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

CORRECTED APPELLANTS' REPLY BRIEF

Dated: January 22, 2025
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Chad S.C. Stover (No. 4919)
BARNES & THORNBURG LLP
222 Delaware Avenue, Suite 1200
Wilmington, Delaware 19801-1050
Telephone: (302) 300-3474
E-mail: chad.stover@btlaw.com

Craig A. Thompson
VENABLE LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21202
Telephone: (410) 244-7605
Facsimile: (410) 244-7742
CAThompson@venable.com

Frank C. Cimino, Jr.
Charles J. Monterio, Jr.
Eric T. Harmon
VENABLE LLP
600 Massachusetts Avenue, NW
Washington, D.C. 20001
Telephone: (202) 344-4569
Facsimile: (202) 344-8300
FCCimino@venable.com
CJMonterio@venable.com
ETHarmon@venable.com

Attorneys for Appellants/Plaintiffs-Below

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OVERVIEW

Bayer's[1] Brief ("Bayer Br.") advocates for an extreme and novel diminution of *Brulotte*. Without any supporting precedent, Bayer insists that the *Brulotte-Kimble* rule that U.S. patent monopolies must cease when the last U.S. patent supporting the monopoly expires does not apply to a "worldwide" patent license, such that an unexpired Brazilian patent may require continuing royalties on U.S. sales, even though all U.S. patents expired. According to Bayer, this is a simple matter of freedom of contract. But *Brulotte* and *Kimble* hold that contracts for post-expiration patent royalties must yield to the fundamental principle that patent monopolies cannot extend past the term established by Congress. Bayer's objective is clear: to extend its U.S patent monopoly beyond the statutory limit, based upon a *foreign* patent. If Bayer's position prevails, it would effectively surrender control over the duration of U.S. patent monopolies to foreign patent laws. This objective is antithetical to settled U.S. patent law, as twice affirmed by the U.S. Supreme Court. Bayer presents no countering principle, consistent with both *Brulotte*'s anti-monopoly concerns and the territorial nature of patents, to justify surrendering *Brulotte-Kimble*'s bright-line enforcement of the limited life of U.S. patents to the leverage of patentholders hoping to evade those limits through foreign patent laws.

[1] For convenience, Corteva uses the same shorthand references in its opening brief.

Bayer's alternative argument that the Agreement covers non-patent rights fares no better. Both *Brulotte* and *Kimble* emphasize that a "hybrid" agreement is enforceable *only* if it shows that post-expiration royalties are paying for non-patent rights and not for continuation of the patent monopoly. Bayer does not, and cannot, dispute that Corteva's royalties did not change post-expiration, and it fails to identify any evidence, intrinsic or extrinsic, that these unchanged royalties are no longer paying for expired patent rights. *Brulotte* squarely rejects continued royalty payments post-expiration absent a clear intent to compensate for non-patent rights.

Finally, Bayer's contractual argument also lacks factual support. The Agreement is straightforward: royalties for rights. Corteva is simply seeking to enforce the agreement as written, not trying to alter the deal after-the-fact. The Agreement provides for royalties to be assessed on a country-by-country basis, which is exactly what Corteva seeks here. Bayer, by contrast, is charging royalties in this country even after admitting it no longer has rights here. Once all U.S. patents expired, no further U.S. rights existed for which Corteva needed to pay, and none that could support a U.S. [redacted] royalty determined by Bayer. No patent rights, no intellectual property rights, no other rights whatsoever. All third parties, including competitors, may use the invention for any purpose in the United States without payment and without any restrictions.

It is undisputed that Bayer sets separate country-by-country royalty rates each year based on the value Bayer assigns to NK603. Bayer has no reasonable explanation why Corteva would seek a country-by-country royalty structure in the license but then agree to continue to pay Bayer on U.S. sales years after Bayer's U.S. rights expired due solely to an anomalous later expiration of a Brazilian patent.

On both grounds, therefore, Bayer fails to justify the Superior Court's erroneous rulings. The decision below should be reversed and the case remanded for entry of summary judgment for Corteva.

ARGUMENT

I. Bayer's Claimed Exception to *Brulotte-Kimble* for "Worldwide" Licenses Does Not Exist, and the "Hybrid" Agreement Exception Plainly Does Not Apply.

A. Bayer Seeks to Invent, Rather than Apply, an Exception to *Brulotte.*

According to the Supreme Court itself, the *Brulotte* rule should be "simplicity itself to apply." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 458 (2015). Bayer admits that, generally under this rule, "parties may not require payment of royalties after all the U.S. patents have expired." (Bayer Br. 5, citing *Brulotte v. Thys Co.*, 379 U.S. 29 (1964)). Nevertheless, Bayer insists that *Brulotte* does not apply to worldwide licenses involving an unexpired foreign patent. Quoting *Kimble*, Bayer posits that "royalties may run until the latest-running patent covered in the parties' agreement expires," whether that patent is foreign or domestic. (Bayer Br. 15, citing *Kimble*, 576 U.S. at 454). If Bayer's proposed exception were adopted by the courts, the exception would swallow the rule: patentholders could merely demand "worldwide" scope in their licensing agreements, and, so long as a foreign patent outlives the U.S. patents, *Brulotte* would vanish. *Brulotte*'s core purpose—enforcing the strict statutory time limits set by Congress to allow time-limited U.S. patent monopolies in the U.S. market—would be defeated by operation of a non-U.S. patent. Tellingly, Bayer does not cite any authority, nary a court decision nor any academic literature in the decades spanning *Brulotte* to *Kimble* to the present, that recognizes or advocates for a foreign-patent loophole that would effectively negate *Brulotte*.

Bayer's sole justification is the unremarkable fact that U.S. patent law, including *Brulotte*, does not apply extraterritorially to foreign patent rights. *See* Bayer Br. 4 ("Permitting royalties to continue based on a foreign patent does not extend a U.S. patent monopoly."); *id.* at 20 ("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."). Bayer is wrong: U.S. patent laws generally, and *Brulotte* specifically, apply to royalty agreements that include foreign patents, especially contracts governed by domestic (here, Delaware) law, even if they do not control the foreign patents themselves. *See Adm'rs of Tulane Educ. Fund v. Debio Holding, S.A.*, 177 F. Supp. 2d 545, 549-51 (E.D. La. 2001) ("Additionally, the Court recognizes that there is apparently no case in which a court has refused to apply the *Brulotte* holding to foreign patent license agreements. In fact, to the contrary, several courts have assumed *Brulotte's* rule applied.") (citing *Forbo–Giubiasco, S.A. v. Congoleum Corp.*, 1985 WL 1827 (S.D.N.Y. June 26, 1985); *Compton v. Metal Prods., Inc.,* 453 F.2d 38 (4th Cir.1971)); *Adm'rs of Tulane Educ. Fund v. Debio Holding, S.A.*,, 2001 WL 1661891, at *2 (E.D. La. Dec. 28, 2001) (denying request to certify ruling for interlocutory appeal because ruling "did not simply conclude that *Brulotte per se* applies to foreign patents" but "rather, the Court determined that, in [that] particular case, the law of the United States, including *Brulotte*, applie[d]."). Two decades after *Tulane*, Bayer cannot cite a single case to the contrary.

When, as here, U.S. sales do not infringe the foreign patent, the royalties are not being paid for the foreign patent, but, rather, are being paid for post-expiration U.S. sales. This is especially so when those royalties are wholly unchanged from when the U.S. patents were in force and controlled those U.S. sales. None of Corteva's domestic competitors would need a license to Bayer's Brazilian patent for the domestic sales for which Bayer is attempting to charge Corteva.

Bayer's proposed exception for foreign patents fails the *Kimble* test that "[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." *Kimble*, 576 U.S. at 459. Here, where Bayer insists that the Agreement requires the *exact same royalties* to be paid by Corteva for U.S. sales of the exact same products, pre-patent-expiration as well as post-patent expiration, the answer is clear: no dice. Bayer does not allege that Corteva is using Bayer's Brazilian patent when making its U.S. sales any more than Brulotte was using the five Thys Company patents that were not incorporated into its hop-picking machine. *Brulotte*, 379 U.S. at 30. Thys Company could not expand its U.S. patent monopoly to extract royalties, nor should Bayer.

Bayer's contention that, post-expiration, the payments suddenly shifted from royalties for use of U.S. patents to *identical* royalties ostensibly for a Brazilian patent that has zero nexus to anything attributable to an [redacted] royalty for U.S. sales defies logic. If simplicity is the rubric for applying *Brulotte*, Bayer's argument conspicuously fails that test. It is a transparent end-run around *Brulotte*, seeking to preserve a U.S. patent monopoly that *Brulotte* flatly prohibits: "a projection of the patent monopoly after the patent expires is *not enforceable . . . whatever the legal device employed*." *Id.* at 31 (quoting *Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 256 (1945)) (emphasis added). Indeed, in the Superior Court, Bayer openly called for abrogation of *Brulotte*-*Kimble*, A870-71, a telling reveal of its true intent.

Bayer's lack of authority supporting its proposed exception speaks volumes. Its lone case addressing a foreign patent, *Nautilus, Inc. v. ICON Health & Fitness, Inc.*, 304 F. Supp. 3d 552 (W.D. Tex. 2018), *amended*, 2018 WL 2107729 (W.D. Tex. May 7, 2018), *aff'd*, 754 F. App'x 292 (Fed. Cir. 2019), supports Corteva. In *Nautilus*, a Chinese patent on elliptical equipment remained in effect post-expiration of U.S. patents, and patentholder Nautilus sued for royalties on U.S. sales of "Products" sold by defendant licensee ICON, which raised patent misuse per *Brulotte* as its defense. The court found no patent misuse because "unassembled component parts and assembly instructions packaged in and shipped from China" constituted a "Product" that actually "infringed" an unexpired Chinese patent held by Nautilus. *Id.* at 567. Bayer makes no comparable assertion here that making U.S. sales infringes the Brazilian patent. This distinction (Nautilus alleged infringement of a foreign patent; Bayer does not) is dispositive. Indeed, *Nautilus* rests on it, explaining that "Nautilus asserts that ICON owes it royalty payments because the products ICON sold in the U.S. were directly covered by the Chinese patent itself, not because the products were covered by the U.S. patent and then tied to the Chinese patent." *Id.* Here Bayer seeks to impose royalties by tying the Brazil patent to U.S. sales because the Brazil patent is licensed, not because U.S. sales of products infringe the Brazilian patent. If, as Bayer insists, *Brulotte* exempts foreign patents, *Nautilus* would not have needed to adjudicate infringement of the Chinese patent.[2]

The principle that unexpired foreign patents cannot support post-expiration U.S. royalties is well understood and oft-applied. In the four cases discussed in Corteva's opening brief that applied *Brulotte* notwithstanding unexpired foreign patents, no royalties were paid on U.S. sales post-expiration. *See* Corteva Br. 26-28. The principle is so well accepted that, in three of the four cases, the patentee did not even pursue royalties on U.S. sales. In each case, therefore, U.S. royalties were not owed on U.S. sales where, according to Bayer, the contract required payment. Indeed, the outcome was so clear, and Bayer's contrary argument so weak, that in

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[2] Notably, [redacted]

each case the patentholder/licensor did not even litigate this purported foreign patent "exception." Termination of the U.S. royalties was a given.

The first of these post-*Brulotte* cases, *Meehan v. PPG Indus., Inc.*, 1985 WL 1999 (N.D. Ill. July 3, 1985), *aff'd*, 802 F.2d 881 (7th Cir. 1986), illustrates well how *Brulotte* has been implemented. There, the last U.S. patent expired nearly two years before a licensed Canadian patent expired. The licensee refused to pay royalties on U.S. sales post-expiration, and the patentholder sued, claiming that "he was entitled to royalties" until "the Canadian patent expired." *See id.* at *2. The Canadian patent represented the "last running patent" in the license. The patentholder lost; the court applied *Brulotte*, ruling that "the royalty provisions . . . were unenforceable as a matter of overriding federal patent law after January 4, 1983, when the U.S. patent covering plaintiff's invention expired," *id.* at *5. The Court of Appeals for 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. Even though the facts in *Meehan* match those here, Bayer suggests this Court should ignore the precedent simply because the patentholder apparently did not raise Bayer's argument, so the Seventh Circuit did not review it. (Bayer Br. 24). The fact that the patentholder apparently did not even argue the "last running patent" issue despite having an unexpired Canadian patent speaks loudly to the argument's lack of merit.

For *Scheiber v. Dolby Lab'ys, Inc.*, 293 F.3d 1014 (7th Cir. 2002), which held that an agreement calling for the continued payment of post-expiration U.S. royalties based upon an unexpired Canadian patent was unenforceable under *Brulotte*, *id.* at 1023, Bayer argues that the Seventh Circuit did not consider its fictional foreign-patent exception. *See* Bayer Br. 24. True, but immaterial; the patentholder did not even attempt to make the argument.

Bayer similarly argues that *Zila*, which considered whether a global license agreement allowed royalties *as to Canadian sales* based on an unexpired Canadian patent after expiration of the original U.S. patent, *i.e.*, where the patentholder was *not* seeking royalties on U.S. sales, is immaterial principally because, like *Meehan* and *Scheiber*, the Ninth Circuit did not address this exact issue. (Bayer Br. 24-25). Here, too, the Ninth Circuit did not address it because the patentholder was not even seeking U.S. royalties, apparently accepting the obvious conclusion that *Brulotte* bars continued royalties for U.S. sales regardless of an unexpired foreign patent.[3] *See Zila, Inc. v. Tinnell*, 502 F.3d 1014, 1023-24 (9th Cir. 2007).

Likewise, Bayer's sole distinction of *Amplatz v. AGA Med. Corp.*, 2012 Minn. Dist. LEXIS 200 (Minn. Dist. Ct. May 21, 2012), is that the court never adjudicated

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[3] Bayer also distinguishes *Zila* on the immaterial grounds that the license agreement was perpetual and that it lacked an express clause allowing importation of foreign patented goods. *See id.* at 25. Neither point affects whether *Brulotte* applies to foreign patents and global licenses.

the issue. That fact hardly eclipses the court's express recognition that "*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." *Id.* at *42.

The only other distinction offered by Bayer (Br. 24) is that these decisions are outside of Delaware and do not bind this Court. That does not diminish their persuasive impact, especially given that federal courts are applying federal patent principles. They are entirely consistent with the recent Third Circuit decision emanating from Delaware, *Ares Trading S.A. v. Dyax Corp.*, which holds that state law conflicting with "federal policy favoring limited durations for patent monopolies" is preempted. 114 F. 4th 123, 137 (3d Cir. 2024). In *Ares Trading*, post-expiration royalties were allowed because the "obligation is not calculated based on activity requiring use of inventions covered by the [patents] after their expiration." *Id.* at 128. Here, by contrast, the royalty for U.S. sales of NK603 products necessarily is for U.S. use of the licensed invention.

Bayer's contention that the Agreement provides Corteva with valuable post-expiration U.S. rights sufficient to avoid *Brulotte* and justify continued royalties is equally meritless. Bayer asserts that its worldwide license conveyed to Corteva the right to develop and cultivate seed in Brazil and sell the seed in the U.S. without considering country-by-country implications. (Bayer Br. 16). But Bayer does not assert that the sale of U.S. products infringes the Brazil patent, as *Nautilus* required. And Bayer cannot bootstrap *Zenith Radio* and *Automatic Radio* to fill this hole, as those cases involve potential infringement of *U.S.* patents, not potential infringement of *foreign* patents. *See Automatic Radio Mfg. Co. v. Hazeltine Res., Inc.,* 339 U.S. 827 (1950); *Zenith Radio Corp. v. Hazeltine Res., Inc.*, 395 U.S. 100 (1969). Expanding *Automatic* and *Zenith Radio* to create an exception for an uninfringed foreign patent would eviscerate *Kimble*'s dictate that the *Brulotte* rule should be simplicity to apply. At bottom, patents are territorial, and Corteva's activities in Brazil are not at issue.

The evidence of Bayer's wrongful exercise of patent leverage is clear. Bayer does not dispute that, under its interpretation of the Agreement, even *after* expiration of all U.S. patents, it may control to whom in the U.S. Corteva may sell its products and how [redacted], arguing instead that Corteva did not preserve these facts below. *See* Bayer Br. 17 n.3. But Corteva did present these facts below (A893-94; A1022-23), which merely provide an additional example of why the Agreement, as interpreted by Bayer, constitutes patent misuse. *Brulotte* cites similar restrictions as clear support for its ruling. *See* 379 U.S. at 32 (noting that the license agreements "prevent assignment of the machines or their removal from Yakima County *after,* as well as before, the expiration of the patents" and that "[t]hose restrictions are apt and pertinent to protection of the patent monopoly; and their applicability to the post-expiration period is a telltale sign that the licensor was using the licenses to project its monopoly beyond the patent period") (emphasis in original). Providing an additional factual example to support an appellate argument is perfectly proper. *See Kerbs v. Cal. E. Airways, Inc.*, 90 A.2d 652, 659 (Del. 1952) ("We will not permit a litigant . . . to raise an entirely new theory of his case, but when the argument is merely an additional reason in support of a proposition urged below, there is no acceptable reason why in the interest of a speedy end to litigation the argument should not be considered. We think the point falls within the class of additional reasons supporting the plaintiffs' theory.").

At bottom, Bayer ignores the underlying policy driving *Brulotte-Kimble*: the statutory limitation of *all* U.S. patent monopolies to a fixed term of years. After that term expires, the monopoly must cease and the invention enters the public domain for all to use freely. Applying Bayer's fictional foreign-patent exception would upend the Supreme Court's declaration that *Brulotte* applies simply and irrespective of the particular "legal device employed," rendering *Brulotte* virtually toothless.

B. Bayer Does Not Identify any Non-Patent Rights that Corteva Would Receive in Exchange for the Full Claimed Royalties.

For a patent royalty contract to fall outside of the *Brulotte* rule, both *Brulotte* and *Kimble* emphasize that it must demonstrate that the post-expiration royalties are directed to a tangible right separate and apart from the expired patents. *Kimble* gave three examples of how this may occur: a stepdown agreement (providing a lower royalty rate to reflect the expiration of patent rights), deferred royalties that amortize the amount to a longer payout period, or a joint-venture agreement. *See Kimble*, 576 U.S. at 453-54. Bayer does not argue that any of these alternatives apply here, and instead, like the petitioner in *Kimble*, "[c]ontend[s] that such alternatives are not enough," *id*. at 454, such that a *theoretical* alternative purpose of the royalties will suffice.

Bayer's argument is all theory and zero facts. It does not cite any evidence, intrinsic or extrinsic, that the Agreement ties the post-expiration royalties to a non-patent right. Instead, Bayer merely contends that, because the Agreement covers non-patent intellectual property and, it speculates, other rights beyond intellectual property might exist, the post-expiration royalties are allowable because they theoretically might apply to those other purposes. This is the exact argument that *Brulotte* prohibits:

> The machines in issue here were patented articles and the royalties exacted were the same for the post-expiration period as they were for the period of the patent. . . . The sale or lease of *unpatented* machines on long-term payments based on a deferred purchase price or on use would present wholly different considerations. . . . 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 32-33 (second emphasis added, internal citation omitted). *Brulotte* expressly rejected the lower court's speculation that the royalty reflected deferred payments. *Id.* at 32. Bayer's theorizing here is no different.

Bayer's principal legal argument is that a formal "stepdown" reduction in royalty is not mandatory under *Kimble*. *See* Bayer Br. 34-35.[4] This misstates Corteva's position. To be sure, authorities have declared that a stepdown is mandatory, including the *Milgrim* treatise cited approvingly by *Kimble*, but this Court need not decide if this strict rule is correct. Bayer's position fails even under a broader standard that *either* a formal stepdown "***or*** ***some other clear indication*** that the royalty at issue was ***in no way subject to patent leverage***" is required. (Corteva Br. 33 (quoting *Kimble v. Marvel Enters., Inc.*, 727 F.3d 856, 857 (9th Cir. 2013), *aff'd*, 576 U.S. 446 (2015) (emphasis added)); *id.* at 32 n.5 (citing multiple cases applying this standard)). Given that Corteva's royalty did not change when the U.S. patents expired, nor does the Agreement provide that this same royalty somehow switched to account for non-patent rights post-patent-expiration, Bayer

[4] Bayer's assertion that the Superior Court did not rule that any hybrid agreement will avoid *Brulotte*, *see* Br. 34, is wrong. The court ruled that mere inclusion of non-patent rights in the license suffices: "Here, the Agreement granted Corteva a license to patent rights—MONSANTO Patent Rights and Licensed Patent Rights—*and* non-patent rights—Biological Materials and MONSANTO Know-How. Because the post-expiration royalties are tied to non-patent rights, they aren't precluded by *Brulotte*." (Order 24) (footnote omitted).

does not, and cannot, meet this standard. As with *Brulotte*, this is "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.

To make this strained argument, Bayer discredits its own expert, who squarely testified that *no* non-patent rights are required to practice the invention as used by Corteva. *See* Bayer Br. 30 & n.6. This is a quintessential fact opinion.

Bayer finally argues that, separate from any intellectual property, it conveyed NK603-event seeds to Corteva, a non-patent use that distinguishes *Brulotte*. *Id.* But this occurred at the deal's outset, not after patent expiration years later, and the seeds having the NK603 trait merely embody the patented invention itself. Bayer has received more than a [redacted] in royalties from Corteva companies (A413, ¶ 9), belying any contention that its compensation has been deferred. Bayer's failure to point to any evidence, intrinsic or extrinsic, tying the post-expiration royalties to the initial seed conveyance over 20 years ago is no different than the unsupported deferral theory rejected in *Brulotte*. *See Brulotte*, 379 U.S. at 31 ("The royalty payments due for the post-expiration period are by their terms for use during that period, and are not deferred payments for use during the pre-expiration period.").

In sum, Bayer fails to show what specific non-patent rights were conveyed and exercised by Corteva post-expiration, and where the Agreement ties the post-expiration royalties to those non-patent rights. It fails to show why the royalty did not change after patent expiration. There must be proof in the Agreement that the royalties are paying for *something* beyond an expired patent monopoly. This is not a mere dispute over proper consideration, as Bayer would have it. (Bayer Br. 33). To satisfy the "hybrid" agreement exception, the agreement must have "some other clear indication" that the royalties are not paying for a continued right to practice the expired patented monopoly due to Bayer's overwhelming patent leverage. *Kimble*, 727 F.3d 857. Bayer simply fails to offer any such clear proof. Its silence is fatal.

II. Bayer Fails to Demonstrate that the Parties Intended for the Country-by-Country Royalties to Continue to Be Owed in the U.S. Even When the Relevant U.S. Patents Supporting those Royalties Expired.

The Superior Court's explanation of the Agreement's meaning fails to meet the overarching test for contract interpretation: showing that its interpretation is reasonable, and that Corteva's is not. The exact opposite is true: like the Superior Court, Bayer fails to provide a plausible explanation for why Corteva would accept such one-sided terms flying directly in the face of federal patent policy per *Brulotte*. Why would any rational company agree to pay royalties for U.S. sales post-expiration of U.S. patents, solely to retain a license for a Brazilian patent, where the parties had agreed that royalties would be determined on a country-by-country basis? Common sense should prevail.

According to Bayer, Corteva sought ongoing global protection so that it could produce seed products anywhere in the world. (Bayer Br. 40-41). But the Agreement does not base royalties on global protection—it ties them to sales on a country-by-country basis. For U.S. sales and the associated royalty, only the U.S. patents are relevant.

Bayer's overall position that Corteva is seeking to rewrite its bargain is thus mistaken. The deal struck in 2002 was *royalties* for *rights*. (A56, § 1.05). More than a [redacted] later, Bayer now wants further royalties for no rights. Moreover, the parties specifically negotiated that royalties would be calculated on a country-by-country basis, both as to the amount of sales (which Bayer addresses) and the rate (which Bayer largely ignores, much like the Superior Court, which plainly misunderstood the deal).[5] Given that fact, it is clear that the parties tied the royalty term to the country-by-country value of the license to the patents giving rise to the royalties, rather than to a worldwide term divorced from the value of the patent license and the country-by-country royalty rates. Had the parties intended otherwise, they would have calculated the royalties on a worldwide standardized basis not tied to country-specific, [redacted] terms. Bayer never explains why the Superior Court's view, which divorces the royalty term from the separate royalty rates and amounts, is reasonable.

Further, Bayer points out that others pay a much higher royalty than Corteva's post-expiration U.S. royalty, but Bayer fails to cite any extrinsic evidence explaining how this shows that *Corteva* is receiving value for its post-expiration U.S. royalties. *See* Bayer Br. 39-40. This merely demonstrates Bayer's unlawful patent leverage and abuse of its monopoly to extract huge monopolistic payments as a market price

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[5] Like the Superior Court, Bayer points to the fact that the same method is employed to calculate the country-specific royalties (Bayer Br. 45, citing Order 17), but Bayer does not dispute and indeed acknowledges that the Agreement's royalty provision (section 4.01) is "country-specific" (Bayer Br. 38, citing Corteva opening brief), as a separate rate for each country is used to calculate the royalty, as Bayer determines annually.

even after the patents expire. It has no bearing on the parties' contractual intent more than two decades ago.

Finally, Bayer offers no substantive explanation why its Technology Stewardship Agreements with individual growers would provide for royalty terms varying country-by-country based upon patent status when, according to Bayer, the Agreement does not. *See* Bayer Br. 42. Instead, it distinguishes Corteva from the growers due to size and sophistication, and the Agreement from the TSAs by date (the Agreement was entered in 2002; the TSAs in 2022), but those distinctions do not explain the differential treatment. If anything, those factors cut the other way: the large, sophisticated company with substantial market power should command favorable terms.

Thus, Bayer presents nothing to resolve the fundamental lack of plausibility that *both* parties would have agreed to perpetuate Bayer's U.S. patent monopoly post-patent expiration, contrary to federal law and policy, where royalties are calculated on a country-by-country basis. Where one party (Corteva)'s contract interpretation is reasonable and comports with patent law and policy requiring inventions to enter the public domain without further constraint, and the other party (Bayer)'s interpretation is unreasonable and plainly conflicts with patent law and policy, such that its legal viability rests upon a fictitious loophole in the law, Corteva's interpretation necessarily prevails.

CONCLUSION

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

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BARNES & THORNBURG LLP

/s/ Chad S.C. Stover
Chad S.C. Stover (No. 4919)
222 Delaware Avenue, Suite 1200
Wilmington, Delaware 19801-1050
Telephone: (302) 300-3474
E-mail: chad.stover@btlaw.com

Craig A. Thompson
VENABLE LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21202
Telephone: (410) 244-7605
Facsimile: (410) 244-7742
CAThompson@venable.com

Frank C. Cimino, Jr.
Charles J. Monterio, Jr.
Eric T. Harmon
VENABLE LLP
600 Massachusetts Avenue, NW
Washington, D.C. 20001
Telephone: (202) 344-4569
Facsimile: (202) 344-8300
FCCimino@venable.com
CJMonterio@venable.com
ETHarmon@venable.com

Attorneys for Appellants/Plaintiffs-Below