotes. Those quotes support FAME's position that (1) repeatedly over a six year period, Vujevich would tell FAME when EmTurn would receive cash and FAME would then issue an invoice for the Marketing Fee (the agreement of the parties involved repeated occasions for

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[96] A863 at 11-A864 at 4 (emphasis added).
[97] A870 at 2-8.

performance by FAME), and (2) EmTurn would then tell Vujevich to pay the invoice (EmTurn knowingly accepted the performance or acquiesced to it without objection). As Vujevich testified, Turner never stated an intent to treat the Marketing Fee for the Stock differently than the Marketing Fee for the Guaranteed Minimum Compensation, the Royalties, or the Bonuses (i.e., the cash component of the Li-Ning Contract).[98] Accordingly, the course of performance indicates Defendants' obligation to pay the Marketing Fee on the Stock accrued when EmTurn received cash (i.e., when the Stock was sold). The Trial Court thus misconstrued the parties' course of performance, and should be reversed as a matter of law.

2. *The Trial Court erred by ruling there were no material issues of fact concerning the parties' course of performance.*

As quoted ante, the Opinion ignores evidence in the record supporting FAME's position, which demonstrates that at minimum a genuine issue of fact exists as to the parties' course of performance on when the Marketing Fee accrued for non-cash compensation.

At summary judgment, the role of the trial court is to "identify disputed factual issues whose resolution is necessary to decide the case, but not to decide such issues." *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992) (citation

[98] A553 at 69:7-11.

omitted). "In discharging this function, the court must view the evidence in the light most favorable to the non-moving party. This means it will...accept the non-movant's version of any disputed facts. From those accepted facts the court will draw all rational inferences which favor the non-moving party." *Id.* (citations omitted). Although parties may file cross-motions for summary judgment, claiming there are no material facts in dispute, "that does not necessarily mean that summary judgment must be granted to one of the parties." *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 935 (Del. 2004). The trial court may still determine that "a disputed issue of material fact exists that precludes summary judgment for either moving party." *Id.* at 936; *accord Nalda v. Green Valley Home Inspections, LLC*, 2021 WL 3783640, at *3 (Del. Super. Aug. 24, 2021) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962) ("If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted."); *Louis-Humphrey v. Andres De Cos, LLC*, 2019 WL 3976101, at *2 (Del. Super. Aug 22, 2019) (quoting *Ebersole*, 180 A.2d 469-470) ("When material facts are in dispute, or 'it seems desirable to inquire more thoroughly into the facts to clarify the application of the law to the circumstances,' summary judgment will not be appropriate."); *see also Wilson v. Tweed*, 209 A.2d 899, 901

(Del. 1965) ("Viewing the facts presented on the motion for summary judgment in the light most favorable to the plaintiff, we are unable to say that there is no issue of fact which, if resolved in favor of the plaintiff, would entitle her to judgment against Tweed.").

Here, the Trial Court erred by failing to (i) account for evidence showing the parties' course of performance was to invoice EmTurn only when Vujevich informed FAME that EmTurn received cash and (ii) view the facts in the light most favorable to FAME.

The record is clear; Defendants did not present any evidence that the parties' course of performance demonstrates the commission was due at vesting.[99] EmTurn never paid, and FAME never invoiced, at stock vesting and there is no course of performance evidence in the record for either invoicing or payment at vesting. Conversely, the record contains material facts supporting that the Marketing Fee was due at monetization.[100] The parties had established a process for the payment of Marketing Fees: (1) Vujevich ensured that EmTurn received the cash payment;[101] (2) Vujevich notified FAME of the payment so that FAME could generate an

[99] Exhibit A at 16-17.
[100] *See* supra Facts Section E.
[101] A415 at 218:9-21.

invoice;[102] (3) FAME sent the invoice directly to Vujevich;[103] (4) Vujevich sent the invoice to Turner for approval;[104] and (5) Vujevich caused EmTurn to pay the Marketing Fee.[105] FAME never sent an invoice to EmTurn (through Vujevich) before EmTurn received the cash, i.e., on "phantom" income.[106]

The Trial Court recognized that "FAME always invoiced its Marketing Fees when Defendants actually received *cash* compensation."[107] Falk, one of the most successful sports agents of all time, testified that taking a commission at the time of vesting "would be one of the dumbest things possible for an agent to do[,]"[108] and why taking the Marketing Fee at the time of sale is better for the client and leaves them in control.[109]

> Q. Yesterday [Cantor] mentioned that one of the ways she was aware of that stock could be commissioned is that the agency could get a cash commission at the time of vesting.
>
> ...
>
> A. I have never heard of that in my life.

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[102] A415 at 219:20-220:2; A556 at 78:6-12.
[103] *See, e.g.*, A794; A800; A415 at 219:5-10; A229 at :14-20; A126 at 149:13-150:2; A548 at 47:16-22, A558 at 89:7-10.
[104] A545 at 37:1-10, A548 at 48:4-49:8.
[105] A548 at 48:4-49:5.
[106] A556 at 78:17-20.
[107] Exhibit A at 17 (emphasis added).
[108] A232 at 79:9-10.
[109] A233 at 82:10-83:12.

Q. Okay.

A. I think that would be one of the dumbest things possible for an agent to do.

Q. Why?

A. Why? Because when you read Brian Cupps notes that you referenced earlier in the exhibit, when we first negotiat[ed] the stock, and he valued it at 3.60 a share, and you look at the June 2016 memo and the stock is worth $0.40 a share, had I commissioned [Turner] at 3.60 and then the stock went down to $0.40, he would fire me.

He would say "Why did you take the fee upfront? Why didn't you wait to see how I did? I los[t] money and you made money." You know, the stock has gone down 90 percent.

...

My job is to build trust with my clients. I take every step I can to build trust to let them know that I'm not going to put my own personal interest ahead of their interest. And so it would be almost suicidal for an agent to bill a player when the stock vest[s], in the event it goes down, you are going to get fired because it looks like you are putting your own interest ahead of the player's, you [are] trying to get the fee early.

....

Q. What about the scenario where the agent gets some of the stock upfront as the commission?

A. What about it?

Q. Why not do that?

A. Just not the way I do business.

Q. Why?

A. Because – because I want – I want to be Caesar's wife with the client. It's your stock. I negotiated for you. You decide what you want to do with it. Whatever you decide to do, I will respect. Not going to – not going to induce you to do something. It would be way better for the agent to get the stock [then] the agent has the – has the freedom that the client has. He can do whatever he wants with the stock.

I think it's better for the client to be in control. I believe the client should learn in business from day one, you are in control. Exercise the control, talk to smart people around you who know about disposing of stock, and the tax treatment of stock, what's the best – whatever is best for you, I'm happy to take our fee based on that decision. I don't want to influence your decision one iota based on what's good for me.[110]

Falk's testimony is consistent with the testimony of Vujevich, Turner's financial advisor, regarding stock in endorsement deals:[111]

Q. In your experience, would that be -- have you ever had a client where -- a professional athlete client -- where the agent invoiced the client for money that the client hadn't yet received?

...

A. Not that I am aware.

Q. Okay. Would that be irregular in your opinion?

A. Probably.

Q. Okay. Why would that be irregular?

A. You hadn't received it yet.[112]

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[110] A232 at 79:1-A233 at 83:12.

[111] These points were reiterated during oral argument by FAME's counsel. *See* A865 at 5-A857 at 1; A857 at 10-31:10; A858 at 16-A860 at 4; A860 at 12-19; A861 at 1-10.

[112] A554 at 71:21-A556 at 79:7.

The real course of performance was for Vujevich to tell FAME when EmTurn received cash, from which FAME would invoice and receive a percentage commission. At a minimum, material facts about the parties' course of performance are in dispute, particularly when viewed in the light most favorable to FAME.

3. *The jury should resolve genuine fact disputes on the ambiguities of the commissions.*

A determination that summary judgment is not appropriate would require the jury to make determinations of fact. *Wilson v. Tweed*, 209 A.2d 899, 901 (Del. 1965) ("Viewing the facts presented on the motion for summary judgment in the light most favorable to the plaintiff, we are unable to say that there is no issue of fact which, if resolved in favor of the plaintiff, would entitle her to judgment against Tweed. Accordingly, we are impelled to reverse the judgment below and to remand the cause for trial."); *see also DeLuca v. Hyatt Corp.*, 2019 WL 479229, at *1 (Del. Super. Feb. 6, 2019) ("Summary judgment is only appropriate if Plaintiffs' claims lack evidentiary support such that no reasonable jury could find in their favor.").

It is the province of the jury to be the sole judge of the facts of a case, assess a witness's credibility, weigh evidence, and resolve conflicts in testimony. *Storey v. Camper*, 401 A.2d 458, 462 (Del. 1979) ("In the policy of the law of this state, declared by the courts in numberless decisions, the *jury is the sole judge of the facts of a case*, and so jealous is the law of this policy that by express provision of the

Constitution the court is forbidden to touch upon the facts of the case in its charge to the jury." (emphasis added)); *Chamberlain v. Pyle*, 2023 WL 1771013, at *2 (Del. Super. Feb. 6, 2023) ("The *jury is [also] the sole judge of a witness' credibility* and is responsible for resolving conflicts in testimony.... [I]t is within the *jury's discretion to accept one portion of a witness' testimony and reject another part*. It is the jury, not the judge, who sits as the trier of fact and in doing so is *charged with evaluating credibility and weighing evidence*." (emphasis added)); *see also Van Arsdall v. State*, 524 A.3d 3, 9 n.10 (Del. 1987) ("[j]udges shall confine themselves to their business, which is to adjudge the law and leave juries to determine facts."); *Charbonneau v. State*, 904 A.2d 295, 307 (Del. 2006) ("It was error for the trial judge to accept the State's contention (and essentially find as fact) that Brown (not Mellisa) was lying and then to remove that issue from the jury."); *Lynch v. Athey Prods. Corp.*, 505 A.2d 42, 49 (Del. Super. 1985) ("Although the defendant attacks the credibility of Christian's testimony, such issues of credibility, as noted previously, are not appropriate for disposition on a motion for summary judgment. ... All of these arguments call for a determination by the trier of fact.").

In addition to the aforementioned reasons, the Trial Court also erred by simply accepting Defendants' unsupported contention while ignoring the contrary deposition testimony submitted by FAME. The Trial Court thus inappropriately

made credibility determinations about the testimony and evidence presented by FAME, which is the purview of the jury. *See Chamberlain*, 2023 WL 1771013, at *2.

In summary, the parties' commission payment process was for Vujevich to notice FAME of cash received from FAME's efforts, from which FAME would invoice for a percentage commission. There was no course of performance by which FAME would invoice for a cash commission before the client received cash. Both Falk and Vujevich (Turner's financial advisor) testified it would not make sense to have invoiced before Turner received the cash. At minimum, this issue is a genuine dispute of material fact, properly resolved at trial. Appellant respectfully requests that this Court reverse the Trial Court's grant of summary judgment, and remand for trial on the merits.

CONCLUSION

For the foregoing reasons, this Court should reverse the Trial Court's decision and remand for trial.

Dated: July 16, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of July, 2025, I caused true and correct copies of the foregoing **Redacted – Public Version of Appellant's Corrected Opening Brief** to be served upon the following counsel of record via File & Serve*Xpress*:

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