



IN THE SUPREME COURT OF THE STATE OF DELAWARE

YOURWAY TRANSPORT, INC.	:	No. 208,2026
	:	
Appellant/Defendant-Below	:	
	:	
v.	:	Court Below:
	:	SUPERIOR COURT
VINCERX PHARMA, INC.	:	
	:	
	:	C.A. S23C-09-003 MHC
Appellee/Plaintiff-Below,	:	

**REPLY BRIEF OF APPELLANT,
YOURWAY TRANSPORT, INC.**

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I. REPLY LEGAL ARGUMENT

A. THE SUPERIOR COURT REVERSIBLY ERRED BY ENTERING A DIRECTED VERDICT HOLDING THAT THE PROVISIONS OF THE MASTER SERVICES AGREEMENT AND NOT THE BILL OF LADING CONTROLLED, AND THAT THE MASTER SERVICES AGREEMENT WAS BREACHED.

In granting a directed verdict holding that the Master Services Agreement (“MSA”) and not the bill of lading controlled, and that the MSA was breached, the Superior Court applied the wrong standard and improperly took a triable question from the jury.

Vincerx first argues that Yourway failed to appeal the bill of lading ruling. This argument is wholly without merit. Yourway’s Notice of Appeal specifically stated that the appeal was challenging the grant of Vincerx’s motion for directed verdict on the issue. [A-0027]

Examining both Vincerx’s argument on the matter and Superior Court’s decision, it is clear that these were not two unconnected determinations, but a single legal proposition by Vincerx: namely that Vincerx is entitled to judgment as a matter of law on breach and causation and that only damages should go to the jury.

And below, Vincerx’s counsel specifically described the issues together, stating, “I think it would be helpful -- I don't know if in an instruction or just telling the jury that there's been a directed verdict on the bill of lading and breach

of the Master Services Agreement so that they can understand where we are.” [A-1220]

And the Superior Court treated the decisions as to both whether the bill of lading or the Master Services Agreement applied and whether the MSA was breached as a matter of law together as a single matter. [A-1246-47] As such, Yourway’s Notice of Appeal fairly encompassed the entirety of the matter and there was no waiver.

Next, Vincerox argues that Yourway was fully heard and that the Superior Court did not rule on the bill of lading matter prior to the testimony of Mr. Pirbhai. [Ans. Br. p. 19]. This is false.

Vincerox argues that the Superior Court first expressed doubt that the bill of lading was a contract, citing page A-1070 of the record, supposedly left the door open to Mr. Pirbhai testifying, citing pages A-1089-90 of the record, but that Yourway supposedly did not “walk through” that door.

However, this argument ignores that, as set out on page A-1078, the Superior Court stated, “As I sit here today, I am making a legal determination that the bill of lading was not a contract between plaintiff and defendant.” [A-1078] Furthermore, the discussion on pages A-1089-90 relied upon by Plaintiff was a discussion of the jury instruction that should be given to the jury, not on the merits of the determination already reached.

Thus, the Superior Court determined this issue as a matter of law prior to Mr. Pirbhai's testimony, and in light of that fact, it is no argument to claim that Yourway somehow failed to address it with Mr. Pirbhai after the Superior Court already determined the issue as a matter of law.

More fundamentally, the Superior Court wrongly applied the standard for a negotiated contract, not a carrier contract. A bill of lading binds a shipper by tender and acceptance, not by the common-law elements of offer, acceptance, and consideration. *EF Operating Corp. v. Am. Bldgs.*, 993 F.2d 1046, 1050 (3d Cir. 1993). *See, also, S. Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342, 102 S. Ct. 1815, 72 L. Ed. 2d 114 (1982). As set forth in the authorities cited by Yourway in its Opening Brief, a shipper is bound by a carrier's bill of lading upon the tender of the goods, without signature and is presumed to know the terms of the bill of lading. *Id.*

While Vincerox attempts to distinguish those authorities by arguing that they arose under the Carmack Amendment, and that the Superior Court concluded that the Carmack Amendment does not apply, these authorities are not limited to merely the Carmack Amendment scenario, but are persuasive on the question of how, in general, bills of lading work in the shipping industry.

Furthermore, Vincerox's argument that Yourway could not establish liability based on the bills of lading is misguided. Any error in the legal framework

employed by the Superior Court is reviewed *de novo*. *Bennett v. USAA Cas. Ins. Co.*, 158 A.3d 877 (Del. 2017).

When viewed most favorably to Yourway, as is required under the standard applicable to a motion for directed verdict, *McGrellis v. Bromwell*, 225 A.3d 721 (Del. 2020), the evidence of record raised a question for the jury on whether Vincerx had notice of the terms before tender.

The evidence of record also supported a finding that Vincerx accepted the bill of lading's terms. Yourway's President, Gulam Jaffer, testified that the approval by the client of the shipment documents is the routine practice and that he was sure that bill of lading was sent to Vincerx, as the client is always provided the bill of lading before a shipment is picked up. (Jaffer 48-49) Additionally, Vincerx's Vice President certified, as part of the *pro forma* invoice, that the value of the shipment was \$253,391. [B-411] And Vincerx was shipping via a known and established carrier in industry. Together, this evidence raised a genuine issue of fact that should have been reserved for the jury to decide.

Vincerx also relied upon the claim that Dr. Izumi did not recall a bill of lading, [Ans. Br. p. 24], as support for the claim that the directed verdict was properly applied. But the applicable standard required that this testimony be

viewed in the light most favorable to Yourway, and therefore that the jury might very well have concluded that she lacked credibility.¹

Vincerx also seeks to avoid 6 *Del. C.* § 7-309, which permits limitations on liability provisions in bills of lading. [Ans. Br. p. 23]. However, in this case, Section 7-309(b) was satisfied, or at minimum, the jury should have answered the question of whether Vincerx was afforded the opportunity to declare a higher value. As Mr. Pirbhai testified, Vincerx had the opportunity to declare a higher value with regard to the *pro forma* declaration for customs, but chose not to do so. [A-1119-20] At that point, the trial court had already ruled that the bill of lading, and the limitation of liability it contained, would be excluded from the case. [A-1078] Had that improper determination not been made, the issue of Vincerx's opportunity to declare a higher value concerning the bill of lading would have been addressed.

Vincerx also cites to *Waters v. Del. Moving & Storage, Inc.*, 300 A.3d 1 (Del. Super. Ct. 2023), where the evidence addressing the limitation of liability provision included a signature of the plaintiff. [Ans. Br. pp. 21-22]. However, while *Waters* involved a signature, neither the case nor the statutory scheme of § 7-

¹ Indeed, given that the fact that Vincerx had ceased all operations, and given directly contrary testimony by Dr. Izumi that the program might be restarted, [A-0890], Dr. Izumi's credibility was clearly at issue and supports a finding that barring the evidence of Vincerx's current financial and operational condition was error.

309(b) require it. In this case, the fact that the bill of lading and its terms are binding, as set out in Yourway’s Opening Brief, establish the error in granting a directed verdict.

Vincerx also argues that Yourway breached the MSA, based on the terms of the MSA. Those arguments are meritless. Vincerx argues that the MSA “covers” transportation, citing, *inter alia*, Section 2(j) of the MSA. [B-291]. However, Section 2(j) contemplated the bill of lading, because it contemplates that shipment documents, like the bill of lading in this case, will supply terms (*i.e.*, “other services as are specified in the applicable Quote.”). [B-291].

None of the other terms of the MSA relied upon by Vincerx concerning the terms of the MSA rebut Yourway’s contentions in its brief. First, Vincerx’s reliance on Section 13.6’s signed writing requirement is misguided, because that section applies only to changes to the MSA itself. [B-299]. Here, the application of the bill of lading to the shipment in this case is not a change to the MSA itself, but is contemplated by the MSA and the course of practice between the parties.

Similarly, Section 13.5 states that if there is any conflict between the MSA and another document, that the terms of the MSA would control. [B-299]. This provision therefore applies only to conflicting ***documents***, not to documents contemplated by the MSA or supplementing the MSA, such as the bill of lading.

Further, Section 11.5 is a preservation of remedies provision. [B-298]. While it purports to preserve any remedy Vincerx might have in the event of a breach, it does not, by its very terms, prohibit a cap on liability.

Finally, Vincerx attempts to argue that the declared value of the cell banks on the *pro forma* invoice, amounting to \$253,391, was of no moment because Vincerx relied on Yourway in completing the form and did not contemplate “replacement value” when they were completed. But Vincerx completed the document, engaged in the valuation process, and had its Vice President certify that the cell banks’ value was \$253,391 demonstrate that Vincerx thus understood the declared value mattered.

That the *pro forma* invoice states “NO COMMERCIAL VALUE” is irrelevant. The form actually states, “NO COMMERCIAL VALUE. NOT FOR SALE OR RESALE.” [B-411]. Thus, because the cell banks were not offered for sale or resale, they had no “commercial” value. However, that does not mean that they had no inherent value, or that their value could only be calculated by the method applied by Dr. Lindell.

For that reason, Vincerx’s argument concerning the fact that there is no “market” for the purchase of the cell banks is specious. [Ans. Br. p. 37]. That the cell banks are not for sale or resale does not mean that the cell banks cannot be valued in any way other than the replacement-value theory advanced by Vincerx,

especially in light of its own Vice President's certification of the value of the cell banks in the *pro forma* invoice.

B. IT WAS REVERSIBLE ERROR TO EXCLUDE EVIDENCE REGARDING VINCERX'S FINANCIAL AND OPERATIONAL CONDITION, AS THE EVIDENCE WAS RELEVANT AND ADMISSIBLE ON KEY ISSUES IN THE CASE.

First, Vincerx argues that Yourway supposedly waived appeal of the exclusion of the evidence under D.R.E. 403. That argument is meritless.

The Superior Court, in deciding this matter, determined that this evidence concerned damages, and that the evidence was irrelevant, confusing, misleading, and possibly prejudicial. [A-0625]. In Yourway's brief, it demonstrated that the evidence was not only relevant, but that it was appropriate and, indeed, crucial and necessary for the jury to have received a full and complete understanding of the underlying facts of the case and to have properly determined the correct measure of damages in this case. The arguments raised by Yourway in its brief more than fairly encompass the entirety of the Superior Court's reasoning for excluding the evidence of Vincerx's financial and operational condition.

As such, Vincerx's waiver argument is baseless and should be rejected by this Court.

Vincerx argues that this evidence is not relevant and that Yourway never identified a "material fact that becomes more or less probable because... Vincerx ran out of money." [Ans. Br. p. 31]. This argument is absurd. It is well established that evidence affecting credibility of a witness, unless otherwise barred, is always relevant. "Evidence that impeaches a witness's credibility is relevant and

admissible so long as it is not prohibited by another rule.” *Garcia v. State*, 911 A.2d 802 (Del. 2006). *See, also, Weber v. State*, 457 A.2d 674, 680 (Del. 1983) (“It is well settled that the bias of a witness is subject to exploration at trial and is always relevant as discrediting the witness and affecting the weight of his testimony.” internal quotes omitted.)

The credibility of Dr. Lindell’s testimony was of key importance in this case because his testimony—that the jury should award Vincerox \$7.65M—was reached by calculating what Vincerox would have to spend to regenerate the cell banks. That testimony would certainly have been put in doubt, or, at the very least, challenged, had Yourway been permitted to question him about the fact that Vincerox would never regenerate the cell banks because it was disbanding, and would never spend the money it would take to do so. The jury may have believed that his testimony lacked credibility on that point and that the correct measure of damages was the intrinsic value of the cell banks, which Vincerox itself, on the *pro forma* invoice, valued at \$253,391.

The credibility of Dr. Izumi’s testimony was also at issue as she specifically discussed “restart[ing] the program” and stating that it was only “halted at this moment.” [A-0890]. This testimony lacked veracity, or, at minimum, provided an improper inference that the drug program had only been momentarily halted and would be restarted. Had the testimony of financial and operational condition not

been improperly excluded, Dr. Izumi would have been confronted by the fact that these statements were nonsensical in light of Vincerox's impending demise, and the jury's view of her testimony and her credibility could have been adversely affected as a consequence.

Further, Vincerox argues that permitting the jury to hear that Vincerox "halted" its drug program somehow demonstrates that the exclusion of the evidence that Vincerox halted all operations and virtually ceased to exist as a company did not strip Yourway of a fair trial.

That argument is without merit, because the two are not the same, as "halted" implies resumption, not a full cessation. Telling the jury that the program has halted is not an adequate substitute for telling it that Vincerox has all but ceased to exist. In fact, on the key question of how the damages should have been determined, telling the jury only that the drug program was halted, but not that Vincerox ceased all operations, eliminated all employees except one, and was essentially being wound down, was grossly misleading.

Telling the jury that the drug program was halted implies the program can and would be restarted, when that was never going to occur. Consequently, when the jury was called upon to determine the correct measure of damages, if it wrongly believed that Vincerox would be restarting the drug program, it might then

also have believed that Vincerox was entitled not to the value of the cell banks, but the cost it would expend in the future to regenerate the cell banks.

However, had the jury been told the truth about Vincerox's pending dissolution and the jury understood that there was absolutely no possibility that Vincerox would ever regenerate the cell banks and would never spend the \$7.65M to regenerate the cell banks, the jury might have concluded that it would be fundamentally unjust to award Vincerox that amount, as Vincerox was never going to regenerate the cell banks.

A jury that was not deprived of truthful information about Vincerox's financial and operational condition might well have concluded that a just verdict would award Vincerox for what it lost—the inherent value of the cell banks—rather than the cost of physically replacing those cell banks when it had no intent or ability ever to do so.

If there were rough parity between the inherent value of the cell banks on the one hand and the cost to regenerate them on the other, then perhaps the preclusion of the evidence of Vincerox's pending demise might be harmless error. But when the cost to regenerate the cell banks is dozens of times more than its inherent value, justice demands that the jury at least be given the complete factual background and the opportunity to determine the proper verdict in light of that factual background.

Vincerx's reliance on *Hilco Capital, LP v. Fed. Ins. Co.*, 978 A.2d 174 (Del. 2009) and *Gillen v. Cont'l Power Corp.*, 105 A.3d 989, 2014 Del. LEXIS 548 (Del. 2014) is misguided. In those cases, the excluded evidence was deemed "not critical" *Hilco*, 978 A.2d at 180, or "generally cumulative of evidence that was admitted" *Gillen*, 2014 Del. LEXIS 548 at *15.

However, in this case, the evidence which was wrongly excluded was neither "not critical" nor cumulative. Rather, it was unique, non-duplicative evidence of the crucial facts needed for the jury to make a proper determination as to the amount of damages which could be awarded to Vincerx without providing a windfall.

The jury's questions in this case demonstrate that fact and that the undisputed evidence which was excluded—both evidence concerning Vincerx's insurance and evidence that Vincerx had ceased all operations—was material to the jury's deliberations. That is especially true concerning the questions as to how much Vincerx paid Bayer and what that purchase entailed. Those questions demonstrate that the jury understood that the value of cell banks was not necessarily equal to the costs proffered by Dr. Lindell, but the jury was denied the information which would have permitted it to properly analyze this question.

Finally, the jury instruction did not cure the Superior Court's error, as Vincerx suggests. [Ans. Br. p. 35-36]. The jury in this case was not permitted to

hear evidence about the “loss actually sustained.” No one put the value of what the cell banks were actually worth before the jury because the evidence that would have addressed that question, *i.e.*, that Vincerx was shutting down and would never rebuild the cell banks, was excluded. Instead, the jury instruction in this case did nothing other than to reinforce the improper measure of damages and permitted the jury to award a windfall to Vincerx.

C. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING AN IMPROPER MEASURE OF DAMAGES.

The Superior Court committed reversible error by permitting an improper measure of damages. In Delaware, contract damages are intended to place the plaintiff in the position it would have occupied absent the breach, not to provide a windfall. *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009).

Vincerx devotes much of its Answering Brief to waiver, arguing that Yourway did not object to Dr. Lindell’s testimony at trial. [Ans. Br. pp. 33-35]. Plainly, Vincerx seeks to recast a legal question as an evidentiary question to obtain a more favorable standard of review. This argument does not fairly address Yourway’s argument. The point is not that Dr. Lindell’s calculations were unreliable but instead, that the measure of damages those calculations computed (*i.e.*, the cost of a reconstruction that will never occur) is not a damages measure that the law permits on these facts. What measure of damages the law allows for a breach of contract is a question of law, and questions of law are reviewed by this Court *de novo*.

Nor does the Notice of Appeal’s reference to “consequential damages” forfeit the issue. The Notice identified the Order permitting the challenged damages testimony, and the label attached to that challenge does not narrow it. And Vincerx briefed, and the Superior Court decided, the substance of the question on the Rule 59 motion. Any objection at the trial level would have been futile for

the reasons explained in Section D below. To wit, the Superior Court had already excluded the facts underlying the objection. Even under plain-error review, permitting the jury to award \$7.65 million measured solely by a project Vincerox would never undertake represents the sort of basic and fundamental defect Rule 8 exists to correct.

An award of replacement cost for a recreation of the cell line, which will never occur, is a windfall because the award was directly premised on the payment of the costs needed to complete the project to recreate the cell line. However, because that project will never occur, Vincerox was placed in a better position than it would have been, had there been proper performance, because the reconstruction costs far exceed the inherent value of the cell banks.

Vincerox argues that its damages were not linked to its financial and operational condition, and, in support, claims that Dr. Lindell testified that Vincerox's stalled operations did not affect his analysis. [Ans. Br. p. 38]. That statement, however, merely confirms that Dr. Lindell's analysis was not tethered to Vincerox's actual financial and operational position, but was, instead, calculated based on a fiction that Vincerox would be recreating the cell lines, with the effect of constituting a complete windfall.

Lastly, Vincerox's argument that Dr. Burger "agreed" that replacement cost was the correct measure of damages [Ans. Br. p. 34] is unsupportable. Dr.

Burger's report and testimony was directed to rebut Vincerx's expert on the replacement-cost issue. It was not a concession but, rather, was presented to show that even if replacement cost was the yardstick, Dr. Lindell's valuation of \$7.65M was unsupportable and that the proper valuation was closer to the \$253,391 which Vincerx certified to in the *pro forma* invoice, because a full restart was not needed.

***D. THE SUPERIOR COURT ERRED IN NOT GRANTING EITHER
A NEW TRIAL OR REMITTITUR, AS THE JURY'S VERDICT
WAS AGAINST THE GREAT WEIGHT OF THE EVIDENCE.***

Vincerx argues that it is irrelevant that it will never use the money to recreate the cell banks, notwithstanding that its replacement-value methodology is explicitly based on that premise, and supports that argument by citing *SIGA Techs., Inc. v. Pharmathene, Inc.*, 132 A.3d 1108 (Del. 2015) for the proposition that the measure of damages is based on the reasonable expectations of the parties *ex ante*. [Ans. Br. p. 41, citing *SIGA*, 132 A.3d at 1130]. However, the Court in *SIGA* immediately followed that point by emphasizing that the measure of damages is compensation for the value of what the promisee lost. *SIGA*, 132 A.3d at 1130.

In this case, the value of what Vincerx lost was the value of the cell banks, themselves. Vincerx cannot be said to have lost the value of what it would take to recreate the cell banks, because it will never recreate the cell banks. Awarding such a windfall is the definition of “unreasonable” and should have been found to be conscience shocking.

Vincerx further argues that it should not shock the conscience that the jury’s award was \$2.65M more than Vincerx had paid to Bayer a year before, for not only the cell banks but also, the license to manufacture and market VIP943, and additional data, materials and intellectual property. Vincerx notes that the deal also included additional milestone payments if the drug were developed and

marketed. That argument fails because the milestone payments are all future, contingent payments, which would only come due if those milestones were reached. As such, they are irrelevant to the question of whether valuing the cell banks alone at \$7.65M, one year after the \$5M purchase, in which the cell banks were only one part of a transaction, was in any way reasonable. Because the award to Vincerx exceeded the value of the transaction—while Vincerx was not deprived of and still retained the other parts of the transaction with Bayer, such as the license to manufacture and market the drug as well as the other data, materials and intellectual property—the jury award is an unreasonable windfall under these specific facts.

Finally, Vincerx argues that Yourway waived any objection to Dr. Lindell's testimony. This argument is misguided. Objection would have been futile because by the time of Dr. Lindell's testimony, the Superior Court had already excluded the underlying fact that Vincerx had ceased operations. [*Cf.* A-0625-26 (barring the evidence of Vincerx's financial and operations condition pretrial) and A-0966-1060 (Dr. Lindell's trial testimony)].

Vincerx also argues that Yourway failed to appeal the separate Order limiting Dr. Burger's testimony concerning Vincerx's operational status. [Ans. Br. p. 35]. That argument is doubly wrong. First, the Notice of Appeal designated the Order granting the second motion *in limine*. That was the ruling that excluded the

cessation evidence from the trial, and the order concerning Dr. Burger merely applied that exclusion to one witness. Reversing the former necessarily reverses the latter. Second, the question of whether the replacement cost for a reconstruction that will never occur is a permissible measure of expectation damages does not depend on which witness would have supplied the excluded facts. The measure was erroneous regardless of whether it was Dr. Burger who addressed the issue.

Nor was a trial objection to Dr. Lindell's testimony the correct vehicle to challenge the Superior Court's determination, because the challenge was not to the reliability of the calculations performed by Dr. Lindell themselves, but to the legal question of what constituted the correct measure of damages.

E. IT WAS REVERSIBLE ERROR TO BAR YOURWAY FROM INTRODUCING EVIDENCE OF VINCERX'S INSURANCE PROGRAM, AS THE EVIDENCE IT SOUGHT TO INTRODUCE WAS RELEVANT AND ADMISSIBLE ON DAMAGES ISSUES.

Vincerx posits a strawman by asserting that Yourway's purpose in seeking the inclusion of Vincerx's insurance information was allegedly to "use Vincerx's insurance to suggest that Vincerx was comparably at fault for its own loss" and to "inject into the jury's damages deliberation the irrelevant fact that Vincerx carried separate coverage." [Ans. Br. p. 45]. This mischaracterization of Yourway's position should be rejected.

The insurance information was directly related to Vincerx's risk allocation and was relevant to the question of damages because it explained why Vincerx chose not to value the cell banks in the bill of lading or the *pro forma* invoice for the \$7.65M that they later claimed they were worth. The insurance information and the reasonable inferences as to Vincerx's risk-management strategy would have further bolstered the position that the actual value of the cell banks was the \$253,391 that Vincerx recognized in its *pro forma* invoice and not the \$7.65M it later asserted.

The value of the cell banks was at all times an active issue in this case, so Vincerx's argument that the evidence was not relevant to any "live defense" is meritless. Despite Vincerx's attempt to describe it as being "mitigation" or "comparative negligence"—neither of which are supported in any way—the

presence of Vincerox's insurance information and the reasonable inferences that can be drawn from that information as it relates to Vincerox's loss-allocation strategy and the value of the cell banks were relevant and admissible.

Vincerox also argues that this evidence was irrelevant because Vincerox's insurer denied coverage. [Ans. Br. p. 48]. But the evidence was not proffered to establish that Vincerox was otherwise compensated for the loss, but to explain its motivations for declining to declare the value of the shipment at \$7.65M it later claimed it was worth. If Vincerox believed that it had coverage for the shipment, it would explain why it chose not to increase the declared value in connection with the shipment. This further benefitted Vincerox by permitting it to avoid the additional shipping costs of having Yourway assume greater liability. Mr. Pirbhai testified that Yourway would never have shipped the cell banks for \$15,000 had Vincerox insisted it was valued at \$7.65M. Rather, it would have charged \$300,000. [A-1111-1114]

Vincerox's motivation existed regardless of whether the insurer later declined coverage. The value of the evidence lies not in the actual existence of coverage, but in Vincerox's belief that coverage was in place as that would explain its otherwise inexplicable decision-making as it concerned the risk management in this case.

In addition, Vincerox's argument that there was no prejudice because the Superior Court barred the insurance evidence of both Vincerox and Yourway is a bit like Anatole France's biting observation that "[t]he law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."²

That Vincerox had no plausible basis to present the jury with evidence of Yourway's insurance coverage does not demonstrate that Yourway had no plausible basis to present evidence of Vincerox's coverage. Moreover, barring the presentation of both did not eliminate prejudice, because the parties were not in equal position concerning the relevance of the evidence. Thus, the preclusion of both, under a misguided notion of equal treatment, actually fostered prejudice to Yourway.

Finally, Vincerox argues that the decision to bar this evidence was fine because Yourway was permitted to argue about the bill of lading and Vincerox's decision not to declare a higher value, but that Yourway "failed to support that argument with evidence." [Ans. Br. p. 49]. While that assertion is incorrect, the larger point is that some of the key evidence that Yourway sought to supply to the jury concerned Vincerox's insurance choices, as they related to Vincerox's overall

² See, *Martin v. City of Boise*, 920 F.3d 584, 603 (9th Cir. 2019) (*quoting* France, *The Red Lily*)

risk allocation. That evidence would have supported the positions that Vincerx now claims were unsupported. That argument simply goes to demonstrate that Vincerx's position on this issue is without merit.

F. IT WAS AN ABUSE OF DISCRETION TO PERMIT VINCERX'S CEO TO OFFER EXPERT TESTIMONY DESPITE NOT PRODUCING AN EXPERT REPORT.

Next, Vincerox asserts that it satisfied every obligation to present Raquel Izumi as an expert. This is simply false. Vincerox's interrogatory response, identifying Dr. Izumi as an expert, failed to set out the opinions or grounds to be offered, so it was not a Rule 26 disclosure.

Vincerox asserted that it served "the Izumi Report." [Ans. Br. p. 51]. However, the document that Vincerox cited was not an expert report. Rather, it was a press release touting a "virtual investor event" occurring on the date on the press release. [A-0237]. Indeed, it twice specifically describes itself as "[t]his press release." [A-0239].

Indeed, the press release further contained a "cautionary statement" that it constituted or contained "forward-looking statements" as appropriate for public statements under the applicable securities laws. *See, e.g., Cyan, Inc. v. Beaver Cty. Emples. Ret. Fund*, 583 U.S. 416, 422, 138 S. Ct. 1061, 1066, 200 L.Ed.2d 332, 340 (2018) (discussing the safe harbor provision for such statements.) A legitimate expert report would require no such disclaimer.

Finally, even though Vincerox asserts that this document constitutes "the Izumi Report," it does not purport to be authored by her, and the document concludes by listing Gabriela Jairala of Vincerox, and Totyana Simien of Inizio

Evoke Comms, as the appropriate contacts. [A-0239]. In fact, the only reference to Dr. Izumi is a quote attributed to her about a study then being performed, and that quote appeared alongside quotes by Ahmed Hamdy, M.D., then-C.E.O., and by Vivek Subbiah, M.D., the Chief of Early-Phase Drug Development at Sarah Cannon Research Institute. [A-0237]. Nothing about this document indicates that it was authored by Izumi, so it simply does not constitute a viable expert report by her.

Further, Vincerx's press release gave no notice of the opinions actually offered by Dr. Izumi at trial. The press release said nothing about cell-bank reconstruction, whether the vials located in South Korea were adequate to reconstruct the cell banks, and did not analyze the approach advocated by Dr. Burger. Similarly, Izumi's fact deposition did not constitute an expert report and did not preview the improper testimony. As such, Vincerx's opposition lacks merit.

Vincerx argues that this argument was supposedly waived because no *Daubert* challenge was made. That argument is meritless because the objection is not based on failure to meet the standards under *Daubert*, but the fact that Vincerx never provided a report from Dr. Izumi so she could not testify as an expert. Thus, the *Daubert* argument is misplaced because a party cannot move to exclude opinions it was never told would be offered.

Additionally, Yourway had no basis to move to bar Izumi's testimony as a whole, as she was clearly a viable fact witness. Moreover, because Vincerox provided only a self-described press release, never an actual expert report, but only, would lead any reasonable person to conclude that Vincerox had abandoned its intent to present Dr. Izumi as an expert rather than a mere fact witness, and this Court should not abjure review of the issue on that basis.

To the extent that Vincerox argues that the trial objections did not include this issue, the objections at trial fairly encompass the arguments made in this appeal. It is clear that Dr. Izumi's opinions cannot be construed as fact testimony. The direct-examination rebuttal given by her is scientific judgment about feasibility, not a perception of what Izumi saw or did. [A-1228-31]. In addition, Dr. Izumi, in her testimony, adopted Dr. Lindell's methodology critique as her own. [*See, e.g.* A-1234 & 1242]. This was unquestionably expert testimony and not testimony from a fact witness.

Finally, Yourway was clearly prejudiced because Dr. Izumi's testimony directly addressed whether a full restart was necessary. Given the issues presented in this case, that testimony had the clear potential to cause a gross miscarriage of justice.

II. CONCLUSION

Thus, for all the foregoing reasons, Appellant/Defendant-Below, Yourway Transport, Inc., respectfully asks this Court to reverse the decision below and to remand for a new trial.

Respectfully Submitted,

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