No. 433,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CORTEVA AGRISCIENCE LLC, and AGRIGENETICS, INC.,

Appellants, Plaintiffs-Below,

v.

MONSANTO COMPANY and BAYER CROPSCIENCE LP.,

Appellees, Defendants-Below

Appeal from the Superior Court of the State of Delaware
Case No. N22C-10-293 PRW CCLD

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal is from a declaratory judgment, entered by the Superior Court (Wallace, J.) upon cross-motions for summary judgment, interpreting U.S. patent law and an agreement to provide for ongoing U.S. patent royalties after all U.S. patents have expired, based upon an unexpired foreign patent. The questions on appeal are (a) whether, under the U.S. Supreme Court's *Brulotte-Kimble* rule, U.S. royalties for use of a patented invention may continue after the U.S. patent monopoly expires, and, if so, (b) whether the parties so intended when their contract requires royalties to be calculated on a country-by-country basis.

(a) The Superior Court's judgment violates the fundamental precept of patent law that contracts for U.S. patent royalties cannot provide for royalties to continue *after* the pertinent U.S. patents have expired. This black-letter rule, established in *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), and reaffirmed in *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446 (2015), rests on the fundamental principle that, when all U.S. patents covering an invention expire, their U.S. monopoly must expire as well. Here, all pertinent U.S. patents expired in 2022, but, instead of applying the rule, the Superior Court shredded it, ruling that an unexpired foreign patent can continue the U.S. patent monopoly and U.S. patent royalties. This decision conflicts with the core *Brulotte* principle that U.S. royalties extracted due to patent monopolies ***must*** end when their corresponding U.S. patents expire. In the sixty years since *Brulotte*, no federal or state supreme court has reached this result.

(b) The Superior Court's judgment also conflicts with the parties' intent. Though their original agreement entered in 2002 (the "Agreement") does not explicitly say that royalties for sales in each country end when the patent protection in that country ends, the parties' intent is clear because royalties owed under the agreement are country-specific, based upon sales in each country and applying country-specific rates. The Superior Court erred by finding that an amendment made in 2007 (the "2007 Amendment") changed the royalty calculation from country-specific to worldwide. Notably, Appellees-Defendants ("Bayer") did not even present this argument below, nor could they. Unrefuted evidence demonstrates that royalties owed under the Agreement have *always* been country-specific, both before and after the 2007 Amendment. The Superior Court's misreading led it to conclude, erroneously and in derogation of U.S. patent policy, that the parties intended for U.S. royalties to continue notwithstanding the expiration of all pertinent U.S. patents. The Superior Court's rulings should be reversed.

SUMMARY OF ARGUMENT

A. Under the U.S. Supreme Court's *Brulotte-Kimble* Rule, U.S. Royalties for Use of a Patented Invention Cannot Continue After the U.S. Patent Monopoly Expires, Ending Corteva's Obligations under the Agreement in November 2022.

1. By law, a patentee/licensor cannot seek royalties on U.S. sales of an invention after all of the patentee's licensed U.S. patents have expired, even if the parties ostensibly agreed. That is because patent monopolies are limited in time, and, after a U.S. patent expires, its monopoly expires and the invention returns to the public domain. The Supreme Court has made clear, that, at expiration, the patent's subject matter is dedicated to the public and is free for all to use, *even if* the parties' agreement provides for continued royalties. *Brulotte*, 379 U.S. at 33; *Kimble*, 576 U.S. at 449.

2. Here, Bayer's U.S patents, which earned Bayer over [redacted] in royalties from Appellant-Plaintiff ("Corteva") alone, expired in 2022. Yet despite *Brulotte*'s clear black-letter mandate, the Superior Court ruled that Bayer is entitled to continue to collect royalties for U.S. sales after those U.S. patents (and thus the patent monopoly) expired. (Order 20-27). This ruling fails to follow the clear, binding rule established in *Brulotte* and affirmed in *Kimble* that parties cannot extend patent rights by contractual agreement to require U.S. royalties after the last relevant patent expired. Such an agreement is *per se* patent misuse. *Brulotte*, 379 U.S. at 33; *Kimble*, 576 U.S. at 449.

3. The Superior Court erroneously relied upon an unexpired patent in Brazil as the basis for allowing royalties for U.S. sales to continue after expiration of the U.S. patents, essentially extending the U.S. patent monopoly via a foreign patent. But a foreign patent cannot extend an otherwise expired U.S. patent monopoly. *ALCOA v. Sperry Prods.*, 285 F.2d 911, 925 (6th Cir. 1960).

4. Instead of applying the rule that a foreign patent does not—and cannot—extend a U.S. patent monopoly, the Superior Court misapplied *Brulotte-Kimble's* rule allowing royalties until the "latest running patent" expires to extend to foreign patents, allowing for U.S. royalties to continue until the last foreign patent expired. Neither *Brulotte* nor *Kimble* held that this principle extends to foreign patents, and multiple courts have applied *Brulotte* notwithstanding unexpired foreign patents. *See, e.g.*, *C.R. Bard, Inc. v. Atrium Med. Corp.*, 112 F.4th 1182, 1189-90 (9th Cir. 2024); *Zila, Inc. v. Tinnell*, 502 F.3d 1014, 1023-24 (9th Cir. 2007); *Scheiber v. Dolby Lab'ys, Inc.*, 293 F.3d 1014, 1022 (7th Cir. 2002); *Meehan v. PPG Indus., Inc.*, 802 F.2d 881, 883 (7th Cir. 1986).

5. One of *Brulotte-Kimble*'s narrow exceptions permits agreements to provide for post-expiration royalties as payments for use of non-patent "know-how" and biological materials. *See Kimble*, 576 U.S. at 454. But *Brulotte* and *Kimble* provide that such "hybrid" agreements are enforceable only "so long as" the payments are tied to the non-patent intellectual property, *i.e.*, they "step down" in

amount or have other terms to distinguish these payments from the patent royalties. *See id.*; *Brulotte*, 379 U.S. at 32. It is undisputed that no "stepdown" provision exists in the parties' contract.

6. Instead of identifying a stepdown term, the Superior Court erroneously ruled that *any* hybrid agreement avoids *Brulotte*, even without a stepdown, squarely contrary to the case law. *See, e.g.*, *Meehan*, 802 F.2d at 886. With no stepdown in the agreement, the royalty necessarily is based only on expired patent rights, which is *per se* illegal. *Brulotte*, 379 U.S. at 32; *Kimble*, 576 U.S. at 454.

7. The factual premise of the Superior Court's ruling also is wrong. None of the payments in question addresses non-patent intellectual property. Bayer's own expert acknowledged that, once the patents expired, no other non-patent intellectual property rights remained. Thus, the payments *must* be for use of expired patent rights in violation of *Brulotte*.

B. The Parties Did Not Intend for the U.S. Royalties to Continue After Expiration of U.S. Patents.

8. Even without the clear Supreme Court mandate of *Brulotte-Kimble* prohibiting royalties on U.S. products after U.S. patents have expired, the Superior Court also erroneously ruled that the Agreement's plain language requires royalties to continue everywhere until the last licensed patent in any country expires and the contract terminates. To justify the lack of express terms requiring this, the Superior Court (a) pointed to the Agreement's term, which runs until the last foreign patent

expires, and (b) misread the Agreement as calling for a single worldwide royalty calculation, pursuant to the parties' 2007 Amendment. This was a fundamental error.

9. The parties' licensing agreement does not provide for U.S. patent royalties to continue after the last U.S. patent expired. It instead provides for a country-by-country royalty calculation based on the [redacted] royalty [redacted] Indeed, no provision of the licensing agreement states that royalties for all countries remain in effect until the last licensed patent expires, irrespective of patent status in each country.

10. Both before and after the 2007 Amendment, the royalty structure was determined on a country-by-country basis—not worldwide. Bayer's own designee admitted as much, testifying that country-specific rates are based on the [redacted] provided in each country. This testimony is consistent with the Agreement's terms and the parties' royalty collection behavior, and it harmonizes the agreement with basic precepts of patent law like *Brulotte-Kimble.*

STATEMENT OF FACTS

A. The NK603 Event and Bayer's Patent Rights.

Appellant-Plaintiff Corteva Agriscience LLC ("Agriscience") is one of the world's largest producers of agricultural seed and crop protection products. (A411, ¶ 2). Formed after the 2017 merger of The Dow Chemical Company and E. I. du Pont de Nemours and Company, Agriscience is the only major U.S.-headquartered agriscience company completely dedicated to agriculture. (A411-12, ¶ 3). Its affiliate, Appellant-Plaintiff Agrigenetics, Inc. (together with Agriscience, "Corteva") produces and sells innovative seed products, including corn, sorghum, sunflower, soybean, alfalfa, and canola. (A412, ¶ 4).

Glyphosate, the active ingredient in the commercial herbicide Roundup®, has been used to kill weeds for decades. (A412, ¶ 5). To protect crops from collateral harm, biotechnology companies use genetic engineering (recombinant DNA) to transform crops (known as genetically modified organisms, or "GMOs") to create a final plant, known as an "event," that exhibits tolerance to glyphosate. (A412, ¶ 6). With GMOs, growers can spray their hybrid crops with glyphosate and kill only the weeds, leaving the crop unaffected. (A412, ¶ 7). By 2009, over 90% of global genetically modified crops contained a glyphosate-resistant event. (A412, ¶ 8).

In the late 1990s, Appellee-Defendant Monsanto Company ("Monsanto") developed a glyphosate-resistant event for corn known as the "NK603 Event."

(A412, ¶ 8). Branded "Roundup Ready 2," this glyphosate-resistant corn has become ubiquitous in American agriculture. (A412, ¶ 8). Monsanto was subsequently acquired by Bayer, which merged into Bayer's subsidiary Appellee-Defendant Bayer Cropscience LP (together with Monsanto, "Bayer").

Bayer has been richly rewarded for developing NK603. It received several U.S patents, including U.S. Patent No. 6,825,400 ("the '400 Patent"), issued on November 30, 2004, covering the NK603 corn plant itself, methods of generating the NK603 Event, event-specific methods of detecting presence of the NK603 Event, and methods of producing NK603-containing corn plants; and U.S. Patent No. 9,701,980 ("the '980 Patent"), issued in July 2017, covering corn seeds (germplasm or physical material) containing the NK603 Event. (A176-91; A193-207). Bayer obtained similar patents across the world with varying issuance dates. (A176; A656-89).

A Brazilian patent, No. BR-12-2013-026754-9-B1, which was filed in 2001 but did not grant until 2018 (A656), expires in 2028.[1] No other patents remain unexpired under the Agreement. If Bayer is allowed to collect *U.S. royalties* based on its outlier *Brazilian patent*, it would extend Bayer's U.S. patent monopoly more

[1] Just like the U.S., Brazil provides for a 20-year patent term from the date of filing. The Brazilian patent at issue here, however, expires in 2028 because of a unique Brazilian law—which was subsequently overturned as unconstitutional—that provided a minimum 10-year patent term from the date of grant. Bayer's Brazilian patent was granted before the effective date of Brazil's Supreme Court ruling.

than five years beyond the U.S. patent's expiration (2022), when Bayer's patented invention moved into the public domain for unlicensed competitors to use for free.

B. Patents Confer Time-Limited Rights.

Patent rights are specific to the country that issues the patent. United States patents generally last 20 years from the date of filing. 35 U.S.C. § 154(a)(2), (c)(1). Most other countries follow the same rule. During the patent's term, its owner may license the patent's exclusionary rights. 35 U.S.C. § 261 ("[P]atents shall have the attributes of personal property."). A patent license defines the contractual terms that allow the licensee to perform acts that would otherwise infringe. *See TransCore, LP v. Elec. Transaction Consultants Corp.*, 563 F.3d 1271, 1276 (Fed. Cir. 2009). When the twenty-year term ends, the patent expires, "and the right to make or use the [patented] article, free from all restriction, passes to the public." *Kimble*, 576 U.S. at 451.

C. Corteva's Royalty Agreement with Bayer for the NK603 Event.

In September 2002, Corteva obtained a license to the NK603 Event under a "Roundup Ready® (NK603) Corn License Agreement" (the "Agreement"), (A56-93), which allowed Corteva to sell herbicide-tolerant corn seed with the NK603 Event in exchange for royalties. (A59, § 3.01(a); A65, § 4.01). It has the following pertinent terms:

Scope. The Agreement conveyed to Corteva a non-exclusive license to develop, market, and sell [redacted]. (A57-59, §§ 2.07, 2.15, 2.22, 3.01(a)). The license covered defined Patent Rights and proprietary technological "Know-How" and "Biological Material." (A59, § 3.01(a)). [redacted] (A56, § 2.02; A58, § 2.16).

Royalty rate. From the beginning, the royalty rate was calculated on a country-by-country basis, using sales figures and a specified rate particular to each country. (A65, § 4.01; A828 (showing varying country-specific rates for a given fiscal year)).

In 2007, Section 4.01 was amended from using a specified, predetermined country-by-country rate to an annually determined country-by-country rate defined by [redacted] for that country, (A97-100), but the royalty rate was still set by Bayer for each country. (A97, § 4.01) (establishing base rates "[redacted]"). The [redacted] royalty rate is specific to each particular country. (A386-88). Thus, in both the Agreement and its 2007 Amendment, royalties are determined by Bayer on a country-by-country basis based on that country's individual circumstances and applicable laws. Bayer's designee conceded this in testimony. (A386-88) [redacted].

These terms have been followed for the duration of the Agreement: Corteva paid royalties on a country-by-country basis determined by Bayer after individualized calculations for each country. (A124-26; A308-11; A314-17). Bayer's designee admitted that no provision states that royalties continue in all countries, regardless of patent expiration, until the contract expires. (A370-71; A384-85).

Neither does the Agreement allocate or apportion the royalties to account for any value attributable to Bayer's "Know-How" or "Biological Material." Instead, it applies a single rate for the license for each country. (A375; A385; A394-95).

Restrictive provisions. The Agreement prohibits Corteva from selling or otherwise transferring [redacted] to anyone other than Bayer-licensed (*i.e.*, approved) growers, including during a post-patent-expiration period.

See A59-60, § 3.02(a)-(b); A62, § 3.06; *see also* A62-64, §§ 3.07(b)-(c), 3.10, 3.13; A68-69, §§ 6.02(a), 6.03 (provisions furthering Bayer's monopoly control). It further prevents Corteva from [redacted]. *See* A61-62, § 3.05(d). Bayer contends that these restrictions remain in effect, along with all other provisions regulating sales in the U.S., until 2028. (A947) ("According to ordinary contract principles, all of the Agreement's provisions continue through the contract's entire duration, *i.e.*, until the Brazilian patent expires in 2028, unless a specific provision states otherwise.").

Term. Section 9.01 states, [redacted] (A72). Thus, the *overall Agreement* expires when the last patent expires, but, as Bayer's designee acknowledged, the Agreement does not explicitly say when country-by-country royalties expire, *i.e.*, whether they expire when their respective patent(s) expire or continue post-patent, for the entire duration of the Agreement. (A370-71; A384-85).

Applicable law. The Agreement is subject to Delaware law. (Order 12).

Drafting history. The parties concur that no parol evidence of the drafters' intent exists regarding post-patent royalty obligations in the Agreement and the 2007 Amendment. (Order 15).

D. Expiration of All U.S. Patents for the NK603 Event.

Bayer has earned billions of dollars by selling its own branded crops with the NK603 Event and by licensing its NK603 patents to practically every corn seed company. Corteva has paid over [redacted] in patent royalties for licenses to use the NK603 Event. (A413, ¶ 9).

Bayer's last U.S. patent for the NK603 Event, the '980 Patent, expired in November 2022. (Order 7). Its last foreign patent for the event, a Brazilian patent, expires in 2028. *Id.*

When Bayer presented Corteva with projected royalty amounts for fiscal year 2023 that included post-patent royalties on U.S. sales, Corteva objected, stating that any attempt to collect U.S. royalties beyond November 2022 would impermissibly extend Bayer's U.S. patent monopoly. (Order 7-8).

E. Proceedings Before the Superior Court.

Corteva sued Bayer in October 2022 in the Superior Court, seeking a declaratory judgment that Corteva did not owe Bayer U.S. royalties after November 2022 because (1) the Agreement does not require them (Count I), and (2) requiring post-patent-expiration U.S. royalties constitutes patent misuse (Count II). After

Bayer's motion to dismiss was denied, the parties completed discovery and then cross-moved for summary judgment.

On September 16, 2024, the Superior Court granted summary judgment to Bayer, denied Corteva's cross-motion, and entered a final judgment declaring that Bayer was entitled to collect post-patent-expiration U.S. royalties. (Order 27-28).

First, the Superior Court concluded that the 2007 Amendment changed the country-by-country royalty calculation from varying rates for each country to "one specified percentage . . . for the Territory as a whole." (Order 15-16). It concluded that this change provided "an answer to the ambiguity" of the Agreement itself because it allegedly evidenced the parties' intent to switch from country-by-country royalties to a single global royalty and allow a single live foreign patent to control global royalties. (Order 16).

The Superior Court briefly cited several other reasons supporting its decision: (1) the provision granting Bayer a worldwide license to use Corteva patents that interfere with Bayer's licenses; (2) the inclusion of Know-How and Biological Materials in the license, which purportedly continue post-patent-expiration; (3) the broad definition of Territory; and (4) the purported ease of drafting more specific language supporting Corteva's position. *See* Order 17-18.

Second, the Superior Court ruled that *Brulotte* and *Kimble* do not prohibit parties from agreeing that U.S. royalties continue beyond the expiration of all licensed U.S. patents. It referenced *Kimble*'s language that the "royalties may run until the latest-running patent covered in the parties' agreement expires" (Order 23) (quoting *Kimble*, 576 U.S. at 454), but it failed to explain why that principle would apply when only a foreign patent remains active. *See* Order 23-24 n.110 (dismissing Corteva's cases only because they predate *Kimble*). The Superior Court also relied on the license's inclusion of non-patent rights, such as know-how. (Order 24). Finally, the Superior Court ruled that, because the Agreement tied royalties to sales, not specific use, the *Brulotte*-*Kimble* rule was not implicated. (Order 24-25). Here, too, it did not address the fact that Bayer is seeking royalties on U.S. sales based solely upon the existence of a *foreign* patent.

On October 4, 2024, Corteva timely appealed.

ARGUMENT I: The Superior Court Erroneously Ruled that the *Brulotte-Kimble* Rule Does Not Apply.

A. Question Presented.

Under the Supreme Court's *Brulotte-Kimble* rule of patent misuse, may U.S. royalties for sales of a patented invention continue after the U.S. patent monopoly expires, based solely on an unexpired foreign patent? Corteva raised this issue in its cross-motion for summary judgment at 19-26. (A164-71).

B. Standard and Scope of Review.

This issue presents "[q]uestions of law" that "are reviewed *de novo*." *LeVan v. Indep. Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007). "[A]pplication of the *Brulotte* rule is a question of law that we review de novo." *C.R. Bard, Inc. v. Atrium Med. Corp.*, 112 F.4th 1182, 1188 (9th Cir. 2024). The grant of summary judgment is reviewed "*de novo* 'to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law.'" *GMG Capital Invs. LLC v. Athenian Venture I L.P.*, 36 A.3d 776, 779 (Del. 2012) (citation omitted). Contract interpretation also is reviewed *de novo*. *Id.*

C. Analysis.

1. Post-Expiration Patent Royalties Are Patent Misuse.

Patent misuse is a defense that "relates primarily to a patentee's actions that affect competition in unpatented goods or that otherwise extend the economic effect beyond the scope of the patent grant." *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1372 (Fed. Cir. 1997).[2] It renders post-expiration royalties unenforceable due to obstacle preemption by conflicting with "federal policy favoring limited durations for patent monopolies." *Ares Trading S.A. v. Dyax Corp.*, 114 F.4th 123, 137 (3d Cir. 2024).

The "basic rule of patent misuse" is "that the patentee may exploit his patent but may not 'use it to acquire a monopoly not embraced in the patent.'" *Princo Corp. v. ITC*, 616 F.3d 1318, 1327 (Fed. Cir. 2010) (quoting *Transparent-Wrap Mach. Corp. v. Stokes & Smith Co.*, 329 U.S. 637, 643 (1947)). It is about "patent leverage," imposing "overbroad conditions on the use of the patent . . . that are 'not within the reach of the monopoly granted by the Government.'" *Id.* at 1331 (citation omitted).

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[2] *Accord* Am. Bar Ass'n, *Intellectual Property Misuse: Licensing and Litigation*, 1 (2d Ed. 2020) ("'Patent misuse' is an affirmative defense to an action . . . for royalties under a license that arises when the patentee engages in certain anticompetitive conduct . . . using the patent in suit.").

Patent misuse is "a broader wrong than [an] antitrust violation because of the economic power that may be derived from the patentee's right to exclude" and has, as "its key inquiry . . . whether, by imposing conditions that derive their force from the patent, the patentee has impermissibly broadened the scope of the patent grant with anticompetitive effect." *Id.* at 1328, 1352 (quoting *C.R. Bard*, 157 F.3d at 1372). "The courts have identified certain specific practices as constituting *per se* patent misuse, including . . . *arrangements in which a patentee effectively extends the term of its patent by requiring post-expiration royalties*." *Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 869 (Fed. Cir. 1997) (emphasis added). Extending the patent's value "by requiring post-expiration royalties" is paradigmatic patent misuse because it "'attempts' to extract payments for the post-expiration use of the inventions incorporated into the [products]." *Ares Trading*, 114 F.4th at 139, 141 (quoting *Brulotte*, 379 U.S. at 32).

The rule emanates from the century-old principle that a patentee may not assert a patent's monopoly power over unpatented material. *See Scott Paper Co. v. Marcalus Co.*, 326 U.S. 249, 256 (1945) ("[T]he patent laws preclude the patentee of an expired patent and all others including petitioner from recapturing any part of the former patent monopoly[.]"); *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 664 (1944) (explaining that, since 1917, "this Court has consistently held that the owner of a patent may not employ it to secure a limited monopoly of an unpatented material used in applying the invention”). Eventually, this principle was applied to prohibit post-patent-expiration royalties. *See Ar-Tik Sys., Inc. v. Dairy Queen, Inc.*, 302 F.2d 496, 510 (3d Cir. 1962) (“After the expiration . . . the grant of patent monopoly was spent. An attempt to extend that monopoly by the exaction of royalties thereafter was unenforceable.”); *Baker-Cammack Hosiery Mills v. Davis Co.*, 181 F.2d 550, 573 (4th Cir. 1950) (disputing earlier cases allowing post-expiration royalties).

Two years after *Ar-Tik*, the U.S. Supreme Court definitively held in *Brulotte* that an agreement for post-expiration royalties is unenforceable because it extends the patent’s monopoly power beyond its statutory limit:

> “*[A]ny* attempted reservation or continuation in the patentee or those claiming under him of the patent monopoly, after the patent expires, *whatever the legal device employed*, runs counter to the policy and purpose of the patent laws.”
>
> ***
>
> [A] patentee’s use of a royalty agreement that projects beyond the expiration date of the patent is unlawful *per se*. If that device were available to patentees, the free market visualized for the post-expiration period would be subject to monopoly influences that have no proper place there.
>
> ***
>
> A patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly. But to use that leverage to project those royalty payments beyond the life of the patent is analogous to an effort to enlarge the monopoly of the patent by [ty]ing the sale or use of the patented article to the purchase or use of unpatented ones.

379 U.S. at 31-33 (quoting *Scott Paper*, 326 U.S. at 256) (emphasis added). Thus, *Brulotte*'s prohibition of post-patent-expiration royalties rests upon the broad principle that monopoly power *must* cease upon the patent's expiration. *See Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1022 (7th Cir. 2002) (Posner, J.) (describing "the antimonopoly basis of *Brulotte*").

Brulotte was expressly reaffirmed years later in *Kimble*. The Court explained that its "core feature" is a bright-line cut-off and "broad policy favoring unrestricted use of the invention" after the patent term expires:

> But the core feature of the patent laws on which *Brulotte* relied remains just the same: Section 154 now, as then, draws a sharp line cutting off patent rights after a set number of years. And this Court has continued to draw from that legislative choice *a broad policy favoring unrestricted use of an invention after its patent's expiration*.

Kimble, 576 U.S. at 458 (emphasis added). It noted that "the decision is simplicity itself to apply," whereby "[a] court need only ask whether a licensing agreement provides royalties for post-expiration use of a patent. If not, no problem; if so, no dice." *Id.* at 459. Its reasoning is well-established: "In case after case, the Court has construed [patent] laws to preclude measures that restrict free access to formerly patented . . . inventions[,]" "whether or not authorized 'by express contract,'" because that "would impermissibly undermine the patent laws" by "continuing 'the patent monopoly beyond the [patent] period,' even though only as to the licensee affected" and thus "conflict with patent law's policy of establishing a 'post-expiration . . . public domain.'" *Id.* at 446, 451-52 (quoting *Brulotte*, 379 U.S. at 30-33; *Scott Paper*, 376 U.S. at 255-56).

Kimble further explained that, because patent law "provides an all-encompassing bright-line rule" that all protections expire when the patent expires, *Brulotte* "applied a categorical principle that all patents, and all benefits from them, must end when their terms expire." *Id.* at 463 (citing *Brulotte,* 379 U.S. at 30-32). Citing both *Scott Paper* and *Brulotte*, the Supreme Court affirmed that it had long held "that Congress had made a judgment: that the day after a patent lapses, the formerly protected invention must be available to all for free. And further: that post-expiration restraints on even a single licensee's access to the invention clash with that principle." *Id*. The clash here is equally direct.

Brulotte's "sharp line cutting off patent rights after a set number of years" is "simplicity itself to apply" here to the Agreement. *See id.* at 458-59. Once its U.S. patent monopoly expired, Bayer's U.S. royalties *must* halt per *Brulotte*. With expiration of its U.S. patents, Bayer has lost its monopoly power in the U.S. and may not extract U.S. royalties (or exercise other restrictive provisions of the Agreement in the U.S.) for U.S. sales based upon that former, now-lapsed power.

2. The Superior Court Misapplied the *Brulotte-Kimble* Rule by Allowing an Unexpired Foreign Patent to Sustain Bayer's U.S. Monopoly Power.

After finding that "the operative agreement is a latest-running patent agreement," the Superior Court ruled that continued royalties and restrictions were not unlawful under *Brulotte*. (Order 23). This ruling errs for the simple reason that the Superior Court failed to address the fundamental difference between foreign and U.S. patents. By assuming that they are interchangeable, the Superior Court eviscerated decades of patent law providing that patents cannot extend beyond their territorial boundaries.

Patents are territorial. They confer a monopoly only in the country that issues the patent, and nowhere else. 6A *Chisum on Patents* § 19.04 n.71 (2024) ("Patents are valid only within national boundaries."). A U.S. patent thus confers a monopoly only in the U.S., and a foreign patent confers a monopoly only in the foreign country. *See, e.g.*, *ALCOA v. Sperry Prods.*, 285 F.2d 911, 925 (6th Cir. 1960) ("Foreign patents grant no monopolies in the United States, nor do United States patents grant any monopolies in foreign countries. A patent is granted by a sovereign power and its rights, privileges, and obligations begin and end with the country that issues it."); *Becton, Dickinson & Co. v. Eisele & Co.*, 86 F.2d 267, 269 (6th Cir. 1936) ("Manifestly, his monopoly has no extraterritorial validity, but within the jurisdiction of the United States he has the exclusive authority to exclude or control[.]”).

Due to these inherent territorial limits, foreign patents cannot enable a U.S. monopoly, just as the expiration of a U.S. patent does not affect foreign rights or activity. *See Zila, Inc. v. Tinnell*, 502 F.3d 1014, 1023-24 (9th Cir. 2007) (“Nor does *Brulotte* extend its royalty-canceling powers to contracts for foreign patents. . . . The rights and obligations bestowed by the international patent regime played thus no role in *Brulotte*. Nor should they. The Canadian patent is an entirely separate asset from the U.S. patent.”); *C.R. Bard, Inc. v. Atrium Med. Corp.*, 112 F.4th 1182, 1189-90 (9th Cir. 2024) (affirming that *Zila* “held that *Brulotte* prohibited U.S. royalties after the expiration of the final U.S. patent” even though a Canadian patent remained in effect).

Brulotte itself is based upon and flows from the federal Patent Act. *See* 379 U.S. at 30 (quoting 35 U.S.C. § 154). A foreign patent cannot trump the basic tenets of U.S. federal patent law.

The Superior Court did not, and could not, find that U.S. sales are subject to or otherwise covered by the Brazilian patent. Unrebutted testimony established that [redacted] *See* A553. NK603 corn that is grown and sold in the U.S. cannot infringe a Brazilian patent. *See ALCOA*, 285 F.2d at 925. Despite ample discovery, Bayer presented no evidence connecting

U.S. sales activity to the Brazilian patent. *See* A1052-53. Bayer's counsel conceded the lack of such evidence: [redacted] (A1036). Accordingly, no facts here support a royalty based on the Brazilian patent. *Contrast with Nautilus, Inc. v. ICON Health & Fitness, Inc.*, 304 F. Supp. 3d 552, 567 (W.D. Tex. 2018) (finding no patent misuse despite expiration of U.S. patents because U.S. sales had a nexus to unexpired Chinese patent, which was infringed by "unassembled component parts and assembly instructions packaged in and shipped from China"), *amended*, 2018 WL 2107729 (W.D. Tex. May 7, 2018), *aff'd*, 754 F. App'x 292 (Fed. Cir. 2019).

Zila and *C.R. Bard* demonstrate that normal black-letter territorial boundaries apply to a *Brulotte* challenge. Parties cannot achieve by contract what U.S. patent law prohibits: circumventing U.S. patent limits with a foreign patent to extend U.S. monopoly-power obligations. *Brulotte* applies "whatever the legal device employed." 379 U.S. at 31 (quoting *Scott Paper*, 326 U.S. at 256).

Circumvention of U.S. patent laws (and *Brulotte*) is exactly what happened here. Instead of applying the bright-line cutoff of royalties after patent expiration that *Kimble* says lies at the heart of *Brulotte*, Bayer's 20-year U.S. patent rights were effectively extended more than five years as to Corteva due to a Brazilian patent. The unfairness is palpable. Under the Superior Court's ruling, the patented technology is now in the public domain for all to freely use, yet Corteva must continue to pay post-expiration royalties.

The Superior Court's decision also extends Bayer's monopolistic power in the U.S. more broadly by imposing additional post-patent-expiration restrictions on Corteva's use of the NK603 event. These include the Agreement's restrictions [redacted] (A59-60, § 3.02(a)-(b); A62, § 3.06) and from [redacted] (A61-62, § 3.05(d)). In addition to unjustified U.S. royalties on its now-unpatented invention, Bayer continues to control to whom Corteva may sell and how Corteva uses it, as if Bayer's patent monopoly is still in force.

Brulotte expressly prohibits a patentee from wielding this type of post-expiration patent leverage to extend its limited monopoly power. 379 U.S. at 33. Although the Superior Court mistakenly believed Bayer is not wielding such power,[3] Bayer's claim does just that. This anti-competitive effect is the antithesis of the bright-line simplicity of *Brulotte-Kimble* that all royalties and restrictions must end when the formerly patented invention returns to the public.

[3] *See* Order 26 ("Bayer didn't exercise patent leverage in an attempt to extend its patent monopoly; it simply contracted for a 'convenient method' for royalties based on sale totals.").

3. The Superior Court's Ruling Conflicts with Multiple Decisions Applying *Brulotte* Notwithstanding an Unexpired Foreign Patent.

The Superior Court's decision never addresses the fundamental problem that foreign patents cannot be a source of U.S. monopoly power. Ignoring the territorial and legal differences between domestic and foreign patents, the Superior Court instead relied upon (i) the fact that the unexpired Brazil patent is Bayer's "last patent to expire," (ii) its ruling that the Agreement is "a latest-running-patent agreement," and (iii) a statement in *Kimble* that "'royalties may run until the latest-running patent covered in the parties' agreement expires.'" (Order 23) (quoting *Kimble*, 576 U.S. at 454, in turn quoting *Brulotte*, 379 U.S at 30). This analysis sidesteps the issue at hand: *Kimble*-*Brulotte* plainly mean the last *U.S.* patent to expire. The post-*Brulotte* cases make this clear, repeatedly applying *Brulotte* and not allowing U.S. royalties despite an unexpired foreign patent.

For example, in *Meehan v. PPG Indus., Inc.*, 1985 WL 1999 (N.D. Ill. July 3, 1985), *aff'd*, 802 F.2d 881 (7th Cir. 1986), the last U.S. patent expired nearly two years before a Canadian patent expired. The licensee refused to pay royalties on U.S. sales post-expiration, and the patentholder sued, claiming that the royalty obligation continued "until the last of the U.S. or foreign patents expired" and that "he was entitled to royalties through" the time "when the Canadian patent expired." *See id.* at *2. The patentholder lost; the court applied *Brulotte*, ruling that royalties cannot extend past the life of the U.S. patent, *see id.* at *5, and the Seventh Circuit affirmed, agreeing "that any obligation [defendant] had to continue paying plaintiff royalties beyond the life of the U.S. patent was unenforceable under federal patent law." 802 F.2d at 883. The facts in *Meehan* match those here.

Other cases also apply the *Brulotte* rule to U.S. royalties, despite the existence of unexpired foreign patents. *See Zila*, 502 F.3d at 1024 (applying *Brulotte* to global license agreement where original U.S. patent had expired but subsequent Canadian license remained in effect); *Scheiber*, 293 F.3d at 1023 (affirming judgment refusing to enforce agreement requiring royalty payments for U.S. patents post-expiration until Canadian patent expired); *Amplatz v. AGA Med. Corp.*, 2012 Minn. Dist. LEXIS 200, at *42 (Minn. Dist. Ct. May 21, 2012) ("*Brulotte*, *Meehan*, and *Zila*, terminate[] [any] obligations to pay royalties . . . for sales made in the United States of the covered products when the underlying United States' patent[s] expire.").

Like *Meehan*, these decisions apply *Brulotte*'s prohibition on post-patent-expiration royalties despite the active foreign patents. The Superior Court's decision conflicts with each of these decisions, as they apply *Brulotte* in the very situation where the Superior Court ruled *Brulotte* does not apply. Despite this clear conflict, the Superior Court barely addressed *Meehan* and the other decisions, cursorily dismissing them in a footnote *solely* because they predate *Kimble*, which, it erroneously believed, had created a new "exception" to *Brulotte*. *See* Order 23-24 n.110. *Kimble* did no such thing. *See, e.g.*, *Honeywell Int'l Inc. v. Opto Elecs. Co.*, 2023 WL 3029264, at *10 (W.D.N.C. Apr. 20, 2023) ("*Kimble* plainly intended no change in *Brulotte*; indeed, that was the point of its stare decisis analysis.").[4] In fact, the "last-running-patent" principle is a core part of *Brulotte*'s holding, not an exception. *See* 379 U.S. at 30 ("[A]fter the last of the patents incorporated into the machines had expired."); *id.* at 33-34 ("We share the views of [*Ar-Tik*, 302 F.2d at 510] that after expiration of the last of the patents incorporated in the machines . . . ."). Thus, the last-patent-to-expire principle implements *Brulotte*'s core theory that royalty agreements are enforceable only so long as the relevant patent monopoly continues, but, once the monopoly ends because the patents supporting it have expired, so too the royalties for that monopoly must end.

Here, the Superior Court did the opposite. Using a foreign patent to sustain U.S. patent-based royalties after the U.S. patents have expired turns "the antimonopoly basis of *Brulotte*" on its head. *Scheiber*, 293 F.3d at 1022.

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[4] In n.110, the Superior Court cites *Zila* as if it suggests that last-expiring foreign patents are treated the same as U.S. patents under *Brulotte*, when *Zila* actually rules that, under *Brulotte*, the patentee may continue to collect royalties on foreign sales (but not U.S. sales) when foreign patents remain ***un***expired. *See* 502 F.3d at 1024. Corteva's relief sought here is consistent with that; Corteva does not challenge the country-specific royalties owed in Brazil where Bayer has its only unexpired patent.

4. The Narrow "Non-Patent Royalty" Exception for Hybrid Contracts Does Not Apply Because the Agreement Lacks "Step-Down" Non-Patent Royalties.

The Superior Court's alternative ruling that *Brulotte* does not apply because the Agreement is a hybrid license where post-expiration royalties are "tied to non-patent rights" (Know-How and Biological Materials), (Order 24), also is wrong. It (i) fails to consider crucial undisputed facts showing that, once the U.S. patents expired, no intellectual property rights were needed or used by Corteva; and (ii) misapplies *Brulotte-Kimble* by ruling that no stepdown is needed; *Brulotte*, *Kimble*, and numerous cases hold otherwise.

First, the undisputed facts refute the Superior Court's view that the Agreement "ties" post-patent-expiration royalties to non-patent rights. (Order 24). Bayer concedes that the Agreement neither discounts the royalties after the U.S. patents expire nor allocates between patent and non-patent license rights. (A374-75; A383-85). The same royalty rate set by Bayer applies before and after patent expiration without apportioning it between patent and non-patent rights. Instead, it [redacted] (A385). Indeed, Bayer's designee denied the very tying that the Superior Court erroneously believed to exist:

Q: [redacted]

A: [redacted]

(A375). Similarly, the country-specific, [redacted] royalty rate did not change (*i.e.*, decrease) due to patent expiration, value the strength of non-patent IP protection separate from the patent, or apportion value between patent and non-patent rights in any way. (A391-92; A394-96).

In fact, uncontroverted record evidence also shows that non-patent rights are not needed to make, use, or sell the invention. Bayer's expert testified that Bayer's proprietary rights (such as Know-How or Biological Materials) are encompassed by its patents and that no additional intellectual-property right exists once the patents expire. (A805-07 (agreeing that the NK603 Event is protected by patents only and no other intellectual property and is now unprotected in the U.S.); A808-09 (unaware of any remaining proprietary rights in the U.S.)). Hence, the license's value once Bayer's patents have expired must be zero, as there is nothing to license after the patent-based right to exclude others from the market ceased.

Second, the Superior Court's ruling that *any* hybrid agreement is exempt from *Brulotte*, even if it has no provision allocating the payments to non-patent rights, has been rejected by consensus case law. From *Brulotte* on, cases have consistently held that, absent a clear basis to attribute post-expiration royalties to non-patent rights—usually by a royalty discount or "step down"—continuing the same royalty after U.S. patent expiration constitutes *per se* patent misuse. *Brulotte* addressed this situation:

> The present licenses draw no line between the term of the patent and the post-expiration period. The same provisions as respects both use and royalties are applicable to each. The contracts are, therefore, on their face a bald attempt to exact the same terms and conditions for the period after the patents have expired as they do for the monopoly period.

379 U.S. at 32. Following *Brulotte*, the Circuits have held that a reduced post-expiration royalty is mandatory for the hybrid-agreement exception to apply. *See Meehan*, 802 F.2d at 886 (affirming summary judgment to licensee where the "contract fails to distinguish between pre-expiration and post-expiration royalties" and "the rate of royalty payments remain[s] constant in the post-expiration period"); *Boggild v. Kenner Prods.*, 776 F.2d 1315, 1319, 1321 (6th Cir. 1985) (reversing summary judgment to licensor where "royalty provisions for other rights which conflict with and are indistinguishable from royalties for patent rights" rendered license unenforceable); *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1373 (11th Cir. 1983) (holding that hybrid agreement was unenforceable because it "required [licensee] to pay royalties at the same rate and on the same basis after the patents expired that it paid while the patent was in effect"). Thus, for this exception to apply, the post-patent royalty must (1) "step down" and require less than the original (bundled rights) royalty, or (2) tie the royalty to specific non-patent benefits.

Kimble reaffirmed these requirements, stating that "post-expiration royalties are allowable ***so long as*** *tied to a non-patent right*—even when closely related to a patent." 576 U.S. at 454 (emphasis added). For example, "a license involving both a patent and a trade secret can set a 5% royalty during the patent period (as compensation for the two combined) and a 4% royalty afterward (as payment for the trade secret alone)." *Id.* *Kimble*'s example of a permissible hybrid agreement is the antithesis of the Agreement here.

The Superior Court dismissed *Kimble*'s illustration of a permissible tying arrangement "as just that—an example," and asserted that "it is not at all settled that [that] is a requirement to avoid *Brulotte* trouble." (Order 24 n.113). Even though *Kimble* held that post-patent-expiration royalties are permissible under *Brulotte only* "so long as" they are tied to a non-patent right, the Superior Court ruled in circular fashion that the mere existence of the hybrid agreement sufficed to meet this requirement. (Order 24). It did not cite *any* supporting authority and acknowledged contrary recent decisions.[5] Indeed, the Ninth Circuit opinion affirmed in *Kimble* makes it clear that the rule is mandatory, not aspirational:

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[5] *See* Order 24 n.113 (citing, *e.g.*, *Bradley Corp. v. Lawler Mfg. Co.*, 2020 WL 7027875, at *7 (S.D. Ind. Nov. 30, 2020) ("Unlike the separable pre- and post-patent-expiration royalties described as acceptable in *Kimble*, the License Agreement here sets forth a single, non-diminishing royalty rate without a clear indication that the royalties are not subject to patent leverage."); *Galbraith Lab'ys, Inc. v. Nanochem Sols. Inc.*, 2016 WL 1421004, at *4 (W.D. Ky. Apr. 8, 2016) ("the TAA has no provision differentiating the calculation of royalties during the patent period and . . . after the patent expired"), *op. amended on recon.*, 2016 WL 3630163 (June 29, 2016)); *see also Cricut, Inc. v. Enough for Everyone, Inc.*, 2024 WL 2847946, at *4 (D. Utah June 5, 2024) (finding hybrid agreement lacking royalty stepdown unenforceable because such contracts "are permissible [only] so long as there is some way to distinguish between the patented and non-patented rights"); *Rsch. Corp. Techs. Inc. v. Eli Lilly & Co.*, 2022 WL 3647830, at *4 (D. Ariz. Aug.

> [A] "hybrid" licensing agreement encompassing inseparable patent and non-patent rights ***is unenforceable*** beyond the expiration date of the underlying patent*, **unless the agreement provides a discounted rate*** for the non-patent rights *or* ***some other clear indication*** that the royalty at issue was ***in no way subject to patent leverage***.

Kimble v. Marvel Enters., Inc., 727 F.3d 856, 857 (9th Cir. 2013) (emphasis added), *aff'd*, 576 U.S. 446 (2015).[6] Reflecting its misreading of *Brulotte*-*Kimble*, the Superior Court did not find *any* fact "tying" Bayer's non-patent rights to post-expiration royalties, let alone a "clear indication" that no patent leverage is involved. Under *Brulotte*, this is *per se* patent misuse.

The Superior Court's only other ground for distinguishing *Brulotte* was a supposed distinction between "sales" and "use" royalties. *See* Order 24-26. It analogized the Agreement's sales-based royalties to those upheld in two older Supreme Court cases. *See* Order 24-26 (discussing *Automatic Radio Mfg. Co. v. Hazeltine Res., Inc.,* 339 U.S. 827 (1950), *overruled on other grounds, Lear v. Adkins,* 395 U.S. 653 (1969), and *Zenith Radio Corp. v. Hazeltine Res., Inc.*, 395 U.S. 100 (1969)). The Superior Court's belief, that *Brulotte* would not apply to a sales contract allowing for royalties to be paid for products that did not practice the patented invention, is incorrect and misapplies these cases.

24, 2022) (rejecting an ostensible hybrid license of patent and nonpatent rights that "only provided for one royalty rate").

[6] *Kimble* even cites to a treatise note that "[a] post-expiration *reduction* in the royalty is a ***requirement*** for the exception to apply." 576 U.S. at 454 (citing 3 *Milgrim on Licensing* § 18.07 at n.19.1) (second emphasis added) (collecting cases).

The Superior Court's analysis confuses "use" and "sale" by misapprehending the term "use." A patent protects the right to make, sell, and physically use the invention. Therefore, "'post-expiration use' refers to practicing inventions after their patents expire—acts that would have infringed the patents pre-expiration." *Ares Trading*, 114 F.4th at 140. "The right to make, the right to sell, and the right to use" an invention passes to the public when the invention's patent expires. *Id.* (quoting *Brulotte*, 379 U.S. at 31). "Collectively, these rights constitute the broader right to practice an invention—to use it in ways that would have infringed its patent pre-expiration." *Id*. Therefore, *Brulotte* applies if a "royalty obligation is . . . calculated based on activity requiring post-expiration use of inventions covered by the . . . [p]atents," including sales. *Id.* at 143. Once "use" and "sale" are put in context, *Automatic Radio* and *Zenith Radio* become clear.

Automatic Radio merely held that a sales license was a permissibly convenient way for parties to calculate royalties for use of a patent without necessarily leveraging patent power over non-patented products. *See Zenith Radio*, 395 U.S. at 137; *Brulotte*, 379 U.S. at 33. It has no bearing here because Corteva is not selling products using the Brazilian patent. In any event, *Zenith Radio* states that *Brulotte* *does* apply to sales contracts: "*Brulotte* thus articulated in a particularized context the principle that a patentee may not use the power of his patent to levy a charge for making, using, or selling products not within the reach of the monopoly granted by the Government." 395 U.S. at 136-37. Likewise, "the royalty in *Kimble* was expressly calculated based on sales of infringing products." *Ares Trading*, 114 F.4th at 146.

Zenith Radio merely held that "conditioning the grant of a patent license upon payment of royalties on products which do not use the teaching of the patent does not amount to patent misuse." *Id.* at 135. It has no bearing here, where Bayer's expert conceded that the post-expiration U.S. sales cover products practicing the invention that had been protected by the U.S. patents. (A805-09).

Brulotte, *Zenith Radio*, and *Automatic Radio* thus are consistent: a royalty must be for use of an unexpired U.S. patent practicing the invention, but it cannot pay for use of an invention that entered the public domain. By definition, a foreign patent fails this test. After the last U.S. patent expired, the NK603 Event moved into the public domain in the U.S., thereby prohibiting collection of further sales royalties for its use.

Finally, the Superior Court's view that "[t]he present facts are akin to those in *Automatic Radio* and *Zenith Radio*" (Order 26), also is wrong: in those cases, the patent portfolio on which the royalty was paid *did* include at least one unexpired U.S. patent. Here, there are no unexpired U.S. patents.

In sum, no facts and no cases support the Superior Court's view that the Agreement ties its post-expiration royalties to non-patent rights. Consensus case law, including *Brulotte*, holds otherwise.

ARGUMENT II: The Superior Court's Interpretation of the Agreement's Royalty Provision Is Wrong.

A. Question Presented.

In their licensing Agreement for the NK603 Event, did the parties intend for U.S. royalties to continue after expiration of all licensed U.S. patents? This issue was raised in Corteva's cross-motion for summary judgment at 12-19. (A157-64).

B. Standard of Review.

The standard of review is *de novo*. *Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008) ("[Q]uestions concerning contract interpretation are questions of law and are reviewed *de novo*.").

C. Analysis.

1. The Agreement's Requirement of Country-by-Country Calculation of Patent Royalties Shows that Royalties Expire on a Country-by-Country Basis.

Delaware's objective standard of contract interpretation asks how a reasonable person would understand the Agreement's plain language, reading it as a whole and giving effect to all terms, to determine the parties' intent. If the terms are ambiguous because they are susceptible to more than one interpretation or the intent is not clear, extrinsic evidence may be considered to resolve the ambiguity. *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023).

Here, the parties' intent is clear from the purpose of the Agreement. No reasonable person, let alone a sophisticated company, would agree to terms that require it to pay for the privilege of a huge competitive disadvantage arising from a late-to-issue foreign patent. Contracts must be interpreted reasonably to avoid absurd results. *See, e.g.*, *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract.").

The Superior Court found that the Agreement has a "core ambiguity [that] lies in the relationship between the Term and the royalty provisions" (Order 14), namely § 9.01, which terminates the overall Agreement whenever the last-covered patent expires, and § 3.01, which calculates royalties on a country-by-country basis. The Agreement does not say whether royalties continue after a country's patent(s) expire or until the Agreement's term ends.

The plain language, reasonably read, supports only Corteva's interpretation. Both parties agree that royalties are determined on a country-by-country basis. (A828). *Bayer's own designee witness* so testified. (A387) [redacted]. Quite simply, if patent royalties are determined according to the [redacted] in each country, a reasonable person would understand that the parties intended that the royalties cease when the respective patents for that country expire. The Agreement's purpose is to provide royalties for sales of products including the NK603 event and practicing the patents. Once the patents expire, the purpose of the royalties—

extracting compensation for allowing a competitor's product to include the invention despite the patent monopoly—ceases as well.

This purpose is confirmed in the Agreement itself. Section 1 states the parties' intent to exchange Bayer's rights for Corteva's payment of royalties. Bayer stated that it held [redacted] relating to herbicide resistant Corn plants, and Corteva stated that it wanted to obtain a [redacted] to commercialize Corn under terms that [redacted] (A56, §§ 1.03, 1.05). The parties thus intended for a simple operational framework—an exchange of rights for payment of a royalty. *See Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 823 (Del. 1992) ("The obvious source for gaining contractual intent is the recitals found at the beginning of the Agreement because it is there that the parties expressed their purposes for executing the Agreement.").

Plain logic and the Agreement's clear purpose also tie patent royalties for a particular country to the life of the patents in that country supporting those royalties. "A textually permissible interpretation that furthers rather than obstructs that [contract's] purpose should be favored." *USAA Cas. Ins. Co. v. Carr*, 225 A.3d 357, 363 (Del. 2020) (citation omitted); *see also* Restatement (Second) of Contracts § 202(1) (1981) ("[I]f the principal purpose of the parties is ascertainable it is given great weight.").

Bayer offered no plausible explanation why the parties would have agreed to deal with royalties on a country-by-country basis, but in a manner that ignores patent expiration. The natural reading is that the term of the patent royalty is determined by the term of the corresponding patent, not by the term of the overall Agreement, and particularly not by the later term of a *different country's* patent.

Corteva's interpretation meshes with the licenses Bayer directly grants to individual customers (*i.e.*, growers) through "Technology Stewardship Agreements," pursuant to Section 3.10 of the Agreement. (A63). Bayer issues those country-specific patent licenses on a country-by-country basis (and prohibits farmer customers from exporting seed outside the country of purchase). (A933, §§ 1.a, 1.d, 1.e, 2.b). It is illogical and highly inconsistent for Bayer to issue country-by-country licenses to individual customers but to require Corteva to pay royalties on a worldwide basis without regard to expiration of patents in individual countries.

Further, Corteva's interpretation is the only one that accounts for federal patent-law considerations. Because patent grants provide a time-limited monopoly to inventors, royalties for the sale of products using the patent are limited to the patent's term. Bayer's interpretation is contrary to federal patent policy and the parties' intent for the royalty to reflect the value of Bayer's patented invention on a country-by-country basis.

The only reasonable interpretation of the Agreement is that the U.S. royalty obligation ceases upon U.S. patent expiration.

2. The Superior Court Erred in Its Contractual Analysis.

The Superior Court's contractual analysis (Order 14-19) errs in multiple respects.

First, the Superior Court misapprehended the Agreement's royalty structure and the intent and effect of the 2007 Amendment, finding that the 2007 Amendment resolved the contractual ambiguity "by removing references to individual countries at different specified rates" and instead setting "one percent rate calculation for that defined Territory . . . as a whole[.]" (Order 16-17). This finding that the 2007 Amendment "removed the possibility of treating patent on expiration on a country-by-country basis" because royalties were no longer determined at "different rates," (Order 17 n.77), misreads the 2007 Amendment and is directly contrary to Bayer's designee's testimony that royalties *are* determined country-by-country:

Q: [redacted]

A: [redacted]

Q: [redacted]

A: [redacted]

[redacted]

(A387) (emphasis added); *see also* A388 (admitting the 2007 Amendment allows [redacted]). For years, Bayer has sent royalty notices pursuant to the 2007 Amendment that break down payments owed based on each individual country's unique royalty rate and units sold. *See* A124-26; A308-11; A314-17. This testimony and conduct prove that the 2007 Amendment requires country-by-country royalty rates, conclusively disproving the core basis of the Superior Court's contract interpretation.

Second, the Superior Court's conclusion is strained and illogical. It *agreed* that the original Agreement might have restricted royalties country-by-country based upon patent status, but found that the 2007 Amendment "removed the possibility of treating patent expiration on a country-by-country basis." (Order 16). This was clear error; the Superior Court disregarded the fact that 2007 Amendment set different royalty rates varying according to each country's unique industry-standard royalty rate and focused instead on the provision that Corteva need only pay [redacted] of the country's particular rate. *See* Order 17 n.17 ("Because the enumerated percentage calculation treats the countries together, the Agreement treats the royalties together[,] irrespective of the finalized amount after that calculation is employed.").

The Superior Court's ruling has no support in the record and was not raised by Bayer. The calculation that matters is that the industry-standard royalty rate is determined country-by-country, *not* by the percentage of that rate that Corteva is required to pay. Bayer's designee's testimony confirmed that different royalty rates are set in each country (A387), such that there cannot be "one royalty rate" as the Superior Court found (Order 16). Furthermore, if the parties had agreed in 2007 to change the royalty scheme to require payment of post-patent royalties, surely *some* intrinsic or extrinsic evidence would support such a dramatic shift in the scope of the obligation. The conspicuous lack of any such evidence or argument from Bayer is damning. The Superior Court essentially suggests that the parties hid an elephant in a mouse hole.

Third, none of the Superior Court's other reasons for its decision resolves the ambiguity. *See* Order 17-18.

(1) The Superior Court cited to *Corteva's* grant of a worldwide license to Bayer to prevent potential interference with Bayer's licenses (Order 17, citing A70-71, § 7.06), but this provision merely applies the same definition for Territory used in Corteva's license to Bayer as is used for Bayer's license to Corteva. It has no bearing on the specific terms at issue here.

(2) The Superior Court's reliance on the inclusion of non-patent rights (Know-How and Biological Materials) in a hybrid license (Order 17) also is misplaced. These are customary components of a biotechnology license and are utterly immaterial as to whether U.S. patent royalties continue past U.S. patent expiration, especially when Bayer's own expert admitted that no such intellectual property rights remained in the Licensed Corn Products once the patents expired. (A805-09).

(3) As for the Agreement's definition of Territory (Order 17-18), this does not signify a worldwide royalty. "Territory" is restricted to [redacted] and, in any event, does not supersede the Agreement's assessment of the royalty "in each country." *See* A97, § 4.01.

(4) The Superior Court's view that the sophisticated parties could have readily drafted specific language supporting Corteva's position (Order 18-19) is wrong—and actually applies to Bayer's position and not Corteva's. Sophisticated parties would have known the general *Brulotte* rule that U.S. royalties must cease after all licensed U.S. patents expire, so they would have understood the need to spell out their departure from what was held to be unlawful practice. *See Kimble*, 576 U.S. at 457 (upholding *Brulotte* in part "because parties are especially likely to rely on such precedents when ordering their affairs," such that "[o]verturning *Brulotte* would thus upset expectations").

Finally, the Superior Court relies upon the fact that the Agreement's Term continues until all patents everywhere have expired. (Order 14). This merely restates the same incorrect reading of the Agreement's term. A contract's term provision does not override patent law's unique rules and limitations, including the principles embodied in *Brulotte* limiting the life of a U.S. patent and U.S. royalties to its statutory term.

3. Corteva's Interpretation Should Prevail.

The terms and purpose of the Agreement support Corteva's interpretation. In agreeing with Bayer's interpretation, the Superior Court made clear errors of fact and construction.

CONCLUSION

For the foregoing reasons, the Superior Court's judgment should be reversed and the case remanded for entry of summary judgment in favor of Corteva.

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