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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.	Case No. 433,2024 Court Below: Superior Court C.A. No. N22C-10-293 PRW CCLD **PUBLIC VERSION** **E-FILED JANUARY 6, 2025**

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This is not a one-dimensional "patent monopoly" or "patent royalty" case. *See, e.g.,* Corteva Brief pp. 6, 8, 13, 37.[1] Rather, this dispute concerns an agreement in which Bayer granted Corteva[2] a worldwide license to a portfolio of rights that included more than just U.S. patent rights (the "Agreement," as defined further below). The license allowed Corteva to sell corn containing the NK603 gene. It included a broad portfolio of patents across multiple countries like the U.S., Argentina, Brazil, Canada, and others. The license additionally provided Corteva with Biological Materials (*e.g.*, physical seeds with the NK603 gene for Corteva to use to develop its own corn lines) and Know-How (such as standard operating procedures that helped enable Corteva to rapidly commercialize its corn lines to compete with Bayer's).

Corteva and Bayer—both sophisticated agriscience companies—entered into the Agreement over two decades ago. Under its terms, Corteva agreed to pay Bayer a royalty in exchange for the worldwide license to the suite of rights. The Agreement

[1] "Corteva Brief" refers to Corteva's Opening Appellant Brief.

[2] Monsanto Company and Agrigenetics, Inc. entered into the Agreement. Both entities have since been acquired. They are referred to in this brief as Bayer and Corteva, respectively.

ends with the expiration of the last NK603 patent anywhere in the world. It does not include a special termination provision for Corteva's royalty obligations.

Twenty years later, Corteva has decided it no longer likes the deal it bargained for. It now argues its royalty obligations should end on a country-by-country basis as the last NK603 patent expires in each respective country. Among other claims, Corteva argues the Biological Materials and Know-How provide no value apart from the patents. Corteva Brief pp. 29-30. Like the Superior Court, this Court should interpret and enforce the Agreement as written. *See Glaxo Grp. Ltd. v. DRIT LP*, 248 A.3d 911, 919 (Del. 2021) ("Even if the bargain they strike ends up a bad deal for one or both parties, the court's role is to enforce the agreement as written.").

Interpreting the Agreement as written does not run afoul of *Brulotte v. Thys Co.*, 379 U.S. 29 (1964). In *Brulotte*, the U.S. Supreme Court considered whether an agreement licensing U.S. patents (and limited solely to the United States) with royalty obligations extending beyond the expiration date of the patents was enforceable or a "misuse" of the patents. *Id*. at 30-32. The Court concluded that the post-expiration royalties were "unlawful per se" and thus unenforceable. *Id*. at 32.

Since the *Brulotte* decision, the U.S. Supreme Court has explained that "parties can often find ways around" the *Brulotte* holding. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 453 (2015). For example, notwithstanding *Brulotte*, "royalties may run until the latest-running patent covered in the parties' agreement expires." *Id*. at 454. Additionally, "post-expiration royalties are allowable so long as tied to a non-patent right—even when closely related to a patent." *Id*.

The Agreement Corteva and Bayer drafted meets **both** of the U.S. Supreme Court's prescribed *Brulotte* workarounds as identified in *Kimble*. The Agreement's unique attributes, including its worldwide nature, demonstrate that these sophisticated parties intended to draft an agreement that lawfully required the payment of worldwide royalties until the last NK603 patent in the world expires.

For these and other reasons, the Superior Court granted in full Bayer's motion for summary judgment and denied in full Corteva's motion for summary judgment. This Court should affirm the Superior Court's decision.

SUMMARY OF ARGUMENT

1. **Admitted in part**. The U.S. Supreme Court has held, when considering a licensing agreement for only U.S. patents, that parties may not require payment of royalties after all the U.S. patents have expired. *Brulotte v. Thys Co.*, 379 U.S. 29 (1964). Parties can and often do find ways around this rule, a practice which has been explicitly condoned by the U.S. Supreme Court. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 453 (2015).

2. **Denied**. The Superior Court's ruling in this case followed both *Brulotte* and the exceptions articulated in *Kimble*. Royalties may continue to run until the latest-running patent covered in the parties' agreement expires. *Id*. at 454. They may also continue to run so long as they are tied to a non-patent right. *Id*. The Agreement in this case meets both of those exceptions.

3. **Denied**. The Superior Court did not erroneously rely on the unexpired Brazilian patent as a basis for allowing royalties on U.S. sales after the last U.S. patent expired. Corteva must continue to make royalty payments on U.S. sales because the Brazilian patent does not expire until 2028. The U.S. Supreme Court has not required an unexpired U.S. patent to satisfy the *Brulotte* exception that allows royalties to continue until the last patent expires. Permitting royalties to continue based on a foreign patent does not extend a U.S. patent monopoly.

4. **Denied**. The Superior Court did not misapply *Brulotte* or *Kimble* in this case. The U.S. Supreme Court has not required an unexpired U.S. patent in order to meet a *Kimble* exception. Allowing royalties to continue based on a foreign patent does not extend a U.S. patent monopoly. None of the cases cited by Corteva considered the arguments raised by Bayer in this case. Corteva also overlooks that its U.S. sales can trigger Brazilian patent rights, such as when corn seed is cultivated in Brazil and subsequently imported into the United States. Corteva has the right to use the Brazilian patent rights in connection with its U.S. sales, and, therefore, must continue paying royalties until 2028.

5. **Denied**. Neither *Brulotte*, nor *Kimble*, nor any opinion binding on this Court has required that royalties must step down to satisfy the exception that royalties may continue after patent expiration if they are tied to non-patent rights.

6. **Denied**. The Superior Court did not hold that **any** hybrid agreement meets the exception that royalties may continue after patent expiration if they are tied to non-patent rights. The Superior Court held only that the Agreement at issue in this case meets the exception. It also held that the Agreement meets the other *Kimble* exception that royalties may continue until the last patent included in the parties' agreement expires.

7. **Denied**. The Superior Court did not rely on an incorrect premise. Royalties may continue if they are tied to "non-patent rights." *Kimble*, 576 U.S. at 454. The exception does not require that royalties be tied to other intellectual property rights. *Id*. So even assuming no intellectual property rights remained after the last U.S. patent expired, Corteva is not excused from its bargained-for contract obligations.

8. **Denied**. The Superior Court correctly found that Corteva's royalty obligations continue through the Term of the Agreement until the expiration of the Brazilian patent in 2028. Nothing in the Agreement indicates Corteva's royalty obligations end before that year. The Superior Court did not misread the Agreement. It specifically addressed Corteva's argument that the royalty rate varies from country to country.

9. **Denied**. The Agreement's Term ends with the expiration of the Brazilian patent in 2028. Nothing in the Agreement indicates a special term for Corteva's royalty obligations. The provision upon which Corteva relies relates solely to calculating the royalty owed to Bayer. It does not speak to when Corteva's royalty payment obligation ends.

10. **Admitted in part**. The royalty amounts resulting from the Agreement's calculation varied in each country. But as noted by the Superior Court, the 2007 Amendment revised the Agreement to provide a uniform calculation method for every country. The fact that the royalty amount varies in each country has no bearing on when Corteva's royalty payment obligations end. This Court should affirm the Superior Court's decision.

COUNTERSTATEMENT OF FACTS

Bayer develops, produces, and sells certain crop seeds and plants that contain herbicide resistant transgenic traits. A34, ¶ 16. The herbicide tolerant crops Bayer produces are designed to tolerate herbicides such that the cultivated crop can survive herbicide application, which kills the surrounding weeds. A40, ¶ 33. Bayer licenses the herbicide resistant traits it develops to certain competitors like Corteva.

The NK603 Event is a transgenic corn event resulting in tolerance to the herbicide glyphosate. A455, ¶ 7. In the 1990s, Monsanto developed an herbicide-tolerant corn product using this event. A34-35, ¶ 17; A35, ¶ 19; A39, ¶ 32. Monsanto marketed this product as "Roundup Ready® Corn 2." A41, ¶ 37.

Corteva's predecessor, Agrigentics, sought a license from Monsanto to sell corn seed resistant to glyphosate to its farming customers and sought Monsanto's assistance in developing its own glyphosate-resistant corn lines. A35-36, ¶ 19. To that end, Monsanto and Agrigentics entered into a "Roundup Ready® (NK603) Corn License Agreement" (the "Agreement") on September 30, 2002. A491, § 2.08.

The Agreement provides Corteva with a worldwide license to a number of different rights to "[redacted]" A492, § 2.15 (defining "Licensed Corn Products"); A493, § 3.01

(providing Corteva a license in the "Territory"); A492, § 2.22 (defining "Territory" to mean "[redacted]"). The licensed rights include a portfolio of "[redacted]" A493, § 3.01. The Agreement defines these licensed rights:

- [redacted] A490-91, §§ 2.02, 2.07.
- [redacted], § 2.16.
- [redacted]. A492, § 2.17.
- [redacted]" A491-92, §§ 2.14, 2.15.

In exchange for the portfolio of licensed rights, which includes Bayer's patent rights, Biological Materials, and Know-How, Corteva agreed to pay Bayer a royalty as described in Section 4.01 of the Agreement. A498, § 4.01. Nothing in the Agreement indicates Corteva pays the royalty for only Bayer's patent rights. The opposite is true. The Agreement makes clear that Corteva pays the royalty for the entire portfolio of licensed rights. A490, §§ 1.03, 1.05; A493, § 3.01; A498, § 4.01.

Originally, Section 4.01 set out three separate royalty calculations: one for the United States and Canada for Fiscal Year 2003, one for the United States and Canada for "[redacted]," and one for "[redacted]." A498, § 4.01. In 2007, however, the parties amended Section 4.01 to eliminate the different royalty calculations for the United States and Canada as compared to all other countries. A525-26, § 4.01. The parties agreed that "[redacted]. A525, § 4.01 (emphasis added). Under amended Section 4.01, Corteva pays no more than [redacted] per Unit sold of corn lines containing NK603. A525, § 4.01.

The Agreement contains a single Term provision applicable to the entire Agreement. The Term provision provides that the Agreement "[redacted]" A504, § 9.01. The parties agree the last Monsanto Patent Right and Licensed Patent Right under the Agreement expires in 2028 in Brazil. A46, ¶ 54. No provision indicates Corteva's obligation to pay annual royalties ends on a different date. Likewise, no provision indicates Corteva's royalty obligations expire on a country-by-country basis with the latest-running patent in the respective country.

The parties agree there is no extrinsic evidence of the parties' intent in drafting the Agreement. A560, A565; Corteva Brief p. 13.

<u>Procedural Background</u>

Bayer and Corteva both moved for summary judgment on May 14, 2024. The Superior Court granted Bayer's motion in full and denied Corteva's motion in full on September 16, 2024.

On Corteva's contract arguments, the Superior Court highlighted: (1) the Agreement includes a uniform method for calculating the royalty amount, meaning it is not a "country-by-country" royalty; (2) the Agreement grants a worldwide license, not a country-by-country license; (3) Corteva's non-patent rights continue after country-specific patents expire, so it follows that Corteva's royalty obligations also continue; (4) the Agreement's Term provision does not include any Territory reference, instead terminating with the last patent to expire. Order pp. 16-18. The Superior Court concluded its analysis by noting that if the sophisticated parties had intended for royalties to end on a country-by-country basis, "they were more than capable of including such specific language." Order p. 18.

On Corteva's *Brulotte* arguments, the Superior Court concluded the Agreement meets both the *Kimble* exceptions. It held that royalties could continue until the Brazilian patent expires and because the royalty is tied to "a global licensing agreement spanning multiple patents, along with non-patent 'know-how' and 'biological materials.'" Order p. 26.

Corteva filed this appeal on October 7, 2024.

<u>ARGUMENT I: The Superior Court Correctly Held that *Brulotte* Does Not Prohibit the Agreement's Royalties from Continuing Until the Last Patent Expires.</u>

A. Question Presented

Does *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), excuse Corteva from paying royalties on U.S. sales after November 2022? Bayer preserved this argument at A437-51, 853-71, and it was resolved by the Superior Court. Order pp. 20-27.

B. Scope of Review

Bayer agrees that the Court should review *de novo* the Superior Court's decision that *Brulotte* does not excuse Corteva from paying royalties on U.S. sales after November 2022. Corteva Brief p. 16. But Bayer disagrees that the facts should be viewed in the light most favorable to either party. Where parties have filed cross motions for summary judgment and have not argued there is a material issue of fact, "the usual standard of drawing inferences in favor of the nonmoving party does not apply." *Farmers for Fairness v. Kent Cnty.*, 940 A.2d 947, 954-55 (Del. Ch. 2008); *see also* Del. Super. Ct. R. Civ. P. 56(h); *Valley Forge Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2012 WL 1432524, at *6 (Del. Super. Ct. Mar. 15, 2012). The parties in this case filed cross motions for summary judgment, and neither party argued there is a material issue of fact, so the standard of drawing inferences in favor of the nonmoving party does not apply.

C. Merits of Argument

Delaware law would enforce the Agreement as written and require Corteva to pay a royalty until the last patent in the world expires. *See* Section II, infra. For *Brulotte* to compel a different result, the Court must find it preempts Delaware law. The Superior Court correctly concluded it does not.

As the U.S. Supreme Court has said, "parties can often find ways around" the *Brulotte* holding. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 453 (2015). In *Kimble*, the U.S. Supreme Court identified at least two options for parties to do so: (1) royalties may run until the last patent covered in the agreement expires, and (2) royalties are permissible post patent expiration if they are tied to a non-patent right, even if closely related to a patent. *Id*. at 454.

The Superior Court correctly found that the Agreement's terms meet both U.S. Supreme Court-prescribed workarounds. It joined other courts, which have similarly declined to extend *Brulotte* to preempt state law in cases factually distinguishable from *Brulotte*. *See*, *e.g.*, *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 260, 264-65 (1979) (distinguishing *Brulotte* and rejecting that federal patent law preempted state contract law with respect to the license at issue); *see also MedImmune, LLC v. Bd. of Trs. of Univ. of Mass.*, 2015 WL 5783381, *9-10 (Md. Ct. Spec. App. June 3, 2015) (declining to extend *Brulotte* to a "collaboration agreement" in which both sides licensed patents); *Nautilus, Inc. v. ICON Health & Fitness, Inc.*, 304 F. Supp. 3d 552, 568 (W.D. Tex. 2018) (declining to extend *Brulotte* to U.S. sales covered by an unexpired Chinese patent).

The Agreement meets both *Kimble* exceptions because the royalties end with the last-to-expire patent and because it ties royalties to more than just patent rights. Either of these on their own, and certainly both in combination, are sufficient to render the *Brulotte* rule inapplicable. This Court, therefore, should affirm the Superior Court's holding. The *Brulotte* decision does not mandate a different decision.

1. Corteva Must Continue Making Royalty Payments on U.S. Sales because the Term Does Not End Until the Last Patent Expires.

a. <u>The Last Patent Expires in 2028.</u>

"Under *Brulotte*, royalties may run until the latest-running patent covered in the parties' agreement expires." *Kimble*, 576 U.S. at 454. The U.S. Supreme Court did not, contrary to Corteva's suggestion, hold that under *Brulotte*, royalties may run only until the latest-running **<u>U.S.</u>** patent covered in the parties' agreement expires. The parties agree the latest-running patent included in the Agreement—the Brazilian patent—expires in 2028. Corteva Brief p. 8.

The Brazilian patent is part of a licensed portfolio of worldwide patents (and other rights) given to Corteva in exchange for a royalty payment. A worldwide license grants distinct benefits. Cultivating seed in one country and selling the seed in a different country implicates patents in both countries. *See* 35 U.S.C. § 271(a) ("[W]hoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States" commits patent infringement); 1 Patents Throughout the World § 28.5 (4th ed. 2024) (patentees in Brazil, for example, similarly have the right to prevent others from "making, using, offering for sale, selling or importing the patented object or process").

Because of the licensed worldwide portfolio, Corteva may develop and cultivate seed in one country (including Brazil) and sell the seed in the U.S. or yet another country without considering the implicated patent rights because Corteva has a license to all the rights. In addition, because Bayer agreed to license Corteva's customers, they can buy and plant Corteva's NK603 seed and then sell their resulting grain into the downstream market, where it may eventually be exported across the world, including to Brazil. A496-97, § 3.10. In return for these worldwide benefits, Corteva agreed to make royalty payments for its worldwide license until the last patent expires.

b. *Brulotte* Does Not Require that the Last-to-Expire Patent be a U.S. Patent.

The U.S. Supreme Court said in *Brulotte* that royalties may continue until the last patent expires. Yet Corteva argues that this Court should instead follow what the Supreme Court did not say—namely, that royalties must end when the last **U.S.** patent expires. Corteva Brief pp. 21-22. But it is not this Court's task "to expand *Brulotte*'s holding beyond its terms." *Zila, Inc. v. Tinnell*, 502 F.3d 1014, 1020 (9th Cir. 2007). Rather, unless explicitly mandated otherwise by *Brulotte*, the Court should "endeavor to give effect to the intent of the parties and the bargain that they struck." *Id.*

According to Corteva, allowing royalties to continue based on a foreign patent would improperly extend Bayer's U.S. patent monopoly.[3] Corteva Brief p. 22-23.

[3] For the first time, Corteva takes issue with certain "restrictions" included in the Agreement. Corteva Brief p. 25. Corteva did not raise this issue before the Superior Court and may not do so for the first time on appeal. Del. Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review[.]"); *Protech Minerals, Inc. v. Dugout Team, LLC*, 284 A.3d 369, 378-79 (Del. 2022) (declining to consider a contract argument raised for the first time on appeal). Even if Corteva had properly preserved the issue, Corteva mentions the "restrictions" only in passing and does not ask the Court to conclude they are illegal, invalid, or unenforceable. If the Court did come to such a conclusion, the Agreement provides that the parties shall negotiate substitute provisions. A76, § 11.02. The Agreement does not say a Court should read and apply other provisions differently (for example, the royalty provision or the Term provision) in light of an allegedly offending provision. It says the opposite: "[redacted]." *Id.* The "restrictions" say nothing about when Corteva's royalty obligations end.

Corteva misunderstands the issue. Continuing royalties after U.S. patent expiration does not extend Bayer's U.S. patent monopoly because it does not implicate U.S. patent law in the first place. Corteva agreed to pay royalties on U.S. sales for a license to all of Bayer's patent and non-patent rights across the world. Its current payment of royalties on U.S. sales, therefore, is for the continued right to use the **Brazilian** patent and other non-patent rights, not the expired U.S. patent. *See Nautilus*, 304 F. Supp. 3d at 568 ("[T]he Court's conclusion that ICON must pay royalties on the sales of the disputed products does not violate the patent-misuse doctrine even though those products were sold in the U.S. after the U.S. patent expired. The disputed products were covered by the Chinese patent, and that is enough."). Corteva's contract obligations to pay royalties on the Brazilian patent also do not change the fact that new entrants may practice the expired U.S. patent without license from Bayer.

Brulotte does not speak to royalties paid for the use of non-U.S. patents because it "has no self-executing international effect." *Zila*, 502 F.3d at 1023-24 (explaining the holding's "dispositive effect on state contract law is a consequence of the Supremacy Clause"); *Nautilus, Inc.*, 304 F. Supp. 3d at 568 ("Texas contract law is fully competent to dispose of the rights and obligations owing under the contract as it pertains to the Chinese patent. *Brulotte* has nothing to say on the matter.”). *Brulotte* “only displaces state contract law with respect to royalty obligations related to federally-bestowed patent rights.” *Zila*, 502 F.3d at 1024.

Because *Brulotte* does not speak to foreign patents, it does not prevent parties from contracting for royalties under foreign patents even where the royalty base includes sales made in the U.S. *See Zila*, 502 F.3d at 1024 n.7 (“*Brulotte* derives only from federal Supremacy Clause principles and does not otherwise impair agreements to pay royalties in exchange for the assignment of an invention.”). Nothing in *Brulotte*, for example, prevented Bayer and Corteva from agreeing in 2002 that Corteva would pay royalties based in part on U.S. sales for a license to use the Brazilian patent until it expired in 2028 or even after 2028. *See id*. at 1024 (explaining that *Brulotte* “neither renders the entire 1980 Agreement unenforceable nor displaces Zila’s obligation to pay royalties on the valid Canadian patent”). That is what remains of the Agreement today.

The Agreement satisfies the *Brulotte* exception that royalties may continue until the last patent expires. The U.S. Supreme Court did not require that the last-to-expire patent be a U.S. patent. And in any event, *Brulotte* has no effect on an agreement to pay royalties for a foreign patent.

c. It Does Not Matter Whether Corteva Uses the Brazilian Patent.

Corteva argues it matters that the Superior Court did not find that U.S. sales "are subject to or otherwise covered by the Brazilian patent." Corteva Brief p. 23. As already discussed in the preceding section, *Brulotte* does not bear on whether and how parties may pay royalties for foreign patents.

Setting that aside, U.S. Supreme Court precedent establishes that parties can agree to pay royalties on sales that do not use the licensed patent. In *Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950), the licensee took a nonexclusive license to a portfolio of patents and applications related to radio broadcasting. 339 U.S. at 829. In exchange, the licensee agreed to pay "a small percentage of [the] selling price of [its] complete radio broadcasting receivers," regardless of whether those receivers used any of the patents. *Id*. at 829-30. The Court found that where "use of patents" was licensed, it was "not per se a misuse of patents to measure the consideration by a percentage of the licensee's sales," even where the sales included products not necessarily using the patents. *Id*. at 834.

In the *Brulotte* decision, the Court distinguished *Automatic Radio* because in *Brulotte* there were no unexpired patents that could be used by the licensees. While one unexpired patent remained, it "was not incorporated" into the machine that the patent owner sold to the farmer licensees. *See Brulotte*, 379 U.S. at 30 n.2. As a result, the licensees had no ability to use the unexpired patent. The *Brulotte* Court contrasted these facts with *Automatic Radio*. There, the licensee acquired a patent portfolio license for its use in manufacturing radio broadcasting receivers. *See* 339 U.S. at 829. The royalty in *Automatic Radio* could continue because, although some of the patents had expired, the "royalties claimed were not for a period when **all of them** had expired." *Brulotte*, 379 U.S. at 33 (emphasis added). The Supreme Court explained it was a "convenient and reasonable device" to calculate royalties based on the licensee's sales even when not all of the patents were used. *Id*.

Then in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 136-39 (1969), the U.S. Supreme Court again confirmed that *Brulotte* and *Automatic Radio* are consistent. The Supreme Court reasoned it was not problematic for a license provision to measure royalties "by the licensee's total sales even if, as things work out, only some or none of the merchandise employs the patented idea or process, or even if it was foreseeable that some undetermined portion would not contain the invention." *Id*. at 138.

The U.S. Supreme Court's *Zenith* and *Automatic Radio* reasoning applies here. The Agreement sets forth a "convenient method" for determining royalties for a license to a portfolio of worldwide patents, including a still unexpired Brazilian patent. *See Zenith*, 395 U.S. at 137. Corteva has the ability (including to the present day) to use that Brazilian patent—just like the licensee in *Automatic Radio* had the ability to use unexpired patents (and unlike the licensees in *Brulotte*). It does not matter to the analysis whether Corteva actually uses or used its worldwide patent rights. It does not matter whether Corteva uses the Brazilian patent in connection with its U.S. sales.

What Corteva acquired in the Agreement was "the privilege to use any or all of the patents . . . as it desired to use them." *See Automatic Radio Mfg.*, 339 U.S. at 834. Even if Corteva "chooses to use none of them," it "nevertheless contracted to pay for the privilege." *See id.* The extent to which Corteva takes advantage of its worldwide rights can change at any time through 2028. This is entirely within Corteva's control and a privilege it has under the Agreement, as Corteva itself acknowledges. A1053, 57:6-18. That is, Corteva has the "absolute right" to grow NK603 seed in Brazil, and then import that very same seed into the United States for sale here. *Id.* (Corteva's counsel acknowledging to the Superior Court that Corteva has [redacted] as Corteva wants and to [redacted]).

d. <u>The Other Cases Corteva Cites Do Not Consider the Arguments Raised by Bayer in this Case.</u>

Corteva relies on cases outside Delaware and federal cases outside the Third Circuit in its attempt to establish that the Superior Court erred. Corteva Brief pp. 26-28. Those cases did not bind the Superior Court and do not bind this Court. And those cases did not consider arguments similar to the arguments raised by Bayer in this case.

In *Meehan v. PPG Industries*, 802 F.2d 881 (7th Cir. 1986), the licensee stopped making payments on sales of the licensor's invention after the U.S. patent expired even though there was an unexpired Canadian patent (as well as an expired U.K. patent). The licensor argued, among other things, that because (1) the agreement was solely for a trade secret rather than a patent right, (2) the agreement was an installment method of paying the full contract price of the trade secret, and (3) there was no patent at the time the contract was entered into, *Brulotte* should not apply. *Id*. at 884-85. The Seventh Circuit rejected each argument in turn—none of which are the arguments raised here by Bayer. The Seventh Circuit did not consider or address whether royalties could continue based on the unexpired Canadian patent. *Id*. Its opinion is also silent as to whether the licensee had the right to import the invention from Canada into the United States (as Corteva can import from Brazil here), or vice versa.

In *Scheiber v. Dolby Laboratories, Inc.*, 293 F.3d 1014 (7th Cir. 2002), the agreement at issue covered both U.S. and Canadian patents. The parties agreed the licensee would pay royalties until the later Canadian patent expired. *Id*. at 1016. After the U.S. patent expired, the licensee refused to pay royalties on it, citing *Brulotte* to argue that a patent owner cannot enforce a contract requiring royalty payments beyond a patent's expiration. *Id*. at 1017. In response, the licensor contended the Seventh Circuit could disregard *Brulotte* because (1) a 1988 amendment to the patent statute superseded *Brulotte*, and (2) the licensor entered the agreement with unclean hands. *Id*. at 1019-22. Notably, the licensor does not appear to have raised, nor did the Seventh Circuit address, an argument that royalties could continue because they were tied to the still-valid Canadian patent. There is also no discussion of whether products could be imported between Canada and the U.S. After considering the arguments the licensor did raise, the Seventh Circuit concluded the agreement was unenforceable after expiration of the U.S. patent. *Id*. at 1022-23.

Similarly, in *Zila, Inc. v. Tinnell*, 502 F.3d 1014 (9th Cir. 2007), the agreement at issue required royalties to continue "in perpetuity." The licensee, however, discontinued royalty payments following expiration of the U.S. patent even though the agreement also covered an unexpired Canadian patent. *Id*. at 1018. The district court held the agreement was unenforceable. *Id*. at 1016. The Ninth Circuit disagreed on appeal. It held that *Brulotte* has no effect on foreign patents, meaning it neither rendered the entire agreement unenforceable nor displaced the obligation to pay royalties on the Canadian patent. *Id*. at 1024. The Ninth Circuit also concluded royalties could continue on U.S. sales until the last U.S. patent expired but remanded for the district court to resolve a disputed fact issue about whether a U.S. patent was included in the scope of the royalty provision. *Id*. at 1026-27.

As in *Scheiber*, the *Zila* licensor does not appear to have raised, nor did the Ninth Circuit address, an argument that royalties could continue on U.S. sales until the Canadian patent expired. The *Zila* agreement did not accommodate such a scenario. It said royalties would continue in perpetuity. It did not end royalties with the last patent to expire, as the Agreement in this case does. Likewise, the Ninth Circuit's opinion says nothing about whether the product at issue could be imported from Canada to the United Sales, and thus there is no discussion on whether the U.S. sales might require use of Canadian patent rights.[4]

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[4] Corteva cites to *C.R. Bard, Inc. v. Atrium Medical Corp.*, 112 F.4th 1182 (9th Cir. 2024), as affirming the *Zila* decision. *See* Corteva Br. at 4, 23. *C.R. Bard* involved U.S. and Canadian patents, but the parties there specifically contracted for a royalty on "covered U.S. sales until the U.S. patent expired in 2019" and a royalty on "covered Canadian sales until the Canadian patent expired in 2024." 112 F.4th at

Finally, Corteva relies on *Amplatz v. AGA Medical Corp.*, 2012 Minn. Dist. LEXIS 200 (Minn. Dist. Ct. May 21, 2012). The agreement in that case involved a U.S. patent, a European patent application, and certain "U.S. or foreign patents which may issue." *Id.* at *6-7. But the opinion makes no mention of whether European or foreign patents ever issued. When the licensee sought to avoid making royalty payments based on *Brulotte*, the licensor argued that the U.S. patent's expiration might preclude royalties on U.S. sales but did not preclude royalties based on foreign sales. *Id*. at *40-42. Appearing to agree, the court limited its holding to "sales made in the United States," meaning royalties on sales made in foreign countries could continue even if based on the expired U.S. patent. *Id*. at *42. As with the preceding cases, the licensor does not appear to have raised, nor did the court address, an argument that royalties could continue on U.S. sales until a foreign patent expired.

None of the foregoing decisions bind this Court. And none of the foregoing decisions addressed the arguments presented to the Court in this case. The U.S. Supreme Court has said royalties may continue until the latest-running patent

1187. The case does not address whether parties may agree to the payment of royalties on U.S. sales until the last-to-expire of U.S. and Canadian patents.

expires. *Kimble*, 576 U.S. at 454. The U.S. Supreme Court did not limit its holding to unexpired U.S. patents.

The Court's task is not to "expand *Brulotte*'s holding beyond its terms." *Zila*, 502 F.3d at 1020. The Court should "endeavor to give effect to the intent of the parties and the bargain that they struck." *Id*. The parties struck a bargain for royalties to continue until the last patent expires, which is the Brazilian patent in 2028.[5]

2. Corteva Must Continue Making Royalty Payments on U.S. Sales because the Payments are Tied to Non-Patent Rights.

The U.S. Supreme Court said in *Kimble* that royalties are permissible post patent expiration if they are tied to a non-patent right, even if closely related to a patent. 576 U.S. at 454. The Agreement's royalty provision meets that exception because it ties royalties to Biological Materials and Know-How.

a. <u>The Agreement Ties Royalties to More than Just Patent Rights.</u>

The Agreement's Section 1.05 explains that Corteva sought a "[redacted]" to Bayer's rights in order to further Corteva's interest in commercializing

[5] Corteva notes that it "does not challenge the country-specific royalties owed in Brazil where Bayer has its only unexpired patent." Corteva Brief at p. 28 n.4. In fact, Corteva did not challenge the royalties that it owes on sales in Brazil or any non-U.S. country, such as Canada or Argentina. The Complaint limits the challenge solely to "U.S. royalties." *See*, *e.g.*, A31, A53. Corteva's complaint recognizes, as explained above, that *Brulotte* does not apply to non-U.S. patents or sales.

corn tolerant to glyphosate herbicide. A490. Section 1.03 identifies that Bayer's rights include "[redacted]" *Id.* Then, Section 3.01 states that Corteva was granted a license to "[redacted]" A493. The license was granted "[redacted]" in the Agreement, including "[redacted]" A490, § 1.05. So Corteva agreed to pay a royalty for more than just Bayer's patent rights, including those listed in Sections 1.03 and 3.01. *Id.*

It is clear why Corteva sought a license for more than just patent rights. Patents simply grant a patent owner the right to exclude others from practicing the patented invention. *See Clouding IP, LLC v. Google Inc.*, 61 F. Supp. 3d 421, 429 n.6 (D. Del. 2014) ("The core exclusionary right of a patent is the negative right of a 'patentee' to 'exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States.'"); *Uniloc USA, Inc. v. Motorola Mobility, LLC*, 2020 WL 7771219, *2 (D. Del. Dec. 30, 2020) ("The right that comes with a patent is the right to exclude others from making, using, offering for sale, and selling an invention."). For this reason, courts recognize that a patent license is essentially a covenant not to sue. *See Novozymes A/S v. Genencor Int'l, Inc.*, 474 F. Supp. 2d 592, 602 (D. Del. 2007) (explaining that a nonexclusive patent license "may amount to no more" than a covenant not to sue); *In re Spansion Inc.*, 2011 WL 3268084, at *7 (D. Del. July 28, 2011) ("The Federal Circuit has 'on numerous occasions explained that a non-exclusive patent license is equivalent to a covenant not to sue.'"). While a patent protects the licensee from infringement claims, it is ultimately up to the licensee to actually develop the technology or product described in the patent.

A mere patent license was not what Corteva desired, however, as the Agreement makes clear. Rather, to further Corteva's interest in commercializing corn tolerant to glyphosate herbicide (as identified in Section 1.05), Corteva desired, and Bayer provided, not just the right to practice Bayer's patents, but also the enabling technology to physically develop and rapidly commercialize Corteva's own seed lines with the addition of the NK603 gene via the Biological Material and Know-How. A493, § 3.01. The Biological Material that Bayer provided to Corteva included Bayer's physical seed, *i.e.*, [redacted] with the NK603 gene (A636-38)—seed which Corteva could then use to introgress or incorporate the gene into its own corn lines. The Know-How Bayer provided included standard operating procedures that set forth how to quickly validate successful introgression of the desired glyphosate resistant trait. A636-48. In exchange, Corteva agreed to pay a royalty.

Attempting to discount the value of the Biological Materials and Know-How Bayer provided, Corteva says that after the U.S. patent expired, "no intellectual property rights were needed or used by Corteva." Corteva Brief pp. 29-30. First, the *Kimble* exception does not require that royalties be tied to other intellectual property rights. It requires only that they be tied to "non-patent right[s]."[6] *Kimble*, 576 U.S. at 454 ("[P]ost-expiration royalties are allowable so long as tied to a **non-patent right—even when closely related to a patent**." (emphasis added)). Corteva does not dispute that the Biological Materials (*i.e.*, physical corn seeds) and Know-How are non-patent rights.[7] Whether Corteva still needs the tools and materials two decades after Bayer provided them is beside the point.

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[6] It thus does not matter whether 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." Corteva Brief p. 30. Additionally, Bayer's expert is not a legal expert, so she cannot offer a legal opinion. *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2015 WL 5818071, at *2 (Del. Super. Ct. Aug. 4, 2015) ("Delaware case precedent in the last decade has clarified that expert witnesses are prohibited from providing legal opinions. An expert witness' legal interpretation of documents defining the parties' legal obligations is of no value to the court." (internal quotation marks omitted)).

[7] To the extent Corteva argues that Bayer did **not** provide it with Biological Materials and Know-How (a fact that it did not dispute during the summary judgment briefing before the Superior Court), that would be a breach of contract theory and would not be relevant to whether the Agreement ties the royalty to the Biological Materials and Know-How.

Corteva says in passing that the Biological Materials and Know-How are "encompassed by [Bayer's] patents." Corteva Brief p. 30. Corteva appears to suggest that it does not need to continue paying for the Biological Materials and Know-How because they were disclosed in Bayer's patent, so there are no remaining "intellectual property rights" and the value of the license must be zero. *Id*. Assuming Corteva is correct, that fact does not defeat Corteva's express obligation under the Agreement to pay royalties for the Know-How and Biological Materials. *See Aronson*, 440 U.S. at 266 (explaining that state law allows royalties to continue on trade secrets even after they are generally disclosed and holding that "[f]ederal patent law is not a barrier to such a contract"); *Luv N' Care, Ltd. v. Groupo Rimar*, 844 F.3d 442, 447 (5th Cir. 2016) (rejecting the district court's holding, which imposed "an extra-contractual requirement" that the "product-related information already be protected by some other legal right in order to receive protection under the contract" and explaining that parties can create contract obligations for product designs even if they are in the public domain).

Corteva's argument is akin to asserting that it is unlawful to charge for materials no longer protected by "intellectual property rights." But bookstores are still allowed to sell copies of Shakespeare, and consumers cannot steal aspirin from their local pharmacy.

Second, it does not matter whether Corteva needed or used the Biological Materials or Know-How after the U.S. patent expired. *Brulotte* speaks to royalties paid for patents, not other rights. Indeed, that is the point of the *Kimble* exception that royalties may continue if tied to rights other than patent rights. And nothing in Delaware law prevents a party from contracting to pay for a right after they no longer use it or even if they never use it. For example, there is no reason why Mary could not agree to pay Paul $100 a month for 2 years to use a printer that she never uses or uses for only the first two months.

Corteva's arguments ultimately amount to complaints about the value of the consideration Corteva bargained for. Corteva has not argued the Agreement fails due to insufficient consideration. Even had Corteva raised the argument, Delaware courts do not consider whether consideration is fair or adequate. *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 764 (Del. 2022) ("[W]e limit our inquiry into consideration to its existence and not whether it is fair or adequate."); *Glaxo Grp. Ltd.*, 248 A.3d at 919 ("Even if the bargain they strike ends up a bad deal for one or both parties, the court's role is to enforce the agreement as written."). And whether the consideration is sufficient certainly plays no part in the *Brulotte* analysis.

b. <u>The U.S. Supreme Court Has Not Required that Royalties Step Down After Patent Expiration.</u>

Despite that the royalty is paid in exchange for far more than just patent rights, Corteva argues the Agreement does not meet the *Kimble* exception because the royalty does not "step down," with a lower royalty amount tied to non-patent rights. Corteva Brief, p. 21. *Kimble* does not dictate such an inflexible result. The decisions cited to the contrary by Corteva are at odds with *Kimble*'s later-in-time recognition that parties can creatively work around *Brulotte*. *See Meehan*, 802 F.2d at 886 ("[T]here must be some provision that distinguishes between patent royalties and trade secret royalties."); *Pitney-Bowes, Inc. v. Mestre*, 517 F. Supp. 52, 63 (S.D. Fla. 1981) (noting the royalty did not differentiate between the trade secrets and the patent).

The Ninth Circuit explained in *Kimble* that a license for patent and non-patent rights that extends beyond the patent term will often include a discount for the non-patent rights post patent expiration. *Kimble v. Marvel Enters. Inc.*, 727 F.3d 856, 863, 865 (9th Cir. 2013). Corteva says the Ninth Circuit "makes it clear" that such a step down is "mandatory." Corteva Brief pp. 32-33. Not so. The Ninth Circuit explained that the step down requirement should not be applied "inflexibly." *Id*. at 865. It specifically recognized that "a discounted rate may not be necessary to avoid *Brulotte* in every case." *Id*. The Ninth Circuit counseled that where there is no discounted rate, there should be a clear indication that the royalty was not subject to patent leverage. *Id*.

On appeal, the U.S. Supreme Court agreed that parties may continue post-expiration royalties when tied to non-patent rights. 576 U.S. at 454. The Court identified an "example" of a way parties might meet the exception. *Id*. It said parties could structure a license to set a 5% royalty for a patent and trade secret and a 4% royalty for after the patent expired. *Id*. While the Court provided the example, it did not **require** that parties use the example structure—what has been called a "step down"—to meet the exception. Nor did the U.S. Supreme Court require that agreements explicitly distinguish between patent royalties and non-patent royalties to meet the exception. Its opinion was consistent with the Ninth Circuit's opinion, which said a discounted rate may not be necessary in all cases. 727 F.3d at 865.

By not requiring a step down, the Superior Court did not find that **any** hybrid agreement—an agreement involving both patent and non-patent rights—is exempt from *Brulotte*. *See* Corteva Brief p. 30. It found the hybrid Agreement in this case was exempt because the Agreement granted a worldwide license to a portfolio of both patent and non-patent rights. It is not true that all hybrid agreements will do the same. The Superior Court also based its holding on the first *Kimble* exception that royalties may continue where there is still an unexpired patent.

Neither the U.S. Supreme Court, this Court, nor any Delaware court has required a "step down" or discounted rate. And Corteva has never argued that Bayer exercised patent leverage. Nor could it. Indeed, the history of contract amendments between Bayer and Corteva—two very large, sophisticated public companies—demonstrates the opposite.

The parties amended the Agreement at least five times between 2006 and 2019. *See* A522-43. These amendments were part of complex negotiations (including the settlement of litigation) and business deals, involving not just the Agreement and NK603 patents, but numerous licenses and cross-licenses. For example, the Side Letter Agreement of 2011 (A533-37) amended **thirteen (13)** different agreements in total. This included amendments to "[redacted]"—a type of agreement for which *Brulotte*'s preemption is wholly inapplicable—as well as the Agreement at issue and [redacted]. *Id.*; *MedImmune*, 2015 WL 5783381, *9-10 (declining to extend *Brulotte* to a "collaboration agreement" in which both sides licensed patents).

Throughout all of the negotiations and re-negotiations, there is no evidence that Corteva ever sought to amend the Term of the Agreement (which requires Corteva to pay royalties until the last patent expires), despite being provided with ample opportunity to do so. And where the parties actually did amend the Royalty provision in one of the amendments (A525-28), they made no change to the Term. This is exactly the type of license, not subject to patent leverage, to which the Ninth Circuit held *Brulotte* inapplicable. The Supreme Court did not quibble with the Ninth Circuit's decision. *See Kimble*, 727 F.3d at 863-64; *see generally Kimble*, 576 U.S. 446.

The Agreement satisfies the exception that royalties may continue after patent expiration where the license ties royalties to more than just patent rights.

ARGUMENT II: The Superior Court Correctly Held that the Agreement Requires Royalty Payments to Continue Until the Last Patent Expires.

A. Question Presented

Does the Agreement require Corteva to make royalty payments on U.S. sales after November 2022? Bayer preserved this argument at A430-37, 842-52, and it was resolved by the Superior Court. Order pp. 12-19.

B. Scope of Review

Bayer agrees the Court should review *de novo* the way the Superior Court interpreted the Agreement. Corteva Brief p. 37; *Allied Cap. Corp. v. GC-Sun Holdings, LP,* 910 A.2d 1020, 1030 (Del. Ch. 2006) ("[T]he proper interpretation of language in a contract is a question of law.").

C. Merits of Argument

Corteva argues it owes no royalties on U.S. sales after November 2022 because the Agreement's royalty provision expires on a country-by-country basis. Corteva Brief p. 37. Corteva misreads the Agreement. The Agreement plainly requires Corteva to pay royalties until the last-licensed NK603 patent expires in 2028.

1. The Agreement's Plain Language Requires Corteva to Pay U.S. Royalties through 2028.

The Term of the Agreement "[redacted]." A504, § 9.01.

Nowhere does the Agreement provide any end date for any provision other than that found in Section 9.01. *See* A548-50, A552. Nowhere does the Agreement use the phrase "country-by-country." Just the opposite—the Agreement provides a **worldwide** license. A492, § 2.22; A493 § 3.01; A502-03, § 7.06 (referencing "[redacted]").

The provision upon which Corteva relies to support its country-specific reading relates solely to calculating the royalty owed to Bayer. A498, § 4.01; A525-26 (modifying § 4.01). Corteva argues Section 4.01 is a "country-by-country" royalty because the resulting calculation varies in each country. But the provision does not speak to when Corteva's royalty payment obligation **ends**. Section 4.01 may include a royalty calculation that results in a different royalty amount in each country, but it does not include a country-by-country termination of that royalty.

Corteva nevertheless characterizes the Section 4.01 royalties as "patent royalties" that an ordinary person would understand to expire or drop to $0 when the patent expires. Corteva Brief p. 38. As already explained, the Agreement ties the royalty to more than just the NK603 patent rights. The Superior Court correctly highlighted that Corteva's non-patent rights "continue past any country-specific patent's expiration, so it follows that Corteva's royalty obligations would extend past expiration as well." Order p. 17.

And Corteva is incorrect in its assumption that a license royalty drops to zero upon patent expiration. When the U.S. patent related to NK603 expired in the United States, the industry standard royalty did not drop to $0. Bayer's licensees (other than Corteva, who only pays $[redacted]) still pay $[redacted] per Unit. A455, ¶ 15.

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. *See Pittsburgh Mailers Union Loc. 22 v. PG Publ'g Co.*, 30 F.4th 184, 188 (3d Cir. 2022) ("According to [ordinary contract] principles, if a specific provision does not have its own durational clause, the general durational clause of the [agreement] applies.") (relying on *CNH Indus. N.V. v. Reese*, 583 U.S. 133 (2018)); *see also Washtenaw Cnty. Parks & Recreation Comm'n v. Vortex Aquatic Structures Int'l, Inc.*, 2022 WL 726946, at *3 (Mich. Ct. App. Mar. 10, 2022) ("[I]f a specific provision in a contract does not include an end date or duration, then the contract's general durational term applies to that specific provision.").[8] Here, the Royalty provision does not state otherwise, so the

[8] While these cases do not involve contracts for patent rights and other related rights, this factual distinction does not undercut the rule that a contract's general durational term ordinarily applies to all contract provisions in the absence of a more specific, contrary term. That these cases involved the question of whether certain provisions were enforceable after the contract's termination date rather than whether certain

Agreement's general Term provision applies to Corteva's royalty obligation. A498, § 4.01; A525-26.

Additionally, the Agreement obligates Corteva to pay royalties "[redacted]" not "per Unit that infringes a still unexpired patent." A498, § 4.01; A492, § 2.24; A492, § 2.15 (defining "[redacted]"). Section 2.21 likewise defines "Royalty" as "[redacted]." A492. The Agreement thus makes clear that Corteva's royalty payment obligations continue for the Term of the Agreement, which continues until 2028.

2. It Makes Sense that Corteva Agreed to Pay Royalties through 2028.

It was objectively reasonable for Corteva to agree to pay royalties through 2028. *See Waters v. Del. Moving and Storage, Inc.*, 300 A.3d 1, 20-21 (Del. Super. Ct. 2023) ("[A] contract's construction should be that which would be understood by an objective, reasonable third party."). A worldwide license agreement provided significant commercial benefit to Corteva because it made Corteva's worldwide agricultural business operations much easier. Crops like corn are grown, imported,

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obligations ended prior to the termination date also does not undermine this ordinary contract principle.

and exported across the globe. A455, ¶ 5; A474, ¶ 34. The Agreement provided that Corteva (and by implication its farmer customers) would benefit from the worldwide regulatory approvals sought by Bayer, which cost millions of dollars and require significant time and energy to secure. A501, § 6.01; A557.

Corteva could not sell seed containing NK603 in a country without regulatory approval secured by Bayer nor could Corteva's farmer customers sell grain grown from Corteva's corn lines without these regulatory approvals paid for and secured by Bayer. A555-56; A559. A worldwide license allows Corteva to seamlessly grow or breed seed in one country yet export to and sell seed in another country. The Agreement makes it so Corteva does not need to separately pay for rights in every country that its corn lines containing NK603 touch.

The Agreement also grants Corteva the worldwide license at a steep discount. It says Corteva will pay [redacted]. A525-26 (modifying § 4.01). So Bayer and Corteva agreed that Corteva would receive a [redacted] discount at a minimum. And since licensees now pay $[redacted] while Corteva is obligated to pay only $[redacted], Corteva receives a [redacted] discount. A525-26; A455, ¶ 15.

Finally, Bayer granted Corteva the right to use Bayer's trademarks "[redacted]," A512, ¶ 1, a bargain that common sense suggests Bayer might not have been willing to make but for Corteva's agreement to pay a royalty until the last patent in the world expired.

For all these reasons, it makes objective sense that Corteva agreed to pay royalties worldwide even after some patents expired.

Corteva attempts to support its argument to the contrary by pointing to Bayer's Technology Stewardship Agreements ("TSAs") with individual growers. Corteva Brief p. 40. Corteva says it would be illogical and inconsistent for Bayer to issue country-by-country licenses to individual customers while reaching an agreement with Corteva for Corteva to pay royalties until the last patent in the world expires. Corteva Brief p. 40.

Bayer's TSAs with individual growers have no bearing on interpreting the Agreement, which is between only Bayer and Corteva. Corteva is a sophisticated, international company. Corteva's license agreement with Bayer will necessarily involve economic and commercial considerations different from those at play in Bayer's license agreements with individual growers (who typically reside and farm in a single country). There is no reason to look to the 2022 TSA upon which Corteva relies to interpret the 2002 Agreement. There is nothing "illogical" or "highly inconsistent" about Bayer negotiating different terms with differently situated parties.

Regardless, Corteva's characterizations of the TSAs are not even accurate. Corteva describes the TSA as a "country-by-country license and notes that farmer customers are prohibited from exporting seeding outside the country of purchase. Corteva Brief at p. 40 (citing A933, § 1.e). It ignores, however, that farmers are allowed to sell their grain (*i.e.*, the "crops or material produced" from seed) to "grain handlers and/or markets" for subsequent "export" to countries with regulatory approval. A933, § 1.n. Farmers growing NK603 corn in the United States benefit from not only U.S. patents (and other non-patent rights) but also from patents in foreign countries (including Brazil) to which their grain can be exported.

Corteva also argues that Bayer's reading is not plausible because it is contrary to federal patent policy, and only Corteva's interpretation of the Agreement accounts for federal patent law considerations. Corteva Brief p. 40. Corteva conflates its contract claim with its claim that the Agreement violates *Brulotte*.

The Court must interpret the Agreement's royalty obligations under Delaware law before determining whether those obligations violate federal patent law. *See C.R. Bard, Inc.*, 112 F.4th at 1186 ("A court must first use the familiar state law tools of contract interpretation to determine the parties' contractual obligations. . . . Then, the court must separately ask whether those contractual obligations are permissible under *Brulotte*."). The Court should not interpret the Agreement contrary to its plain language to avoid a *Brulotte* issue. Doing so would impermissibly collapse Corteva's two arguments into a single claim. *Brulotte* is a doctrine of preemption, mandating that certain contracts be found unenforceable under federal law despite being enforceable under state law. *Brulotte* is not a doctrine of contract interpretation. *See C.R. Bard*, 112 F.4th at 1186. For the reasons already explained, interpreting the Agreement as written does not violate *Brulotte*.

3. The Superior Court Did Not Err in Its Analysis.

The Superior Court held that Corteva's suggested interpretation of the Agreement "runs afoul" of its "overall scheme for a worldwide license agreement that continues in full until the last patent expiration date." Order p. 18. To support that conclusion, the Superior Court observed that the 2002 version of the Agreement specifically referenced "the United States," "Canada," and "other countries of the Territory" and included specified rates for each. Order pp. 15-16. It then noted that in 2007, the provision was amended to remove "the references to different countries at different specified rates." Order p. 16. Based on the change, the Superior Court reasoned that the parties set a single percentage rate calculation for the whole world, removing "the possibility of treating patent expiration on a country-by-country basis." Order p. 16.

Corteva complains the Superior Court misread the 2007 Amendment because the 2007 Amendment calculates royalties based on each country's unique industry-standard royalty rate, resulting in a country-by-country royalty rate. Corteva Brief pp. 41-43. But the Superior Court addressed Corteva's argument that the royalty rate varies from country to country even under the 2007 Amendment. Order p. 17 n.77. It explained: "[W]hat matters here is the calculation, not the result. 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." Order p. 17 n.77. The Agreement includes one method for calculating the royalty in each country, indicating the countries should be considered together rather than separately and rebutting that the royalty obligation ends on a country-by-country basis.

Finally, Corteva takes issue with the Superior Court's conclusion that the sophisticated parties in this case were more than capable of drafting specific language to end royalties on a country-by-country basis and would have done so if that is what the parties intended. Order p. 18. Corteva argues that sophisticated parties would have known the *Brulotte* rule, so they would have "spell[ed] out their departure from what was held to be unlawful practice." Corteva Brief p. 44. That is exactly what the parties did in the Agreement. They tied the royalty to a worldwide portfolio of rights that included more than just patent rights, and they ended the royalty with the last patent to expire. The parties made clear they were not engaging in an unlawful practice at all.

The Superior Court correctly interpreted the Agreement as written, concluding that the Agreement requires Corteva to pay royalties until the last patent expires and that Section 4.01 does not indicate otherwise. This Court should affirm the Superior Court's decision.

CONCLUSION

For all these reasons, the Court should affirm the Superior Court's grant of Bayer's motion for summary judgment and denial of Corteva's motion for summary judgment.

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