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IN THE SUPREME COURT OF THE STATE OF DELAWARE

E. I. DU PONT DE NEMOURS AND COMPANY,	)	No. 280,2013
Plaintiff Below/Appellant,	)	Court Below – Superior Court of the State of Delaware, in and for New Castle County C.A. No. N10C-09-058 (MMJ)
v.	)	
MEDTRONIC VASCULAR, INC.,	)	**REDACTED PUBLIC VERSION**
Defendant Below/Appellee.	)	

REPLY BRIEF OF PLAINTIFF BELOW/APPELLANT

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TABLE OF CONTENTS

[redacted]

TABLE OF AUTHORITIES

Page

CASES

[redacted]

Page

[redacted]

I. Fact Issues Exist as to The Timeliness of DuPont's Claims

A. Fact Issues Regarding the Claim Based on Cordis Sales

The Cordis Claim Was Inherently Unknowable. Medtronic does not dispute that there are triable issues as to whether any of PwC's or Deloitte's knowledge may be imputed to DuPont, Dup. Br. 23-26; Medt. Br. 36, and that the Superior Court therefore erred in concluding the contrary. Dup. Br. 24-26. Nor does Medtronic dispute that the court erred in concluding that DuPont would have uncovered facts sufficient to assert the Cordis claim if it had only asked Medtronic to conduct an audit of Cordis; since DuPont did ask and Medtronic refused, that position is untenable. Dup. Br. 21-22. Instead, Medtronic puts a gloss on the "inherently unknowable" standard that turns this Court's statute-of-limitations jurisprudence on its head. Ignoring the undisputed fact that neither PwC nor Deloitte, the two accounting firms hired by DuPont to conduct royalty audits of Medtronic, were able to uncover a basis for the Cordis claim in the real world, Medtronic nonetheless argues that DuPont has failed to show the "inherently unknowable" nature of the claim because—in the hypothetical world—it was still theoretically possible for PwC to have discovered the issue. According to Medtronic, "DuPont has to produce evidence that PwC *could not have* figured it out." Medt. Br. 35-36. But this Court's jurisprudence has never equated the "inherently unknowable" standard with strict, physical impossibility, as Medtronic

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urges here. Indeed, if that were the standard for a claim to be "inherently unknowable," this Court in cases like *Layton*, *Boerger*, and *Coleman* (discussed below) would have found for the defendants rather than the plaintiffs.

In the seminal case of *Layton v. Allen*, 246 A.2d 794 (1968), the plaintiff sued for medical malpractice based on the fact that her doctor had, during an operation, left a several-inch-long metallic hemostat in her body. The hemostat was not discovered until 7 years later, when it began causing abdominal pain. 246 A.2d at 796. The Court applied the discovery rule to the case, characterizing the plaintiff's injury as "inherently unknowable." *Id.* at 797. Of course, the fact that the hemostat had been left in the plaintiff's body *was* physically knowable—an X-ray could have easily discovered it. *Id.* at 796. The standard that the court applied for determining whether the claim was "inherently unknowable," however, was whether "reasonable care and diligence" on the part of the plaintiff would have "led to the discovery of the hemostat prior to that date." *Id.* at 796; *see also Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 n. 23 (Del. 2004). If Medtronic's proposed standard had been applied—whether the injury's discovery was theoretically possible—the *Layton* court would have dismissed the case, telling Mrs. Layton, "You could have figured it out by getting an X-ray."

More recently, in *Boerger v. Heiman*, 965 A.2d 671, 676 (Del. 2009), the injury was the accountant-defendants' malpractice in failing to advise the plaintiff

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that he would be subject to double taxation because of his failure to file a form with the I.R.S. to obtain Subchapter S status for certain corporations that he owned. *Id.* at 673-74. The Superior Court had entered summary judgment because the plaintiff knew about the double taxation problem early on, had asked one of his accountants about the creation of an LLC and its tax implications, and a subsequent accountant had asked him why he had not elected Subchapter S status. *Id.* at 675. This Court reversed summary judgment, however, holding that the injury was "inherently unknowable" because there was "no 'red flag' that clearly and unmistakably" would have led to discovery of the defendants' negligent tax advice. *Id.* The plaintiff's injury was "inherently unknowable" even though, if he had consulted a more competent accountant and received the correct advice, he quickly would have been able to "figure it out." Again, if Medtronic's proposed standard had been applied, *Boerger* would have come out the other way.

And similarly, in *Coleman v. PwC*, this Court held that the accountant-defendant's malpractice was "inherently unknowable" even though there was no physical impediment to its discovery, as indeed, a special committee was later able to discover the problem. 854 A.2d 838, 841 (Del. 2003); *see also Isaacson, Stolper & Co. v. Artisan's Sav. Bank*, 330 A.2d 130, 133 (Del. 1974) (fact that defendant accountant had failed to obtain needed permission from Secretary of Treasury for changing interest-deduction practice held "inherently unknowable"

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even though plaintiff presumably could have asked defendant accountant about it).

Here, DuPont was much more diligent than the plaintiffs in *Layton*, *Boerger*, and *Coleman*—hiring not one but two investigators. That neither of them discovered the facts underlying the Cordis claim means that there are fact issues as to whether DuPont's injury was "inherently unknowable." If reasonable diligence does not discover an injury, it is inherently unknowable, and the discovery rule applies. *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 591 (Del. Ch. 2007) (reasonable diligence does not require plaintiffs to "sift through" voluminous documents); *Ryan v. Gifford*, 918 A.2d 341, 360 (Del. Ch. 2007) (reasonable diligence does not require shareholder "to conduct complicated statistical analysis" to uncover claim). Here, Medtronic does not dispute that DuPont was not entitled to receive any information from Medtronic about its royalty calculations; the only way DuPont could potentially obtain information was by hiring an independent auditor subject to Medtronic's approval and a duty of confidentiality to Medtronic. Dup. Br. 10-11, 21-23. This is a classic case, therefore, in which the plaintiff was "blamelessly ignorant" because of "justifiable reliance on a professional or expert"—experts who did not discover the basis for the Cordis claim. *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at * 5 (Del. Ch. Jul. 17, 1998); *see also Isaacson*, 330 A.2d at 133; *Coleman*, 854 A.2d at 84; *Island Farm, Inc. v. Master Sidlow & Assocs., P.A.*, 2007 WL 2758775, at *3-4

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(Del. Super. Sept. 20, 2007) (issues of fact as to whether statute was tolled until plaintiff received results of accounting firm audit).

It is Unclear What Information Medtronic Provided to PwC. Moreover, there are fact issues about what information PwC actually had relating to the Cordis claim and thus whether PwC could indeed have "figured it out." Medtronic assumes its own conclusion by arguing that "PwC had access to all the information needed to uncover this claim." Medt. Br. 36. But it is undisputed that PwC did not have *any* information about how Cordis was calculating royalties; indeed, PwC's report notes this and thus recommends that DuPont ask Medtronic to conduct an audit of Cordis—a request DuPont made, only to be ignored. Dup. Br. 21-22. And the fact that PwC had "agreed" the Cordis revenue numbers with the revenue numbers in Medtronic's royalty reports to DuPont, Medt. Br. 35, is meaningless: Without knowing what the Cordis revenue number represented (*e.g.*, types of products and respective amounts), PwC could not determine how the Cordis royalties were being calculated. The royalty reports that Cordis sent to Medtronic contained no information about which products were royalty bearing, what formulas were being applied, or how the calculations were being made. AR001. Indeed, Medtronic's own employees did not know how Cordis was calculating royalties. AR077 (finance head did not know what Cordis' product mix was); AR092 (no idea what Cordis paid royalties on); AR042-43 (no knowledge of

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"Factory Cost" ever being calculated for Cordis royalties). Indeed, it was not until the Deloitte audit had concluded in fall 2006 that Medtronic's in-house counsel—who had analyzed the Cordis Addendum and the PACRA in 1999 and participated in the PwC audit in 2000—learned that DuPont was not being paid royalties on Cordis sales in accordance with the PACRA. AR086-89; *see also* A959-61 (unaware of who made decision about calculating Cordis royalties, or whether they were consistent with requirements of PACRA). That Medtronic's own employees did not know how Cordis royalties were calculated raises fact questions about whether the limited information available to PwC in 2000 was sufficient for PwC to "figure out" whether DuPont was being underpaid.

Finally, Medtronic argues that "all the evidence" concerning Medtronic's "apportioning" of royalties on its own stent devices put DuPont "on inquiry notice that Medtronic would pay royalties after apportioning Cordis's stent system sales." Medt. Br. 28-29. Notably, there are myriad triable issues to DuPont's royalty claims based on Medtronic's own devices, as discussed in Section I.B. below. But that aside, there is simply no evidence that Medtronic's royalty calculations on its own devices (namely, the decision to deduct [redacted]% from royalties on Medtronic sales) was related to Medtronic's decision to not follow the PACRA for Cordis sales. In fact, Medtronic did *not* apportion Cordis' sales, and never applied the same [redacted]% deduction that it applied to its own Medtronic device sales. A960-61

[redacted]

(Cordis' sales number was multiplied by tiered numbers in the PACRA); AR074 (sales as reported by Cordis were multiplied times tiers in Article VII). Indeed, as noted above, Medtronic's employees were not even aware of how Cordis had been calculating royalties on the Cordis devices. Dup. Br. 22-23. Medtronic argues that "DuPont knew enough to spur a reasonable person to conduct a prudent investigation into how royalties were being calculated and paid for Cordis sales," Medt. Br. 29, but DuPont did that—the Deloitte audit—and Deloitte discovered absolutely nothing about this claim.[1]

B. <u>Fact Issues Regarding the Claim Based on Medtronic Sales</u>

The PwC Report. Medtronic claims that two sentences in the PwC report, which addresses Article II(D)(i) of the PACRA, "informed DuPont that Medtronic was using the PACRA formula for apportioning stent system sales because stents *are* Related Products." Medt. Br. 13 (emphasis supplied), 21. But this passage says that "stents *include* Related Products." A380. The word choice matters. If

[1] Medtronic's argument that DuPont has waived the Cordis claim because it supposedly failed to argue that any tolling doctrine applies is frivolous. Medt. Br. 34. At pages 3-5, DuPont argues that the discovery rule (a/k/a the "doctrine of inherently unknowable injuries," *Petroplast Petrofisa Plasticos S.A. v. Ameron Int'l*, 2011 WL 2623991, at *16 (Del. Ch. Jul. 1, 2011)) applies to both claims, noting that it did not discover any of them until fall of 2006. This paragraph quotes heavily from *Coleman*'s discovery-rule standard—the "red flags" test and the question of whether "a more diligent investigation, even if pursued, would have uncovered facts to enable the plaintiff [] to discover the basis of [its particular] claim." DuPont next compares the discovery-rule holdings of *Coleman* to the Superior Court's decision with respect to the Cordis claim. Dup. Br. 4-5. The discovery rule tolling doctrines are then discussed in greater detail on pages 18-24. Because the court never held that DuPont's injury was not unknowable (despite a subheading called "No Inherently Unknowable Injury," the court concluded that DuPont was on inquiry notice, not that the injury was knowable, Add. 49), DuPont's opening brief does not dwell on the issue of whether the discovery rule applies.

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PwC were intending to convey that Medtronic took the position that all stents "are" Related Products and therefore categorically excluded from the royalty base, it would have used that word. That PwC instead used the word "include" creates at least an inference—to be construed in DuPont's favor—that PwC was referring to exactly what DuPont understood this passage to mean: that sales of stent systems "include" Related Products such as pumps, introducers, and guidewires, A762; A672-73; A944, which are "Related Products" because they are "sold ... in conjunction with a Product" such as a "Catheter." A109. This understanding was confirmed by Medtronic during discovery: [redacted] raising the reasonable inference that one invoice—with one price—applied to such contracts. A927-28.

In contrast with the reasonableness of DuPont's interpretation, Medtronic's is dubious. It argues that a jury must only interpret this passage to mean that stents "are" "Related Products," and that the PwC report "specifically told DuPont how Medtronic *was calculating* royalties on sales of its stent systems," *i.e.*, applying the "Related Products" formula of Article II(D)(i) to deduct the stent portion of stent systems. Medt. Br. 22, 28 (emphasis supplied). But no knowledgeable Medtronic witness ever testified that, at this time, Medtronic was in fact applying Article II(D)(i) to treat the stent part of Medtronic's stent systems as a "Related Product," much less that PwC was told that by Medtronic. In discovery, no Medtronic

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witness claimed that the [redacted]% deduction which Deloitte (not PwC) eventually discovered in the second audit was because Medtronic thought stents "are" Related Products. Moreover, if Medtronic had deducted the stent part because the stent constituted a "Related Product," then it would have paid royalties on all other parts of the Catheter, including, *e.g.*, the shaft and luer. But Medtronic's finance chief testified that the [redacted]% deduction reflected a decision to pay royalties only on the balloon portion. AR050-53. Further, Medtronic's claim that the PwC report necessarily describes the treatment of the stent as a "Related Product" is also undermined by the failure of Medtronic's witnesses to explain which formulas in fact were applied in DuPont's royalty reports before the PwC audit, or what the basis was for the [redacted]% deduction that Deloitte finally discovered in 2006. AR116-17; AR119; AR122-25; *see also* AR054-55; AR058 (not knowing when or by whom decision was made about paying only on the balloon part); AR035-036; AR041 (chief patent counsel not familiar with PACRA terms "Selling Price," "Factory Cost," or "Related Product" and unaware of any Factory Cost calculation); AR039 (not knowing who made decision that stent was nonroyalty bearing). A jury could therefore conclude that Medtronic did not treat the stent part as a Related Product under Article II(D)(i), making DuPont's understanding of these two sentences in the PwC report quite reasonable, if not compelling.

Moreover, Medtronic ignores the credible evidence in the summary-

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judgment record that PwC was not told that Medtronic was excluding the stent components of its stent systems but was in fact led to believe that the stent part was royalty-bearing. First, PwC's auditor testified that, had he been told by Medtronic that it was not going to pay royalties on stents, he would have put that in the report. Dup. Br. 11. Second, PwC reported to DuPont that Medtronic *was* paying royalties on stents—either 1% or 1.5% as per the amended agreement. A363. If PwC had thought that Medtronic was in fact paying only [redacted]% of the Selling Price (*i.e.*, having deducted [redacted]% for the stent component), a jury could conclude that it would have reported [redacted]% and [redacted]% rather than 1% or 1.5% to DuPont. Third, a PwC memo, A364, and the report, A383, both listed various vascular products that Medtronic "excluded from the royalty calculation under the Agreements." "Stents" are conspicuously absent. As DuPont's expert stated in her unrebutted affidavit, these "other areas of the report would have led DuPont to believe Medtronic was paying royalties on stents." A1221.

The Deloitte Report. Medtronic appears to concede that the court erred in concluding that draft reports were sent to DuPont before the written report was sent on September 18, 2006. A470; Dup. Br. 33-34; Medt. Br. 23. But Medtronic then erroneously argues that a misdated draft report "leaves no doubt" that Deloitte informed DuPont that Medtronic was not paying royalties on stents before August 25 because the draft states "[w]e discussed this matter with DuPont and DuPont

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disagreed with AVE's interpretation of [what constitutes a] Product." Medt. Br. 16, 23; B335-338. Yet Deloitte's auditor, Yogesh Bahl, testified unequivocally that no discussions about Medtronic's royalty calculations took place before the report was sent on September 18 "because of the Confidentiality Agreement," which he believed barred any such disclosures to DuPont until a written report was sent to it. A972. Because Deloitte was "very focused on maintaining confidentiality per the agreement with Medtronic," instead of directly informing DuPont what "Medtronic was paying and not paying on," Bahl created "hypothetical scenarios" (sent on July 10, AR027-29) to understand DuPont's interpretation of the PACRA. A988-89. "[W]e figured out a way to understand DuPont's interpretation *without sharing what Medtronic was doing*." *Id.* (emphasis supplied). DuPont did not respond to the hypothetical scenarios until August 29, 2006, AR030-32, and "based on DuPont's response to those multiple-choice answers," Deloitte was "able to get an understanding of DuPont's interpretation of the agreement." A989. Thus a jury could easily conclude that DuPont was *not* told how Medtronic was calculating royalties before September 18, 2006. *See also* A992 (Deloitte used "scenario letter" [*i.e.*, AR027-29] with DuPont rather than discussing Medtronic's calculations); A1001-02 (would not have discussed preliminary findings with DuPont); A972 (Deloitte was "very focused on not sharing Medtronic information with DuPont"; would not have told

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DuPont what Medtronic thought was not royalty bearing until sending draft report); A947-8; A1215-16. The court erred in not crediting Bahl's unchallenged testimony, which led it erroneously to conclude that DuPont was "put on notice" by Deloitte before the written report was sent on September 18. Dup. Br. 33-34.

Fraudulent Concealment. To show that there is a genuine issue of material fact regarding the fraudulent-concealment doctrine, DuPont need only point to evidence in the summary judgment record from which a jury could conclude that Medtronic made a "partial, selective disclosure"—even if "not itself a lie"—that constitutes an "actual artifice." *In re Tyson Foods*, 919 A.2d at 590. DuPont explained that Medtronic's statements about "net sales" were false and misleading because "net sales" was not the metric required to be reported by the PACRA—the "Selling Price" was—and accordingly cannot be justified by Medtronic as being just what the PACRA required. Dup. Br. 28-30. Medtronic ignores this point, repeating the erroneous argument that it made to the Superior Court. Medt. Br. 34. Medtronic reported "net sales," not "Selling Price," and it is undisputed that the figures it provided DuPont for "net sales" were false. AR071 (admitting that the "net sales" figure on the DuPont royalty reports only showed [redacted]% of the real net sales); AR065 (defining net sales as sales less discounts and returns); AR068 (net sales numbers on Medtronic's internal books are different than those sent to DuPont). These false statements were "partial, selective disclosures" and "actual

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acts of artifice." Medtronic's attempt to justify its false statements by insinuating that it was just following what Bard had done is also meritless. Medtronic had no idea, when it decided to underpay DuPont, what Bard had previously done. AR046 (not recalling conversations with Bard about PACRA); AR095-96 (no knowledge of contact with Bard about how they calculated royalties; never saw any documents about that); AR061-62 (didn't discuss royalty calculation on stent delivery systems with Bard). Second, until this litigation, Medtronic never saw the memo that it cites (Bard produced it in discovery, not Medtronic), Medt. Br. 33, and there is no evidence that the memo was actually implemented by Bard.

The Post-July 5, 2003 Royalty Claim. Medtronic stopped making royalty payments on its balloon catheter products on July 5, 2003. Add. 33. The court concluded, on Medtronic's motion for summary judgment, that this was permitted under the plain language of the agreement and therefore was not a breach. Add. 70-71. The court also determined that DuPont had actual knowledge that Medtronic would cease royalty payments on that date, and thus any claim for post-July 5, 2003 royalties was time-barred. Add. 34-36, 70-72. The court did not, therefore, address inquiry notice with regard to this claim.

DuPont did not appeal either of these rulings. It is therefore the law of the case that there was no breach of contract when Medtronic ceased royalty payments at that time. *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 424 (Del.

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2013). Perversely, Medtronic now argues that, when it terminated royalty payments, DuPont was put on inquiry notice of the claims at issue in this appeal, *i.e.*, that Medtronic was secretly deducting [redacted]% from royalties on its own sales and not following the PACRA regarding Cordis sales. But Medtronic does not explain how a "non-breach" could constitute a "red flag" triggering inquiry notice about breaches of unrelated provisions in a contract; nor does it make sense that a party would be obligated to conduct a "more diligent investigation" of what has been found to be a perfectly lawful act. *Coleman*, 854 A.2d at 842-43. Because it was not a breach for Medtronic to end royalty payments on July 5, 2003, that act could not have put DuPont on inquiry notice of the claims at issue on this appeal.[2]

Pre-accrual negotiations. Medtronic argues that communications during the parties' negotiations of possible amendments to the PACRA "provide unrefuted evidence" that DuPont knew all the information "a reasonably prudent person would need to inquire into whether Medtronic was paying royalties on only

[2] Even if the termination of royalty payments *were* a breach, it would still have not put DuPont on inquiry notice of the claims at issue on this appeal. Independent breaches are analyzed separately for purposes of determining whether a party is on inquiry notice of different claims. *Envo, Inc. v. Walters*, 2012 WL 2926522, at *8-10 (Del. Ch. Jul. 18, 2012), *aff'd*, 2013 WL 1283533 (Del. Mar. 28, 2013); *compare Fisher v. Reich*, 1995 WL 23966, at *5 (S.D.N.Y. Jan. 10, 1995) ("a disclosure cannot trigger inquiry notice unless it relates directly to the fraudulent misrepresentations or omissions at issue."). Although it may be true that "whatever is notice calling for inquiry is notice of everything to which such inquiry might have led," *Dean Witter*, 1998 WL 442456, at *7, since there was actual notice of the cessation of royalty payments in 2003, there was no need for inquiry at all. Moreover, the inquiry that finally led to discovery of the 56% deduction did not lead to discovery by Deloitte of the failure to apply the PACRA to Cordis sales. It certainly cannot be said as a matter of law that the actual notice about the post-2003 royalties would have uncovered the claims at issue here.

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a portion" of its own and Cordis' stent systems sales. Medt. Br. 28. But Medtronic misstates the standard. The question is not whether DuPont had information needed to ask Medtronic whether it was underpaying DuPont but whether, as a matter of law, there were red flags that clearly and unmistakably put DuPont on notice that Medtronic had injured DuPont by underpaying it. *Coleman*, 854 A.2d at 843. After misstating the standard, Medtronic then ignores all the evidence that a jury could credit as showing that there were no such red flags.

The communications in spring 1999 were in the context of negotiations to amend the PACRA—before Medtronic had even decided whether to pay royalties on the stent part of stent systems. A561-63. Medtronic does not dispute the fact that, for much of 1999, Medtronic owed DuPont nothing because of the credit it had from the earlier assignment agreement. Dup. Br. 7. Nothing that happened before Medtronic owed DuPont money for underpayment could qualify as a "red flag" of a claim, because no claim had accrued. *Aloe Vera of Am., Inc. v. United States*, 699 F.3d 1153, 1160 (9th Cir. 2012) (information received by plaintiff before cause of action accrues cannot put it on inquiry notice); *Spiegel v. Siegel*, 2008 WL 151951, at *5 (S.D. Fla. Jan. 15, 2008) ("[A] plaintiff cannot be deemed to be on inquiry notice of a fraud that has, in fact, not yet occurred."); Dup. Br. 35. Citing a page from the middle of a fax with an obscured date, B243, Medtronic nonetheless argues that, by March 1999, "Medtronic was calculating royalties by

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apportioning stent systems and drawing down a royalty credit based on that apportionment." Medt. Br. 27. But the fax was not sent until June 3, 1999—after all of the communications in question. A255. More importantly, Medtronic does not dispute that, at this time, it did not yet owe DuPont any money. If there was no failure to pay an obligation, there was no breach and no claim had accrued. Dup. Br. 34. Accordingly, all the pre-accrual events cited by Medtronic are irrelevant.

Even if a cause of action had accrued in the spring, the communications cited by Medtronic do not show that, as a matter of law, there were red flags that clearly and unmistakably put DuPont on inquiry notice. Medtronic argues that it "told DuPont [what] it was going to do when calculating royalties," Medt. Br. 27, but the cited documents do not say that. Instead, they relate to how Medtronic was hoping—but failed—to amend the PACRA. Dup. Br. 35-37. At no time did Medtronic ever tell DuPont that, even if it did not achieve the amendments that it sought, it would not pay DuPont royalties on stents; indeed, the record raises the opposite inference. Medtronic simply ignores the testimony of its own witnesses that these documents do not relate to how Medtronic intended to calculate DuPont royalties, but rather to proposed changes to the PACRA. Dup. Br. 36; A889; A923 (referring to ASP and "1.5%"); AR080-82 (doesn't understand spreadsheet at A244); A965-66 (A244 does not reflect Medtronic royalty calculations). Then, Medtronic engages in speculative tea-reading of Molnar's notes, ignoring the facts

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that Molnar himself did not know what they were (AR101-03; AR109-12), no Medtronic witness claims to have spoken to him on this subject, and Medtronic admitted that the notes' substance does not "relate[] to anything in the DuPont royalty calculation," A968. Finally, Medtronic does not dispute the fact that DuPont told it that it thought that the "entire stent system" was royalty bearing. A235; A685-86. Rather than disputing this, Medtronic responded by proposing to amend the PACRA so that it would not have to pay royalties on stents. Dup. Br. 8. (Medtronic's argument that Fassler's April 19, 1999 proposal had nothing to do with stents, Medt. Br. 27, ignores his testimony to the contrary, and the fact that the proposal would have created an end-run around "Catheter" by creating a new definition that made royalty bearing only products covered by the Levy patent on balloons. A248-49.) Given that Medtronic made the April 19 proposal right after it was told that DuPont believed [redacted] A235, and then withdrew it, a jury could reasonably conclude that DuPont reasonably understood that Medtronic agreed with DuPont's position that stents were royalty bearing.

Internal memos. Medtronic tries to justify the Superior Court's weighing of evidence and making of credibility determinations regarding Bichlmeir's draft memo by arguing that the draft shows that he "had enough information to cause a reasonably prudent person to inquire whether Medtronic was paying royalties only

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on a portion of stent system sales." Medt. Br. 25. This makes no sense. None of Mr. Bichlmeir's musings had anything to do with a communication from Medtronic about how it was calculating royalties. Instead, he had misrecollected the PACRA's terms. In light of his position in charge of numerous DuPont patent licenses, this mistake was understandable. Patent licenses often cover only the patented technology as opposed to the larger end product encompassing that patented component. *See, e.g.*, *Imation Corp. v. Koninklijke Philips Elecs. N.V.*, 586 F.3d 980 (Fed. Cir. 2009) (cross-license providing parties with rights to use and incorporate technology within scope of licensed patents); *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012) (noting that royalties are usually on the smallest salable patent-practicing unit). Thus, it makes perfect sense that Mr. Bichlmeir would mistakenly write, when drafting the memo at "a high rate of speed" and recollecting the PACRA "off the top of [his] head," A802, that PACRA royalties "depended … on patents," B290. Neither his mistake nor his realization and correction of that mistake, DuP. Br. 31, could be notice of anything—much less notice as a matter of law of Medtronic's wrongdoing.

Mr. Housman's December 2003 email. Medtronic's argument that Mr. Housman's statement that [redacted] was referring to stent systems is meritless. Medt. Br. 28. By using the phrase [redacted] Housman clearly meant [redacted]

[redacted]

[redacted] Stent systems do, of course, have balloons, so DuPont could reasonably have read this as referring to products other than stent systems. That this is not just a reasonable interpretation but in fact what Housman meant is confirmed by the fact that, three years later, he told Deloitte that Medtronic considered stent systems with balloons to be royalty bearing. AR002-04 (giving consent to Deloitte to give DuPont list royalty and non-royalty-bearing products); AR009-26, at AR013-24 (Medtronic's list showing "coronary stents" as royalty bearing); AR005-08 (list of non-royalty-bearing products not including coronary stents).

C. <u>The Factual Material in the Fassler Letter Is Not Privileged</u>

Medtronic admits that material in the April 6, 1999 email of the very same nature as that contained in the beginning of the April 1 letter is factual and therefore "not privileged." Medt. Br. 37. Nor does it contest that such material in the April 1 letter—the statement that [redacted]—could easily be separated from the rest of the letter, with the privileged material redacted. DuP. Br. 39-40. Moreover, Medtronic does not dispute that it put "at issue" this subject by falsely arguing that DuPont always agreed that stents were not royalty bearing. Dup. Br. 40. Accordingly, the court erred by refusing to compel the production of the admittedly non-privileged first two sentences of the April 1 letter.

[redacted]

II. Medtronic's And The Superior Court's Construction Of "Part" Violates The Plain Language Of The PACRA

Medtronic does not dispute that its stent systems (and Cordis') meet the definition of "Catheter," and that they "utilize" a DuPont "Material" or "Technology." Nor does Medtronic dispute that the stent is a "part" of the "Catheter," and thus royalty bearing under the plain language of the PACRA. Dup. Br. 14-15. Yet Medtronic argues, without explanation, that following the plain language would "frustrate the purpose" of the definition of Related Products. Medt. Br. 39. This Court should not rewrite the parties' unambiguous contract "under the guise of construction." Dup. Br. 17 & n. 3. The parties could have chosen narrower language but instead negotiated a broad definition of "Catheter" intended to cover stents. Dup. Br. 6. The Superior Court's construction, adopted by Medtronic, violates the plain language of the agreement and the parties' intent.

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