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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CLAUDE GENDREAU and THE CLAUDE GENDREAU INVESTMENT TRUST U/A/D MARCH 16, 2013, Defendants/Counterclaim Plaintiffs-Below/Appellants, MOVORA LLC (F/K/A OSSIUM NEWCO LLC); OSSIUM BIDCO, LLC; and VETERINARY ORTHOPEDIC IMPLANTS, LLC (F/K/A VETERINARY ORTHOPEDIC IMPLANTS, INC.), Plaintiffs/Counterclaim Defendants-Below/Appellees.	No. 447, 2025 Case Below: Superior Court of The State of Delaware C.A. No. N23C-05-034-MAA [CCLD] PUBLIC VERSION EFILED: FEBRUARY 12, 2026

PLAINTIFFS-BELOW/APPELLEES' ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS[1]

In 2020, Plaintiffs-Appellees paid Defendants-Appellants $100 million to acquire Veterinary Orthopedic Implants, LLC ("VOI"). Central to that deal, Defendants agreed to a robust indemnification provision under which they kept all risk related to ongoing, constantly expanding patent litigation brought by non-party DePuy Synthes ("DePuy") against VOI (the "Patent Litigation"). That litigation, from inception, included claims for willful infringement, enhanced damages, and injunctive relief arising from Defendants' illegal copying of DePuy's products. In the agreement, Defendants retained control of the Patent Litigation defense. The litigation ended with VOI's $70-million settlement payment to DePuy, which Defendants approved in writing. But when Plaintiffs demanded indemnity, Defendants refused and breached, forcing Plaintiffs to file suit.

Every Defendant except Claude Gendreau and his Trust settled, agreeing to pay 100% of their pro rata portion of the $70-million settlement payment. Claude

[1] Unless noted, emphases are added; internal citations, footnotes and quotation marks are omitted. Trial and deposition testimony is cited "[appendix number](page:line)"; the Superior Court's October 1, 2025 post-trial opinion is cited "Trial.Op.[page]"; the court's December 2, 2024 summary judgment opinion is cited "MSJ.Op.[page]"; the court's October 1, 2025 order on post-trial issues is cited Trial.Order.[page]"; and Appellant/Cross-Appellee's Opening Brief is cited "OB.[page]."

and his Trust (collectively, "Claude")[2] persisted, asserting an array of wholly unsupported claims that *Plaintiffs* breached the contract, gradually abandoning or losing each claim in the Superior Court proceedings.

Following a five-day bench trial, the Superior Court entered judgment for Plaintiffs and awarded $40,172,084.49 in damages, comprising Claude's pro rata portion of the settlement payment, financing costs associated with the payment, and half of VOI's actual Patent Litigation fees and expenses. Trial.Op.62. The court rejected Claude's breach-of-contract theory, finding "overwhelming evidence" refuted his assertion that Plaintiffs had usurped control of the Patent Litigation defense—a finding Claude does not appeal. Trial.Op.28. Applying clear Delaware law, the court awarded Plaintiffs prejudgment interest as a matter of right. Trial.Order.2-6. Claude appealed, and Plaintiffs cross-appealed.

Claude's arguments on appeal lack merit. First, he asks this Court to read limitations into his clear indemnification obligation without any supporting contractual text, based on his (current) view of what is fair and therefore what the parties *must have* intended. If he loses that argument, he asks this Court to achieve the same result by voiding his indemnification obligation based on a purported

[2] Like Defendants, OB.1.n.1, Plaintiffs refer to Claude Gendreau and Patrick Gendreau by their first names.

Delaware public policy that, as the Superior Court and other courts have found, does not exist. And if he loses *that*, he asks this Court to imply new terms into the contract altogether under the guise of a disfavored implied-covenant claim that the Superior Court dismissed at summary judgment. Finally, he asks this Court to depart from its longstanding, clear rule that prejudgment interest in contract cases is awarded as a matter of right. Instead, he insists that courts must analyze in each case whether the "purposes" of prejudgment interest are satisfied and whether "the measure of damages would bear any relationship to the prejudgment interest [the plaintiff] sought." OB.42-45. At each step, Claude ignores or misstates the Superior Court's factual findings.

Although the Superior Court's judgment should largely be affirmed, this Court should reverse on three discrete legal issues. First, the court erred in holding that the contract does not require indemnification of Plaintiffs' expenses to enforce their indemnification rights following Claude's breach. Second, the court erred in holding that the part of the $70-million settlement payment associated with a [redacted] was not "paid in settlement" of the Patent Litigation merely because it resolved alleged [redacted]. And finally, the court erred in concluding that, as a matter of law, Plaintiffs are only entitled to half of VOI's actual Patent Litigation fees and expenses merely because VOI was jointly represented with a co-client.

SUMMARY OF ARGUMENT

As to Appeal:

1. **Denied.** The Superior Court correctly held that the indemnification provision requires Defendants to indemnify Plaintiffs for all damages suffered in connection with the Patent Litigation, and rejected Claude's argument that his obligation is "limited to the Patent Litigation's scope when the Transaction closed." Trial.Op.22. The provision, on its face, lacks Claude's temporal limitation. The Superior Court's unchallenged factual findings regarding the commercial context of the agreement confirm what the text makes clear. Moreover, indemnification provisions like the one here are not "absurd" as Claude claims; they facilitate transactions between sophisticated parties who make intentional decisions regarding risk allocation. And finally, this Court should reject Claude's request to "clarify" that certain parts of the settlement payment are not covered by the indemnity as a transparent attempt to circumvent the court's well-supported factual findings, which rejected Claude's arguments.

2. **Denied.** The Superior Court correctly found that Delaware public policy does not require voiding the parties' indemnification agreement. Delaware has a strong public policy in favor of enforcing contracts as written. Claude has not carried his burden of showing that his purported public policy against

indemnification for willful acts exists, or that applying such a policy in this case would make sense.

3. **Denied.** The Superior Court correctly dismissed Claude's implied-covenant claim at summary judgment. The contract contains no gap for the implied covenant to fill, and Claude's position would frustrate the bargain that the parties struck in their contract.

4. **Denied.** The Superior Court correctly held that Plaintiffs are entitled to prejudgment interest as a matter of right. Claude's contrary rule has no basis in Delaware law.

As to Cross-Appeal:

1. The Superior Court erred in denying recovery of Plaintiffs' enforcement expenses. The contract reflects the clear intent to cover attorneys' fees and expenses for enforcement actions.

2. The Superior Court erred by interpreting the indemnification provision to exclude the cost VOI paid for a [redacted] as part of the settlement. The parties intended to indemnify *all* payments related to the litigation, including costs paid to settle DePuy's [redacted] The court's ruling that payment for [redacted] cannot be an "amount paid in settlement" is not supported by the case law.

3. The Superior Court erred in awarding Plaintiffs only half of VOI's Patent Litigation fees and expenses simply because VOI was jointly represented with a co-client.

STATEMENT OF FACTS

A. Claude Founds VOI, Which Sells Veterinary Implants

Claude founded VOI and owned a majority of VOI's shares until its sale to Plaintiffs in 2020. Trial.Op.4, 7.n.35. Claude hired his nephew, Patrick Gendreau, into VOI. Patrick eventually began running VOI day-to-day, under Claude's oversight. Trial.Op.4; A460(224:8-13); B159(82:13-17). By 2020, Claude and Patrick co-owned VOI with Brian Beale and Timothy Van Horssen. Trial.Op.4. By this time, Patrick was VOI's CEO. Trial.Op.4; A1132.

VOI's major products include implants used in "TPLO" procedures, a common veterinary surgery to correct the canine equivalent of an ACL tear.

B. DePuy Accuses VOI of Patent Infringement, and Claude Decides To Sell

In 2013, DePuy accused VOI's "Swiss" TPLO plate of infringing DePuy's '921 Patent. DePuy demanded VOI stop such sales. B161-63(84:2-86:22); B861-63. VOI refused, B163(86:17-19), but took steps to conceal its copying. *See infra* pp.9-10.

Well aware that VOI had been copying DePuy products, Claude decided to sell VOI. B160(83:12-20); B218(141:12-21); *see* Trial.Op.5. By 2018, Patrick was in negotiations with DWHP, a private equity company. B163-64(86:23-87:12). DWHP made a $100-million offer. B234(157:14-17).

Those negotiations, however, imploded in November 2018 when DePuy sued VOI for willful patent infringement regarding the Swiss plates. B389(60:16-61:1); A952-53. Because of the lawsuit, DWHP abandoned the negotiations. B172-73(95:22-96:6).

C. DePuy Aggressively Expands the Litigation and Uncovers Smoking-Gun Evidence of Defendants' Misconduct

DePuy's complaint accused only VOI's Swiss plates of infringement, but made clear it would "ascertain in discovery whether … additional TPLO plates also infringe." B417; Trial.Op.4.

DePuy continually, and aggressively, expanded the scope of the dispute. Trial.Op.25.n.162; B179(102:7-16); B180(103:16-19); B398(248:24-249:17). During Defendants' ownership, DePuy added new *products*, new *parties*, and new *patents* to the dispute, targeting VOI's TPLO business even as VOI tried to design around DePuy's patents.

New products. In July 2019, DePuy amended its complaint to accuse VOI's "Elite" and "CBLO" plates of infringement. Trial.Op.4.

In an attempt to design around DePuy's patent, Defendants developed new plates—branded "NXT"—to replace some accused plates. Trial.Op.5; Trial.Op.44 (citing B1763-64; B260(183:23-184:2); B392-93(106:1-22)). When they launched NXT in October 2019, DePuy requested discovery "almost immediately."

Trial.Op.5. VOI's counsel repeatedly warned Defendants—prior to their sale of VOI—that DePuy "intended to add NXT plates" to the Patent Litigation. Trial.Op.5 (cleaned up); Trial.Op.44-45 & nn.274-75.

New parties. DePuy added VOI's manufacturer, Syntec, as a defendant. B449. In response, Claude wrote, "This is getting scary." B449.

New patents. Claude understood DePuy would use new patents to target new plates, complicating redesign. He was told, for example, DePuy was obtaining a "continuation" patent of the '921 Patent. B885-87. The grant of that patent, before the 2020 sale, was "yet another devastating setback," sending VOI's design-around efforts "down the drain." B451. As Patrick testified below, DePuy's "ability to obtain" continuation patents "made it clear" DePuy could use future IP to stymie VOI's efforts to release new TPLO plates. B390-91(90:19-91:22).

Smoking-gun evidence of Defendants' illegal copying and concealment. As the scope of the case expanded, discovery turned up smoking-gun evidence that Defendants, for years, illegally copied DePuy's products and intentionally concealed that copying from DePuy. For example, DePuy obtained purchase orders where Defendants ordered "[DePuy] identical" plates, B855; and an email instructing VOI's manufacturer to "match[] [DePuy] samples" for "all future plates," B399. *See also, e.g.*, B856; B401; B405; B883 (email discussing "100% [DePuy] identical"

VOI product); *see* B308-11(14:1-17:21). DePuy also obtained emails in which Defendants' staff admitted they had "on purpose" sent DePuy a sample of its product without infringing features to "ke[ep] them off of our back." B405. And DePuy deposed Defendants' former employee, who testified that "[a]t trade shows," they kept VOI "copies of DePuy Synthes plates underneath the counter so that they would not be publicly available." B1100(600:11-19).

No later than June 2019, Claude admitted to knowing about these smoking-gun documents reflecting VOI's willful misconduct under his supervision and ownership. B200-06(123:9-129:16); B918-20. DePuy put this evidence in a sealed amended complaint, which Claude received, was aware of, and aggressively fought to keep sealed. B200-01(123:9-124:13); *see infra* pp.12-13. VOI's counsel advised him, "the fact is that you did copy their plate" and "neither the judge in the district court nor the jury will like that we did copy their design and will hold it against us." B943; B214-16(137:1-139:23). That counsel warned, and Claude understood, that evidence of copying is relevant to both patent validity and damages, including treble damages for willfulness. B217-18(140:17-141:3); B943; *see also* B209-10(132:15-133:23); B940.

Financial pressure. The Patent Litigation impaired VOI's business. Patrick believed defense expenses "will be making us insolvent," and complained "[t]he

lawsuit has made our bankers run for the hills." B939; B394(115:16-116:13). Patrick even consulted with bankruptcy lawyers for VOI. B945; B396-97(138:20-141:3). Per Patrick, VOI was "fighting to survive." B453.

D. Plaintiffs Agree To Buy VOI, But Only If Defendants Keep All Patent Litigation Risk

"Faced with the expanding Patent Litigation, Claude directed Patrick to reach out to parties interested in buying VOI." Trial.Op.5. As Claude admitted at trial, "I wanted out." B218(141:12-21). Patrick approached DWHP again, but it declined. Trial.Op.5. "It was under these circumstances that Fidelio first entered the picture." Trial.Op.5.

Non-party Fidelio is a Swedish investment company that was pursuing long-term acquisitions in animal health. A335-36(65:2-66:3). Patrick pursued Fidelio and met with investment director Theodor Bonnier. B948-52.

"From the outset, Fidelio had concerns about the Patent Litigation's potential impact on VOI." Trial.Op.6. But Patrick repeatedly told Fidelio that VOI "had a strong case and didn't infringe." Trial.Op.6 (quoting B154(230:8-11)) (cleaned up); B150(153:4-14).

Fidelio retained Morrison Foerster to evaluate the deal structure. Trial.Op.6. Morrison's preliminary report, based on Defendants' representations and public information, A1218-19, estimated damages at $12-40 million. Trial.Op.6. But

Fidelio "felt 'it was impossible to … judge the risk' … given DePuy's continual expansion of the Patent Litigation's scope." Trial.Op.6 (quoting A357(87:11-20)). Indeed, Patrick told Fidelio there was "at least a high risk" of NXT plates being formally added to the Patent Litigation. Trial.Op.44 (quoting B151(154:3-8)); B153(227:7-14); Trial.Op.6.n.31.

"As such," the Superior Court found, "Fidelio was only willing to purchase VOI if Defendants provided broad indemnification to cover any potential risk of the Patent Litigation." Trial.Op.6 (cleaned up). Fidelio "had to carve out the liability relating to the lawsuit in order … to fund the deal"—otherwise, "[t]hat was a deal breaker for [Fidelio]." A338-39(68:16-69:2); B383(97:8-98:16).

E. Defendants Agree To Keep All Patent Litigation Risk

Claude thus agreed to accept broad indemnification for all losses associated with the Patent Litigation. Fidelio accordingly priced VOI at 10x EBITDA, or $100 million, a valuation that assumed the litigation did not exist. Trial.Op.25.n.163; A339(69:3-14); B385-86(209:15-210:2).

On December 19, 2019, Fidelio offered $100 million contingent on indemnification, which Defendants accepted. B233-34(156:9-157:17); *see* Trial.Op.6. The same day, the Patent Litigation court ordered the smoking-gun documents unsealed. B235-37(158:10-160:3); B461-70. Although the Superior

Court did not reach the issue, the incontrovertible record establishes Claude and Patrick intentionally hid these documents from Fidelio and Plaintiffs. They directed VOI's counsel to appeal the unsealing order to keep the documents sealed during negotiations. B237-42(160:4-165:6); B471-73; B961. As Patrick told Claude, "The good thing is that [the appeal] is postponing … some information being released. Buy[s] us time to proceed with due diligence and get closer to a closing date." B986; B253-54(176:1-177:8). Fidelio's Bonnier testified that he never saw the smoking-gun documents before closing. A388-89(118:1-119:6).

F. The Parties Execute Their MIPA, with Defendants Broadly Indemnifying Plaintiffs for the Patent Litigation

On June 11, 2020, Plaintiffs and Defendants executed the Amended and Restated Membership Interest Purchase and Exchange Agreement ("MIPA") that governs this case. A960. As the Superior Court found, the terms "provide the 'broadest possible' indemnification" for the Patent Litigation. Trial.Op.22 (quoting MSJ.Op.19-20).

Under § 8.2(a), "from and after the Closing," Defendants agreed to "severally … but not jointly indemnify … Buyer [Movora] [and] its Affiliates," including VOI and Fidelio, "from and against any and all Damages arising out of or relating to … any Damages suffered by [VOI] as a result of, or in connection with, the Patent Litigation." A1013.

The MIPA defined "Patent Litigation" by reference to "*DePuy Synthes Products Inc. et al. v. Veterinary Orthopedic Implants, Inc.*, 3:18-cv-01342-HES-PDB (M.D. Fla.), together with any appeals therefrom and any related or derivative Actions." A968. "Action" includes "any claim, action," "suit," "hearing" and "injunction." A961. The MIPA included no language limiting the indemnification to conduct, claims, or damages as of a certain date.

"Damages" was broadly defined, too. They included "any losses, liabilities, damages, awards, … [and] payments" including "amounts paid in settlement" and "fees and disbursement of counsel," whether "known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued," together with "interest." A963.

While the indemnity was broad, the MIPA provided protections for Defendants. Their obligation was capped at the purchase price—about $100 million. Trial.Op.7.n.37 (citing A1014). And $20 million of the purchase price was paid in the form of a Contingent Closing Note, and thus held back to pay for Patent Litigation fees and expenses. Trial.Op.7.n.34 (citing A1033). Defendants also retained the right to control the defense and settlement through their Sellers' Representative. Trial.Op.8; A1004-05(§ 5.5). Claude, with full knowledge of VOI's

illegal copying and concealment, irrevocably appointed Patrick as Sellers' Representative. B271-72(194:2-195:11); A1007-08(§ 5.11).

The MIPA went further to align the parties. At Defendants' request, B969, B981, it provided Patrick would continue as VOI's CEO, A1044-54, with his employment agreement attached. And each Defendant was allowed to roll over some of their ownership interest to the new entity, with Patrick rolling over nearly $25 million worth of stock and thus remaining a major shareholder. A358-60(88:22-90:2); A1033; B381-82(17:13-19).

Plaintiffs paid $99,868,328 for VOI, and the deal closed. Trial.Op.7; A1033. For Claude's 55.55% stake,[3] Trial.Op.7.n.35, Plaintiffs paid Claude $55,482,404. A1033.

G. DePuy Continues Expanding the Patent Litigation as Sellers' Representative Controls Defense

After closing, Patrick continued to run VOI, during which time it continued selling the accused plates, as it had done before. Trial.Op.8; B315-17(57:10-59:11). In 2021, Fidelio created Vimian Group AB ("Vimian"), a public company, to hold VOI and certain other acquired animal-health companies. Trial.Op.8.n.45; A336-37(66:20-67:10).

[3] Claude owned 46.296296% and his Trust owned 9.259259%.

Patrick, as Defendants' Sellers' Representative, controlled VOI's defense of the Patent Litigation. Trial.Op.9-10, 28 & n.178. He hired a new firm, Finnegan, both to defend VOI and to conduct a freedom-to-operate ("FTO") study of VOI's newest TPLO plates, to ensure VOI had successfully avoided infringing DePuy's patents. Trial.Op.10; A384-86(114:19-116:23); B297-98(25:16-26:11). Those plates were initially called "Elite Curve" and "NXT Curve" (after the Elite and NXT plates developed by Defendants), and later Compresiv/Versiv ("C/V"). A383-84(114:23-115:7).

Meanwhile, DePuy continued expanding its case using the same tactics it had used before the transaction. Trial.Op.9. In July 2020, shortly after the transaction closed, DePuy applied for another continuation patent, the '728 Patent, which was a continuation of and in the same patent family as the '921 Patent. B1061; Trial.Op.9. DePuy also moved to add Fidelio as a defendant. B476.

In June 2021, DePuy moved to amend its complaint to assert the '728 Patent and formally accuse VOI's NXT plates of infringement. Trial.Op.9; B1807-16. VOI's counsel had warned Defendants long before the MIPA was signed that DePuy would do so. *See supra* pp.8-9.

Finnegan completed its FTO work, opining that C/V did not infringe DePuy's patents. Trial.Op.10; B298(26:7-11). As the Superior Court found, Patrick as

Sellers' Representative then "injected the C/V plates into the Patent Litigation." Trial.Op.32-34; *see* Trial.Op.10, 28.n.178. Patrick used the redesign to encourage DePuy to settle, but DePuy refused. Trial.Op.10 & n.61; B1767-68; B852. Patrick then authorized Finnegan to use C/V as non-infringing alternatives in the litigation to mitigate damages. Trial.Op.10; A1137; B1777; B1860-61. At Patrick's direction, Finnegan disclosed C/V to DePuy, A1137, made an "extensive" C/V-related production, B1861, and offered expert testimony that C/V did not infringe, A2036-38. Patrick's strategy was not without risk. As Finnegan advised, "we have always recognized that DePuy could still argue in the future that any injunction [ordering VOI not to infringe DePuy's patents] could cover those [C/V] plates." B1861.

H. DePuy Prevails

The Patent Litigation was tried in January 2023. Trial.Op.11. Patrick, who controlled the defense, was VOI's main witness. On direct, he maintained his denial that VOI copied or infringed, B1083-84(755:12-756:6); B1085(759:22-24), echoing what he had told Plaintiffs and Fidelio for years, B383-84(100:7-10); B150(153:11-14); B154(230:8-11).

Patrick was dismantled on cross. Patrick walked back his direct testimony and was impeached repeatedly. B312(18:3-12). Patrick even admitted Defendants "absolutely" "knock[ed] off" DePuy's products. B1096(816:20-21); B313-

14(19:20-20:8). And Patrick conceded Defendants misled their prior counsel when VOI, through that counsel, originally denied infringement. B312-13(18:19-19:18); B1087-89(780:5-782:13).

DePuy heavily featured the "smoking-gun" documents at trial. B1870-75(110:3-113:14, 121:15-122:2) (opening); B1878-82(339:15-340:21, 392:16-394:4) (infringement expert); B338(237:15-23). Patrick incredibly claimed there was nothing wrong with instructing employees to go "line by line to see how we can knock off each item." B1094-95(802:3-803:8). Simply put, Patrick's testimony went "badly." B338-39(237:15-238:6); *see* B299-301(216:23-218:23); A388-89(118:23-119:6); B329-30(207:15-208:14).

At trial, DePuy alleged that Fidelio was only vicariously liable for VOI's infringement. A1111. And the evidence DePuy elicited about Fidelio was unremarkable. DePuy argued Fidelio was foreign, knew about the litigation during negotiations, thought VOI was "interesting," and allowed Patrick to serve as VOI's CEO. *Compare* B1902(1361:1-21), *with* B1885(591:19-21); B1886(596:16-17); B1891(636:19-24). DePuy insinuated incorrectly there was something nefarious about the MIPA's structuring, but the deposition testimony DePuy relied upon, in which Bonnier said he was not sure why VOI had been reorganized from a

corporation to an LLC, was harmless. *Compare* B1902-04(1361:22-1362:24, 1407:19-23), *with* B1888-98(633:3-643:18).

The jury found VOI and Fidelio liable for willful patent infringement and awarded DePuy approximately $60 million in damages. Trial.Op.11. The verdict was entirely comprised of damages related to sales of VOI's Swiss, CBLO, Elite, and NXT plates, not the C/V plates. Trial.Op.11.n.71. VOI and Fidelio were jointly and severally liable. Trial.Op.11.

Given the smoking-gun evidence, the risk of trebling to $180 million was believed by all to be very high. *See* Trial.Op.12.n.78; Trial.Op.11.n.72.

I. DePuy Continues Applying Pressure

After trial, VOI continued to sell its C/V plates. Those plates were not accused products at trial, and Finnegan continued to advise VOI that they did not infringe. Trial.Op.12.n.74 (citing B320-26(62:20-68:1)); B331-32(212:3-214:9); B1863; B1908.

Nevertheless, DePuy accused VOI of engaging in a "post-verdict 'fire sale' to flood the market" with C/V plates, seeking a temporary restraining order and contempt. Trial.Op.12. Although the patent judge criticized VOI's conduct—even though the C/V plates were neither accused nor adjudicated to infringe—the Superior Court in this case rejected those criticisms. Based on the evidence in *this*

case, the court found that "one of the most credible witnesses at trial," Colleen Flesher, provided "credible trial testimony evidenc[ing] these sales were part of VOI's annual ordering program," not some fire sale. Trial.Op.34 & nn.216-17. But in the Patent Litigation, DePuy filed a post-trial motion seeking to enjoin sales of the C/V plates as "not colorably different" from those that had been found to infringe. Trial.Op.12.

J. Sellers' Representative Controls and Approves Settlement

In March 2023, with rulings on both trebling and enjoining sales of C/V outstanding, DePuy contacted Flesher to talk settlement. Trial.Op.12 & n.79; B327-28(77:2-78:17). DePuy and Flesher, with Patrick's direction and approval, negotiated a $70-million settlement to resolve all outstanding issues in the Patent Litigation. Trial.Op.12-13. To achieve that peace, the parties included in the settlement a release and [redacted]. Trial.Op.12-13.

Because Defendants refused to pay, VOI paid the $70-million settlement, financing it through an interest-bearing loan. Trial.Op.13; A411(141:1-18).

K. Plaintiffs Demand, But Defendants Refuse Indemnity

On April 14, 2023, Plaintiffs demanded indemnification for the $70-million settlement and all related expenses. Trial.Op.13. When Sellers refused to pay again, Plaintiffs initiated this case. Trial.Op.13.

L. Plaintiffs File Suit

On May 4, 2023, Plaintiffs asserted a single contract claim against Defendants for breach of their indemnification obligation under the MIPA. Trial.Op.13.

Defendants responded with six counterclaims and numerous defenses. Trial.Op.14. They alleged nine theories of breaches by Plaintiffs to excuse Defendants' performance under the MIPA, A160-65, and sought five declaratory judgments that Defendants owe no obligation to indemnify, A165-72; Trial.Op.14.nn.95-96.

As this indemnification litigation continued, Patrick, Beale, and Van Horssen each settled. Trial.Op.14. Each agreed to pay 100% of their pro rata shares of the $70-million settlement. A415-16(145:15-146:7). Claude, however, refused.

On December 2, 2024, the Superior Court granted in part Plaintiffs' motion for summary judgment and denied Claude's motion. MSJ.Op.26. As relevant here, the Superior Court rejected Claude's good-faith-and-fair-dealing argument (Affirmative Defense Six and a sub-part of Counterclaim Two). MSJ.Op.24-26.[4]

[4] Claude does not appeal the court's burden-shifting framework, where Plaintiffs must show a prima facie case that the settlement was covered, and Defendants must establish the amount of any segment of the settlement not covered. MSJ.Op.20.

M. Plaintiffs Prevail at Trial

The Superior Court held a five-day bench trial in February 2025. Excluding statutory interest, Plaintiffs sought as damages Claude's 55.55% share of: (1) the $70-million settlement; (2) fees and expenses of Patent Litigation counsel; (3) interest on VOI's loan to finance the settlement; and (4) Plaintiffs' costs to enforce their indemnity rights. B112-13.

Before trial, Claude "d[id] not meaningfully dispute" he breached by failing to indemnify at least some damages, and post-trial, he conceded he must indemnify damages associated with VOI's sales of Swiss, CBLO, and Elite plates. Trial.Op.18-19.

On August 29, 2025, the Superior Court issued its Post-Trial Opinion (revised October 1), finding for Plaintiffs and awarding more than $40 million. Trial.Op.62.

The Superior Court found Claude and his Trust were liable for their share of the $70-million settlement and associated financing charges, although it reduced the settlement's value by $9.8 million after concluding Claude's obligation did not extend to the [redacted]. Trial.Op.35-36, 61-62. While Claude and his Trust were liable for their share of Plaintiffs' Patent Litigation fees and expenses, the court concluded that because Finnegan jointly represented VOI and Fidelio, Claude and his Trust were only liable for VOI's "half" of the joint representation fees and

expenses. Trial.Op.48. The court also held that the MIPA did not, with sufficient clarity, provide for indemnification of Plaintiffs' enforcement costs. Trial.Op.52-54.

The Superior Court broadly rejected Claude's arguments. The court rejected Claude's breach-of-contract claims, finding that "overwhelming evidence" refuted Claude's assertion that Plaintiffs usurped control of the Patent Litigation defense. Trial.Op.28. (Claude does not appeal that finding.) The court rejected Claude's argument that his indemnification obligation is "limited to the Patent Litigation's scope when the Transaction closed." Trial.Op.22. The court noted the absence of any text supporting that conclusion and found that the commercial context—with Fidelio and Plaintiffs concerned about an unpredictably expanding Patent Litigation—supported the broad, plain text of the provision. Trial.Op.22-25 & nn.162-63. Alternatively, the court held that "[e]ven if the Court considered Claude's temporal argument, it provides no basis to reduce Plaintiffs' recoverable indemnity" because "[b]oth the NXT plates and [the] '728 Patent related to the pre-Transaction Patent Litigation." Trial.Op.43-45. And the court found unconvincing and excluded wholesale Claude's damages expert, which is the only evidence he proffered to meet his burden of apportioning the $70-million settlement payment into constituent elements. Trial.Op.60-61. Claude does not appeal that decision.

The Superior Court likewise rejected Claude's public policy argument as having no basis in Delaware law. Trial.Op.38-42.

Lastly, in a post-trial order, the court granted Plaintiffs' request for prejudgment interest, holding that such interest is awarded under Delaware law "as a matter of right," and rejecting as a matter of fact Claude's argument that the purposes of prejudgment interest were not implicated in this case. Trial.Order.2-6.

Judgment for Plaintiffs entered on October 1, 2025. B144-48. Plaintiffs timely noticed a cross-appeal on a few select issues.

ARGUMENT

I. The Superior Court Correctly Held That Section 8.2(a) of the MIPA Does Not Limit Indemnification to the Patent Litigation's Scope When the Transaction Closed

A. Question Presented

Whether the Superior Court correctly rejected Claude's argument that the indemnification provision in § 8.2(a) is temporally limited to VOI's pre-transaction conduct and its reasonable continuation. B113-17; B122-26; A657-62; A671-79.

B. Scope of Review

Questions of law, including contract interpretation, are reviewed *de novo*. *N. Am. Leasing, Inc. v. NASDI Holdings, LLC*, 276 A.3d 463, 467 (Del. 2022). This Court "will overturn any of [the court's] factual determinations only if they are clearly erroneous." *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 889 (Del. 2015).

C. Merits of Argument

Section 8.2(a) requires Defendants to indemnify Plaintiffs against "any and all Damages arising out of or relating to … any Damages suffered by [VOI] as a result of, or in connection with, the Patent Litigation." A1013. The Superior Court correctly held this clear text requires Defendants to indemnify Patent Litigation-related Damages without regard to whether they relate to pre- or post-transaction conduct. Trial.Op.22-25. Claude insists otherwise on appeal, arguing that indemnity

covers only "damages based on conduct occurring before the transaction as well as the reasonable and expected continuation of pre-transaction conduct." OB.17. Specifically, he seeks to carve out Damages relating to sales of NXT and C/V plates, which he claims Defendants had nothing to do with.

Claude's argument is meritless. He does not seriously contend that the MIPA's text contains any temporal limitation, because it does not. Instead, he relies on a grab-bag of inapt case law interpreting different language in different contracts to try to piece together a "my watch, your watch" approach, where a seller indemnifies a buyer for pre-transaction conduct, with the buyer responsible for conduct on their own "watch." But this approach is entirely absent from the MIPA's text.

Without text or case law on his side, he falls back to arguing that applying the MIPA as written and as the parties agreed would be unreasonable, unfair, even absurd. But he ignores the court's extensive factual findings that the commercial context strongly *supports* the plain reading of the contract as necessary to consummating the transaction and as value-creating for all.

This Court also should not indulge Claude's request to "Clarify That C/V and NXT-Related Damages Are Not Indemnifiable." OB.25-29. Claude's request is a

thinly-veiled attempt to circumvent the court's extensive factfinding on these issues. Claude cannot show these findings were clearly erroneous.

1. Section 8.2(a) Requires Claude To Indemnify Plaintiffs for All Patent Litigation Damages, Not Only Those Relating to Pre-Closing Conduct

The plain text of the indemnification provision has no temporal limit. Section 8.2(a) provides:

> [F]rom and after the Closing … Sellers shall … indemnify, defend and hold harmless the Buyer [and] its Affiliates (including [VOI and Fidelio]) … from and against any and all Damages arising out of or relating to … any Damages suffered by [VOI] as a result of, or in connection with, the Patent Litigation.

A1013. The MIPA defines "Patent Litigation" as the litigation "pending" under a particular docket number, and also "any related or derivative Actions," including any "claim" or "injunction," or even any new "action" or "suit" "related" to or "derivative" of the patent dispute. A961; A968. A "pending" litigation is one that is ongoing and subject to change. *Pending*, *Black's Law Dictionary* (12th ed. 2024); *Rice v. McCaulley*, 31 A. 240, 243 (Del. 1887). "Damages" include "*any* losses, liabilities, damages, awards [and] payments," including "amounts paid in settlement." A963. Nothing links indemnification to when the underlying conduct occurred. Instead, the text makes clear that Damages are indemnified based on

whether they are suffered "as a result of, or in connection with, the Patent Litigation."

The MIPA not only lacks language temporally *limiting* the indemnity; it repeatedly uses terms that *expand* coverage. "[A]rising out of," "related to," and "in connection with" are "paradigmatically broad." *Lillis v. AT&T Corp.*, 904 A.2d 325, 331 (Del. Ch. 2006); *City of Newark v. Donald M. Durkin Contracting, Inc.*, 305 A.3d 674, 680 (Del. 2023) (similar). "[I]n connection with" "constitutes the broadest possible authorization, and clearly envisions any dispute *plausibly related* to the [subject-matter of indemnification] is within [its] purview." *Lillis*, 904 A.2d at 332. "Related to" is a "far-reaching" term "lawyers often use when they wish to capture the broadest possible universe," which "permits *relatively attenuated connections*." *Blue v. Tilray Brands, Inc.*, 2025 WL 519848, at *4 (Del. Ch. Feb. 17, 2025). Indeed, using expansive terms conjunctively (as in the MIPA) makes them even broader: When parties use "arising from *or* relating to," a damage is covered "if it relates to an [indemnifiable damage], even if it also relates to non-[indemnifiable damages]," because "any other interpretation impermissibly reads the broad term 'related to' out of the contract." *See Snow Phipps Grp., LLC v. KCAKE Acquisition, Inc.*, 2021 WL 1714202, at *35 (Del. Ch. Apr. 30, 2021) (cited in *City of Newark*, 305 A.3d at 680).

Claude does not seriously argue the MIPA contains language effectuating his pre-/post-transaction distinction, although such language would have been easy to include if that were the deal. The only specific text he identifies is § 8.2(a)'s reference to Damages suffered "as a result of, or in connection with, the Patent Litigation." OB.19. He claims that "arising out of" type language "require[s] some meaningful linkage" to the Patent Litigation. OB.19.

This argument fails twice. First, his cited case, *Pacific Insurance Co. v. Liberty Mutual Insurance Co.*, interpreted *only* "arising out of." 956 A.2d 1246, 1257 (Del. 2008). But "relating to" and "in connection with" are even broader (especially when used *with* "as a result of"), covering "any dispute plausibly related to" the Patent Litigation. *Supra* p.28 (quoting *Lillis*, 904 A.2d at 332). Second, Claude's argument has a fundamental missing link: he never explains why "in connection with the Patent Litigation" means in connection with *only pre-transaction conduct at issue in* the Patent Litigation *and that conduct's reasonable continuation*. No language supports that reading. The MIPA says the opposite.

Without text to do that work, Claude resorts to inapt cases. His leading case is *Alcoa World Alumina LLC v. Glencore Ltd.*, 2016 WL 521193, at *7 (Del. Super. Ct. Feb. 8, 2016), *aff'd sub nom. Glencore Ltd. v. St. Croix Alumina, LLC*, 150 A.3d 1209 (Del. 2016) (TABLE). He cites it for the general proposition that indemnities

are construed "strictly against the indemnitee" to cover only liabilities "specifically assume[d]." OB.18. But Claude did specifically assume the obligation: to indemnify "any and all Damages arising out of or relating to … any Damages suffered by [VOI] as a result of, or in connection with," a particular, identified litigation, as well as claims related to or derivative of that litigation. A1013; A968. Claude assumed "any and all" of these Damages, A1013, not only those related to pre-transaction conduct. This case is nothing like *Alcoa*, where the indemnitor assumed *only* listed obligations, and the relevant contract was not listed. 2016 WL 521193, at *8.

Claude cites *RSUI Indemnity Co. v. Sempris, LLC*, 2014 WL 4407717, at *7 (Del. Super. Ct. Sept. 3, 2014), for the proposition that one lawsuit is not "related to" another when it involves "different facts and claims." OB.20. There, however, different parties brought different claims on different theories in different cases. *Sempris*, 2014 WL 4407717, at *4-7. Here, the NXT and C/V claims were part of and resolved in conjunction with the Patent Litigation itself. And as the court found factually, damages relating to both NXT and C/V plates were tied to Defendants' conduct, and Plaintiffs and Defendants knew pre-closing that the NXT plates were going to be added to the case. *See infra* pp.37-39.

Similarly, *In re Fuqua Industries, Inc. Shareholder Litigation*, 1997 WL 257460, at *5-7 (Del. Ch. May 13, 1997), is irrelevant. Claude cites it (at 20) for the proposition that releases of claims "in connection with" an acquisition do not cover conduct after and unrelated to the acquisition. But there, indemnity was limited to losses "in connection with *the acquisition*"—an event occurring at a moment in time. *Id.* at *5. And the conduct at issue occurred *after* and unrelated to the acquisition. But here, indemnity turns on a connection to an enumerated, ongoing court case—not the timing of conduct *within* that court case.

Finally, Claude cites *State v. Interstate Amiesite Corp.*, 297 A.2d 41, 44 (Del. 1972), and *Rizzo v. John E. Healy & Sons, Inc.*, 1990 WL 18378, at *2 (Del. Super. Ct. Feb. 16, 1990), *aff'd sub nom. Joseph Rizzo & Sons Constr. Co. v. Sky Climber, Inc.*, 633 A.2d 370 (Del. 1993) (TABLE), for the proposition that a contract will not be interpreted to indemnify a party for its "own negligence" unless it specifically says so. OB.20-21. But these cases involve agreements where construction contractors expressly insure the indemnitee *for the contractor's own future negligent conduct*. *E.g.*, *Interstate Amiesite*, 297 A.2d at 43-44 (indemnification for injuries "on account of the operations of the said contractor"). "At common law there was no duty placed upon a contractor [for] indemnification to the principal as to … the principal's own negligence." *Id.* at 44. Because such indemnification departs from

the common-law rule, construction contracts imposing indemnification for the principal's negligence "must be crystal clear." *Id.* This, of course, is not a construction-contractor case, and there is no relevant common-law presumption. And in the MIPA, unlike in *Interstate Amiesite*, indemnification does not turn on who caused the damage but on whether the damages occurred "in connection with[] the Patent Litigation." A1013; *see, e.g.*, *Seagate Technology (US) Holdings, Inc. v. Syntellect, Inc.*, 2015 WL 5568619, at *4-6 (D. Del. Sept. 22, 2015) (applying California law) (indemnity "for 'any' damages 'arising out of, relating to, or resulting from' infringement allegations" covered *the entire infringement claim*, regardless of who caused the damages).

At bottom, Claude seeks to revive his "my watch, your watch" interpretation of indemnification, where sellers are responsible for pre-transaction conduct on their "watch" and buyers are responsible for post-transaction conduct. But this argument was litigated at trial and rejected because it has no support in the contract text. Trial.Op.23-24 & nn.155-56. In addition, the Superior Court credited Harvard Professor Guhan Subramanian, who gave unrebutted expert testimony that, as a matter of M&A custom and practice, § 8.2(a) does not reflect a "my watch, your watch" liability allocation. B368-73(25:9-30:17). When parties intend such an approach, they use clear language, which is absent in § 8.2(a). B368-71(25:9-28:22).

And this approach is only feasible in an asset purchase, which Fidelio rejected. B369(26:17-23); A347-49(77:10-79:18).

2. The Court's Unchallenged Factual Findings on the Commercial Context Confirm Indemnification Is Not Temporally Limited

As a fallback, Claude argues this Court should adopt his atextual temporal limitation because any other result would "contradict the logic of the transaction" and produce "commercially unreasonable" or "absurd" results. OB.23. In his view, Defendants providing Plaintiffs indemnification for conduct they do not control "would produce an extreme moral-hazard." OB.23. Claude is wrong, and again ignores the court's findings. The indemnity is not absurd, and *Claude's* temporally-limited interpretation contradicts the transaction's logic. *Chi. Bridge & Iron Co. v. Westinghouse Elec. Co.*, 166 A.3d 912, 926-27 (Del. 2017).

First, Claude's argument proves too much. "[M]oral hazard" is "inherent in [indemnification and] insurance." *See Aearo Techs. LLC v. ACE Am. Ins. Co.*, 2024 WL 3495121, at *7 n.65 (Del. Super. Ct. July 16, 2024), *aff'd sub nom. In re Aearo Techs. LLC*, 346 A.3d 564 (Del. 2025). He points to no Delaware case that moral hazard automatically renders a contract absurd. *Cf. Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010) ("We cannot reform a contract because enforcement of the contract as written would raise 'moral questions.'"). He effectively takes the

position that indemnification is commercially unreasonable unless it adopts a "my watch, your watch" approach because otherwise one party is at the other's mercy. But as the evidence showed, "my watch, your watch" is one of several M&A indemnification schemes, and forward-looking indemnification to cover "particular pending litigations" is another. *See, e.g.*, *White v. Curo Tex. Holdings, LLC*, 2016 WL 6091692, at *11 (Del. Ch. Sept. 9, 2016) (quoting Kling & Nugent, *Negotiated Acquisitions of Companies, Subsidiaries, & Divisions* § 15.02[1][d] at 15-12 (2016)); *see also id.* (discussing deal-related indemnification).

The record refutes Claude's assertion that "[n]o rational businessperson" would agree to the MIPA's forward-looking indemnity. As the Superior Court found, Claude wanted out of VOI amid an aggressively expanding patent lawsuit—one Defendants expected would continue challenging new aspects of VOI's business. Trial.Op.5 & nn.17-19, 25 & nn.162-63. The lawsuit proved an insurmountable roadblock for DWHP, which withdrew its $100-million offer. Trial.Op.5. And for Fidelio, "it was impossible to judge the risk—given DePuy's continual expansion of the Patent Litigation's scope." Trial.Op.6 (cleaned up). The uncertainty of the Patent Litigation's effect on VOI's business meant "Fidelio was only willing to purchase VOI if Defendants provided broad indemnification to cover any potential risk of the Patent Litigation." Trial.Op.6 (cleaned up).

On the flip side, Defendants claimed they "had a strong case" and "didn't infringe." Trial.Op.6. Given the risk of VOI's impending insolvency, *supra* p.10-11, selling may have been Defendants' only option. So, Fidelio was clear: "[I]f you can bear the risk … of the litigation, then we can proceed with [the $100-million deal]." B383(98:8-16) (cited Trial.Op.6.n.32).

By agreeing to this broad, forward-looking indemnification, Defendants unlocked enormous value. They went from an unsellable company on the brink of bankruptcy to a $100-million payout. *See* Trial.Op.5, 25.n.163.

Far from contradicting the transaction's logic, a broad, forward-looking indemnity was *the crux of* this transaction. Indemnification "serve[d] the laudable purpose" of "shift[ing] risks of loss … to get the deal done" where there was otherwise no deal to be had. *EMSI Acquisition, Inc. v. Contrarian Funds, LLC*, 2017 WL 1732369, at *8 (Del. Ch. May 3, 2017). Although Claude may now feel his obligation was too expensive, without it he would not have sold VOI at all—much less received more than $55 million in consideration for his majority share.

Ignoring this record, Claude argues the court's interpretation "would produce an extreme moral-hazard concern." OB.23. But here, again, he ignores the record. As Professor Subramanian, whom the court credited, explained at length, "sophisticated parties understand the moral hazard problem, and they use …

guardrails to mitigate that." B364(21:1-19). Subramanian identified three "important guardrails" designed to align Plaintiffs and Defendants: First, "Patrick," who owed indemnification and controlled the defense as the Sellers' Representative, "would continue as the postclosing CEO of VOI." "Second, and maybe most importantly, he is the sellers' representative … [and] had the right to control the defense of the litigation …. And then finally, he rolled over [$]25 million of equity, so he's got skin in the game…." *Id.* Defendants' indemnification also was generally capped at $100 million—meaning that intentionally incurring damages could easily lead to damages for which Plaintiffs may have no indemnity. The deal's structure, negotiated among sophisticated parties and counsel, refutes Claude's argument that no reasonable person would have agreed to forward-looking indemnification.

Claude argues that Patrick was "terminable at-will" and could be replaced "with a CEO who would wantonly inflate Claude's damages." OB.24. But Plaintiffs could not fire Patrick as Sellers' Representative controlling critical litigation defense or as one of Vimian's largest shareholders. B381-82(17:13-19); A1004-05; A1007-08. Regardless, these farfetched hypotheticals hardly render the indemnity "absurd."

"[B]argained-for on a clear day," the MIPA allocates *all* Patent Litigation risk, past and future, to Defendants. *EMSI*, 2017 WL 1732369, at *8. Claude's contrary reading "is beyond strained"—it rewrites the agreement and destroys the economics

Plaintiffs relied on when paying Defendants $100 million, $55+ million of which went to Claude. *Chi. Bridge*, 166 A.3d at 927-28.

3. Claude's Request for "Clarif[ication]" Is Meritless

Even if this Court endorses Claude's interpretation that indemnity only covers pre-transaction conduct at issue in the Patent Litigation, this Court should reject Claude's request to "clarify" that C/V and NXT-related damages fall outside indemnity. OB.25. This is a thinly-veiled attempt around the court's well-supported factual findings that C/V- and NXT-related damages tie directly back to Defendants' conduct.

As to C/V, the court found Defendants, through their Sellers' Representative, "injected C/V into the Patent Litigation both to facilitate settlement and as non-infringing alternatives to mitigate damages," so that "settling the Patent Litigation without addressing VOI's prior C/V sales was not realistic." Trial.Op.34. Claude's view—that Defendants could inject a post-transaction VOI product into the lawsuit without assuming any indemnification liability created by that choice—would create the very moral hazard Claude purportedly abhors.

As to the '728 Patent and NXT plates, Claude argues that because the new patent did not issue until after the transaction, Defendants could not possibly be responsible for infringement of it. Again, he ignores the record. "Even if the Court

considered Claude's temporal argument," the NXT plates are indemnifiable because "[b]oth the NXT plates and the '728 Patent related to the pre-transaction Patent Litigation." Trial.Op.43-45. That finding is well supported. Defendants undisputedly developed and launched NXT prior to the transaction and in response to DePuy's lawsuit. VOI's patent counsel warned Defendants, before the transaction, that DePuy would add NXT to the suit. Patrick even told Fidelio that adding NXT was highly likely. *Supra* pp.8-9, 12.

Claude objects that DePuy added NXT only after the '728 Patent's post-transaction issuance. OB.27-28. But DePuy's strategy of seeking continuation patents to cover VOI's design-around attempts was unsurprising. DePuy had done it before in 2019. *Supra* p.9. And it is common practice for a patentee to use discovery to understand an alleged infringer's design-around attempts and obtain continuation patents to block those moves. Cesare Righi et al., *Continuing Patent Applications at the USPTO*, Rsch. Pol'y, May 2023, at 4 ("[P]atentees can … even draft new claims responding to arguments made during litigation by alleged infringers."). The Federal Circuit famously blessed this strategy in *Kingsdown Medical Consultants, Ltd. v. Hollister Inc.*, 863 F.2d 867, 874 (Fed. Cir. 1988). That common maneuver—which produced a result all parties anticipated—is precisely what DePuy did here. Trial.Op.43 & n.266 (citing B1807). The record thus fully

supports the court's finding that the NXT plates relate to the pre-transaction Patent Litigation.

II. The Superior Court Correctly Found No Public-Policy Basis To Bar Indemnification

A. Question Presented

Whether the Superior Court correctly rejected Claude's argument that the MIPA should be invalidated in part on public policy grounds. B126-31; A662-66.

B. Scope of Review

This Court reviews "questions that turn on public-policy grounds *de novo*." *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 902 (Del. 2021).

C. Merits of Argument

Claude argues that the indemnity is unenforceable on public-policy grounds because it potentially indemnifies Plaintiffs for their own willful conduct. That is baseless. To be clear, the Superior Court did not find that Plaintiffs committed *any* willful misconduct; to the contrary, it rejected the "fire sale" theory that Claude repeatedly invokes on appeal, finding that "one of the most credible witnesses at trial" refuted it. Trial.Op.34 & nn.216-17; *supra* pp.19-20.

But even pretending that Claude's allegations of post-closing willful misconduct had merit, Claude's argument fails on the law. Delaware holds "freedom of contract in high—some might say, reverential—regard." *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674, 676 (Del. 2024). When sophisticated parties "order[] their affairs voluntarily through a binding contract, Delaware law is strongly inclined to

respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate" a policy "even stronger than freedom of contract." *RSUI*, 248 A.3d at 903. "Such public policy interests are not to be lightly found, as the wealth-creating and peace-inducing effects of civil contracts are undercut if citizens cannot rely on the law to enforce their voluntar[il]y-undertaken mutual obligations." *Id.*

Claude has not shown his supposed public policy exists, let alone that it requires voiding deal-related indemnity agreed to by sophisticated, represented parties to allocate specific, identified risks to close an M&A transaction. And even if such a policy existed, it should not apply here, where Claude oversaw years of intentional patent infringement and concealed it from Plaintiffs and Fidelio during the transaction. This Court should affirm.

1. Claude has not shown his purported public policy exists.

First, this Court has made clear that "the Legislature is the proper forum in which to seek" to remedy the "undesirable" effects of indemnification and insurance contracts. *Whalen v. On-Deck, Inc.*, 514 A.2d 1072, 1073 (Del. 1986). Where the Legislature has not formulated a particular policy, "this Court has indicated … it would defer to the Legislature on the issue." *Id.* at 1074. As this Court recently reaffirmed, "*Whalen*'s approach—deferring to the parties' contractual choices and

to the legislature's prerogative in matters of public policy—is a wise one," meaning that "in the absence of clear guidance from the General Assembly to the contrary, we must reject [the indemnitor's] invitation to void its contractual obligations on public-policy grounds." *RSUI*, 248 A.3d at 904-05; *accord Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 761639, at *11 (Del. Super. Ct. Feb. 26, 2021) ("[L]osses are uninsurable as-against public policy only if the legislature so provides."). Claude does not purport to identify any statutory support for his argument, and so, as the Superior Court noted, his argument "fails at the outset." Trial.Op.40.n.251.

Second, even if this Court looks past the lack of legislative support, Claude identifies only a single criticized, and unreasoned Delaware case that purportedly supports his proposed rule. In *James v. Getty Oil Co.*, the court considered whether indemnity for "injuries or death solely and proximately caused by or arising out of … willful act[s] or … negligence" was enforceable. 472 A.2d 33, 36-37 (Del. Super. Ct. 1983). The court concluded the agreement reflected sufficiently clear intent to indemnify negligence. *Id.* Next, the court briefly "comment[ed]" on "[a] few other matters." *Id.* at 38. It cursorily—citing only a treatise—stated that a "contract to relieve a party from its intentional or willful acts is invariably held to be unenforceable as being against clear public policy." *Id.*

This passing statement cannot sustain the weight Claude places on it, particularly as it has not gained acceptance since. Claude pretends otherwise, claiming *James* "has been cited favorably by many Delaware cases." OB.32. But two of Claude's examples cite *James* for principles about interpretation of indemnification agreements, not its purported public-policy statement. *Alcoa*, 2016 WL 521193, at *7 n.79; *Laws v. Ayre Leasing, Inc.*, 1995 WL 465334, at *2 (Del. Super. Ct. July 31, 1995). And the third quotes *James*'s statement in passing but does not involve indemnification or rely on the statement at all. *Lovett v. Pietlock*, 2011 WL 2086642, at *4 (Del. Super. Ct. Apr. 26, 2011), *aff'd*, 32 A.3d 988 (Del. 2011). Instead, as one court recently observed, "[a]side from a brief statement in *James*, which has not gained wide acceptance, there is no Delaware law supporting" a public policy against indemnification of willful acts. *CNX Res. Corp. v. CONSOL Energy Inc.*, 2024 WL 4929171, at *6 (Del. Super. Ct. Nov. 8, 2024).

To the contrary, Delaware courts, including this one, have permitted indemnification of (1) punitive damages for wanton misconduct, (2) losses occasioned by fraud, (3) settlements of a claim alleging intentional ERISA violations, and (4) restitution and disgorgement of ill-gotten gains from fraudulent-conveyance harms. *See, e.g.*, *Whalen*, 514 A.2d at 1073-74 (wanton conduct); *RSUI*, 248 A.3d at 901-05 (fraud and intentional wrongdoing); *CNX*, 2024 WL 4929171,

at *6 (intentional ERISA violations); *Sycamore*, 2021 WL 761639, at *11-12 (restitution for fraudulent-conveyance harms).

These cases make Claude's proposed policy implausible, and Claude's efforts to differentiate them are fruitless. Claude attempts to distinguish *Whalen* because the indemnified punitive damages did not arise from "intentional or willful conduct." OB.35. But Claude ignores that they arose from "wanton" conduct—hardly supporting Claude's point. 514 A.2d at 1073-74. And this Court's reasoning, that "we cannot infer … a policy against such insurance" simply because "the purposes of punitive damages [might] be frustrated if such damages were insurable," applies equally to willful conduct. *Id.* at 1074.

Claude (at 35) attempts to distinguish *RSUI* because this Court partially relied on a Delaware statute allowing corporations to afford D&O insurance for "any liability." 248 A.3d at 903-04 (emphasis omitted). But this distorts *RSUI*'s reasoning. *RSUI* hewed to *Whalen*'s approach, asking if Delaware "ha[s] a public policy against the insurability of losses occasioned by fraud so strong as to vitiate the parties' freedom of contract." *Id.* at 903. The Court found that it did not, noting that the statute supported a contrary public policy, *id.*; that other public-policy considerations weighed against the proposed rule, *id.* at 904; and that its approach accorded with *Whalen*, *id.* at 904-05.

Claude argues *Sycamore* is distinguishable because restitution and disgorgement do not *always* require wrongdoing. OB.35. This grossly oversimplifies *Sycamore*. The insured there sought indemnification for fraudulent conveyance, and the insurers argued the loss was "uninsurable as a matter of public policy because it represent[ed] disgorgement of … ill-gotten gain" after investors "raided [a company's] high-performing assets," leaving it bankrupt. 2021 WL 761639, at *1. The court concluded this conduct was insurable. *Id.* at *11-12.

Finally, Claude argues that *CNX*, which expressly rejected *James*'s rule, is irrelevant because it allocated past liabilities, not future ones, and implicated important corporate interests about spinoff transactions. OB.34. But that *CNX* involved past liabilities does not make its discussion of Delaware public policy any less accurate, as the court explained. Trial.Op.41.n.255.

And like *CNX*, this case implicates important commercial interests: Defendants wished to sell a company facing expanding accusations of willful misconduct, and, as the Superior Court found, the buyer "was only willing to purchase VOI" with complete indemnity for the Patent Litigation. Trial.Op.6. Claude's public-policy rule would have prevented this deal (and Claude's $55+ million payout). And it would severely hamper Delaware M&A transactions involving patent rights. This case proves the point. Rather than providing clear

allocation of risk, Claude's rule invites disputes about whether damages are "attributable to pre-Transaction conduct and the reasonable and expected continuation of that conduct," whatever that means. OB.17. If Delaware law prohibits sophisticated, represented parties from assigning all liability from a specified lawsuit to one of the contracting parties, buying and selling companies with patent litigation exposure will be difficult if not impossible.

None of Claude's other authorities prove his proposed public policy. Claude relies heavily on dicta in *USAA Casualty Insurance Co. v. Carr*, 225 A.3d 357 (Del. 2020), that "an insured should not be allowed to profit, by way of indemnity, from the consequences of his own wrongdoing." *Id.* at 362. That dicta cannot be reconciled with the decisions above allowing indemnity for wanton conduct, intentional ERISA violations, and fraudulent conveyance. In any event, *Carr* turned on contract terms, not public policy, *id.*, and this Court has referred to *Carr*'s statement as "dicta," *RSUI*, 248 A.3d at 904. Nor is that dicta, arising in the homeowners'-insurance context, relevant to an M&A deal like this one, as "Delaware courts are especially chary about relieving sophisticated business entities of the burden of freely negotiated contracts." *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 565-66 (Del. Ch. 2023).

Claude cites cases for the proposition that "indemnification for an indemnitee's future intentional torts is not permitted." OB.33. But these cases are not about *indemnification*; they involve *waivers of liability* for fraud or bad faith. *J.A. Jones Constr. Co. v. City of Dover*, 372 A.2d 540, 545 (Del. Super. Ct. 1977); *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1060-64 (Del. Ch. 2006); *Rich*, 295 A.3d at 591-92. Waivers differ in kind from indemnification: waivers deny plaintiffs *any* remedy, while indemnification merely determines who pays. *See RSUI*, 248 A.3d at 904-05 ("[C]oncluding that certain conduct, including [fraud], is not uninsurable on public-policy grounds is notably different than placing a stamp of approval on that conduct."). The MIPA involved indemnity, not waiver. DePuy retained its remedy, and the only question is whether Defendants, in exchange for the $100 million Plaintiffs paid them for the indemnity, must pay DePuy's remedy.

Claude cites *State Farm Fire & Casualty Co. v. Hackendorn*, 605 A.2d 3 (Del. Super. Ct. 1991), *abrogated by* 225 A.3d 357, for the principle that "providing coverage for future misconduct leads to reduction in inhibition of potential misconduct." OB.30-31. But *Hackendorn* turned on contract interpretation, not whether a contract was void on public-policy grounds. 605 A.2d at *7, *12-13. Finally, Claude resorts to Williston on Contracts—the same treatise *James* relied

on—for the proposition that permitting indemnification of willful acts would "encourage wrongdoing." OB.31. Claude's citation is misleading. The treatise actually says that indemnification for willful misconduct "raise[s] difficult policy concerns: *On the one hand*, the courts are … reluctant to encourage wrongdoing …. *On the other hand*, a refusal to permit indemnity will often … result in an injury being unredressed by compensation. Balancing these competing interests is difficult." 8 Williston on Contracts § 19:20. This balancing is best left to sophisticated contracting parties or the Legislature.

Without Delaware support, Claude turns out-of-state, asserting *James*'s rule is "universally followed outside Delaware." OB.33-34. This is fiction. Half of Claude's cases concern liability waivers, not indemnification. *See Laeroc Waikiki Parkside, LLC v. K.S.K. (Oahu) Ltd. P'ship*, 166 P.3d 961, 983 (Haw. 2007); *Zachry Constr. Corp. v. Port of Hous. Auth.*, 449 S.W.3d 98, 117-18 (Tex. 2014); *Holmes v. Clear Channel Outdoor, Inc.*, 644 S.E.2d 311, 314 (Ga. 2007) (considering whether indemnification provision *functioned as* exculpatory clause). And while some states preclude indemnification for willful or intentional acts, that is hardly "universal." *E.g.*, *Dixon Distrib. Co. v. Hanover Ins. Co.*, 641 N.E.2d 395, 401-02 (Ill. 1994); *Sinclair Oil Corp. v. Columbia Cas. Co.*, 682 P.2d 975, 980-81 (Wyo. 1984).

As a last resort, Claude seems to argue this Court should void the indemnity on *federal* public-policy grounds. OB.31-32. Claude waived this argument by not making it below. In any event, Claude has not demonstrated that a federal court would invalidate an indemnification provision on these grounds, let alone that a *Delaware* court would. Indeed, at least one federal court has rejected that public policy bars indemnifying induced patent infringement. *SNI Sols., Inc. v. Univar USA, Inc.*, 2020 WL 1976340, at *3 (S.D. Ind. Apr. 24, 2020).

2. Even if Claude's public policy existed, this Court considers whether public policy overcomes the freedom to contract based on the "circumstances presented." *State Farm Mut. Auto. Ins. Co. v. Clarendon Nat'l Ins. Co.*, 604 A.2d 384, 390 (Del. 1992). This case's facts do not warrant applying Claude's proposed policy against indemnifying willful conduct.

To begin, the Superior Court *did not find* that VOI or Fidelio committed any post-transaction willful misconduct. Trial.Op.40.n.247. To the contrary, it rejected Claude's argument that VOI's post-verdict shipments of C/V constituted a "fire sale," finding they were part of an ongoing sales program. Trial.Op.34 & nn.216-17. This program was developed by Patrick years before the transaction. B322-23(64:21-65:18) (cited Trial.Op.12.n.74).

And the commercial context makes Defendants particularly ill-suited to benefit from Claude's proposed rule. For years under Defendants' ownership and control, VOI engaged in flagrant copying of DePuy's products as reflected in smoking-gun documents uncovered by DePuy. Defendants concealed those documents from Fidelio and Plaintiffs during due diligence in 2020, telling Fidelio and Plaintiffs that VOI "had a strong case [and] didn't infringe." *Supra* pp.11-13. Defendants' misconduct precipitated the Patent Litigation and explained DePuy's aggressive tactics. *Supra* pp.7-10. "[O]verwhelming evidence" established that Defendants, through their Sellers' Representative, controlled the litigation's defense and settlement. Trial.Op.28. Defendants are not innocent insurance carriers or strangers to the Patent Litigation; they owned VOI, were personally involved in all relevant facts, and, as the Superior Court found, received $100 million from Plaintiffs *only because* they promised to indemnify the Patent Litigation in its entirety. *Supra* pp.7-12. Voiding this central term of the parties' bargain undoubtedly violates Delaware's pro-contractarian public policy. Claude cannot show that enforcing his indemnification obligation violates any Delaware public policy on this case's facts.

III. The Superior Court Correctly Dismissed Claude's Implied-Covenant Claim at Summary Judgment

A. Question Presented

Whether the Superior Court correctly dismissed Claude's implied-covenant claim. A257-58; B70.

B. Scope of Review

Summary judgment decisions are reviewed *de novo*. *RSUI*, 248 A.3d at 896.

C. Merits of Argument

If his contractual and public-policy arguments fail, Claude asks this Court instead to read into the MIPA an implied, free-floating term requiring Plaintiffs to make all "business decisions" in good faith, and then reverse so he can try to prove lack of good faith below. OB.37-40. This Court should decline.

Claude fundamentally misapprehends the implied covenant of good faith, which "involves a 'cautious enterprise.'" *Nemec*, 991 A.2d at 1125. "[T]he covenant is a limited and extraordinary legal remedy." *Id.* at 1128. It "does not apply when the contract addresses the conduct at issue," *Nationwide Emerging Managers*, 112 A.3d at 896, but only "when the contract is truly silent," *Baldwin v. New Wood Resources, LLC*, 283 A.3d 1099, 1117 (Del. 2022).

In this case, Claude fails to identify any gap in the contract that needs filling with an obligation to act in good faith. Claude does not even purport to identify any

gap in the indemnification provisions. Nor is there one. The MIPA "extensively outlines the parties' rights and obligations regarding the Patent Litigation and indemnification." MSJ.Op.25. Plaintiffs are entitled to *any* Damages related to the Patent Litigation. MSJ.Op.25.n.138. Defendants had certain rights regarding the Patent Litigation defense. MSJ.Op.25. Those provisions govern the parties' conduct regarding the Patent Litigation.

Instead of an indemnification-related gap, Claude argues that the MIPA "afforded Plaintiffs with unfettered discretion" in managing VOI's business, and that all post-transaction business decisions must therefore be conducted with good faith regarding their effect on Defendants. OB.38. "It is one thing to imply a good faith obligation when the parties have expressly agreed that a certain act is within a party's discretion," *Glaxo Grp. Ltd v. DRIT LP*, 248 A.3d 911, 920 (Del. 2021)—for example, when the contract "permit[s] either party 'in its sole discretion' to terminate the agreement," *id.* at 920 n.46. But the implied covenant should not be used "to imply discretion to restrict actions expressly permitted by the parties' agreement." *Id.* at 920-21.

Here, the MIPA did not (as Claude asserts) "afford[] Plaintiffs with unfettered discretion." OB.38. Defendants *sold VOI*, giving Plaintiffs the right to manage the business. Claude's attempt to leverage his indemnification obligation into an

implied obligation by Plaintiffs to manage their business in *his* interest falls outside any known conception of the implied covenant. It is the kind of "free-floating duty … unattached to the underlying" contract that Delaware law rejects. *Nemec*, 991 A.2d 1126 n.18; *see Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 419 (Del. 2013) ("'[G]ood faith' does not envision loyalty to the contractual counterparty, but rather faithfulness to the scope, purpose, and terms of the parties' contract."), *overruled on other grounds by Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013).

Claude's cited cases bear little resemblance to this one. In *Baldwin*, the contract allowed one party to make a "subjective discretionary determination as to whether an indemnitee has met a specific standard of conduct." 283 A.3d at 1120. The Court identified "an implied obligation requiring that [subjective] determination be made in good faith." *Id.* at 1118. Without that obligation, one party could arbitrarily obviate the obligation to meet the standard of conduct in the first place by falsely denying the standard had been met. *Id.* at 1118-19. Implying a good-faith requirement avoided rendering a term meaningless. Here there is no MIPA term that would be rendered meaningless.

Similarly, in *Dieckman v. Regency GP LP*, the Court confronted whether a general partner could invoke the corporation's conflicted-transaction safe-harbor

provisions using a "false or misleading statement[]" to induce the unaffiliated unitholders to trigger the safe harbors. 155 A.3d 358, 368 (Del. 2017). This Court understandably concluded that the obligation "not to mislead unitholders" was obvious, because otherwise the general partner could benefit from a safe-harbor provision obtained through deceit, rendering the provision meaningless. *Id.* Here, again, Claude cannot identify any provision that would be rendered meaningless by requiring Claude to honor his indemnification obligations, and it is not "obvious" that the "parties must have intended" to include a free-floating obligation for Plaintiffs to manage VOI for Defendants' benefit. *Id.*

Finally, Claude cites *Mitchell v. Peterson*, 422 N.E.2d 1026 (Ill. App. Ct. 1981), for the proposition that "implicit in [an] indemnification agreement is 'the understanding that the indemnitor is not liable for needless expenses capriciously amassed by the indemnitee.'" OB.39. But *Mitchell* does not address the implied covenant and instead addresses attorneys'-fees indemnity. Nor has Claude adduced evidence that Plaintiffs capriciously amassed damages. The evidence below, as the court found, was that VOI at all times sold products as part of its normal operating procedures, based on counsel's advice that they did not infringe. *Supra* pp.19-20.

Nor is implying terms into the MIPA necessary to protect the parties' expectations. Claude got the benefit of his bargain: Defendants sold VOI for

$100 million and agreed to broadly indemnify Plaintiffs for the Patent Litigation, up to $100 million. They bargained for protections and obtained certain "guardrails" to align the parties. *See supra* pp.14-15, 35-36. If Claude wanted to maintain operational control, restrict Plaintiffs' operation of VOI, or limit Plaintiffs' indemnity, he could have bargained for such language. Whether such a deal would have been consummated, or what its terms would have been, is speculation. Claude may now regret, with the benefit of hindsight, that he did not write the contract differently, but that does not justify the Court rewriting a heavily negotiated agreement between sophisticated parties. *See Nemec*, 991 A.2d at 1126 ("Parties have a right to enter into good and bad contracts, the law enforces both.").

IV. The Superior Court Correctly Awarded Prejudgment Interest

A. Question Presented

Whether the Superior Court properly awarded prejudgment interest for Plaintiffs' contract damages. B112-13; A914-17; A933-36.

B. Scope of Review

This Court reviews prejudgment interest claims *de novo*. *Brandywine Smyrna, Inc. v. Millenium Builders, LLC*, 34 A.3d 482, 484-86 (Del. 2011).

C. Merits of Argument

For decades, Delaware has treated prejudgment interest on contract damages as a "matter of right and not of judicial discretion." *Brandywine*, 34 A.3d at 485; 6 *Del. C.* § 2301. The Superior Court followed this well-established body of law when awarding Plaintiffs prejudgment interest. Claude's novel proposed rule—that courts have discretion to deny prejudgment interest when they conclude an award would not further the purposes of prejudgment interest in a particular case—has no basis in Delaware law or the facts of this case, and this Court should reject it.

In Claude's view, the court should have denied prejudgment interest because Plaintiffs paid the settlement with a loan, and the interest on that loan was part of Plaintiffs' contract damages. Claude argues that the loan meant Plaintiffs were not deprived of funds, and so prejudgment interest is inappropriate.

Brandywine forecloses Claude's argument. In *Brandywine*, this Court held that the plaintiff could recover both loan interest expenses paid as actual damages, as well as prejudgment interest. 34 A.3d at 486. The Court explained that prejudgment interest and interest comprising contract damages are "conceptually separate and distinct." *Id.* Prejudgment interest "compensates the plaintiff for the loss of the use of [their] money" and "forces the defendant to relinquish any benefit that it has received by retaining the plaintiff's money in the interim." *Id.* Interest the plaintiff "actually incurred," however, "was an element of damages on which [the plaintiff] was entitled to *receive* prejudgment interest." *Id.*

Claude attempts to skirt this holding, contending that the interest expenses in *Brandywine* were only damages because they did not make the plaintiffs whole, and instead "merely allowed the dealership to stay afloat" while it suffered other damages. OB.45-46. But *Brandywine*'s reasoning was based not on the fact that the plaintiff continued to suffer losses, but on the fact that the plaintiff "lost the use of the money it was required to pay as interest on the borrowing that was necessitated by [defendant's] conduct." 34 A.3d at 486.

Here, the court found Plaintiffs, too, lost the use of the $70 million used to pay the settlement. Vimian's business model includes acquiring other companies, generally through leverage. B340-41(249:23-250:7). The $70-million loan "t[ook]

up [Vimian's] capacity and … debit ratios," and "t[ied] up … capital" Vimian could not use to "invest[] into other opportunities," A415(145:1-14), making it "more difficult[] [to] acquir[e] other companies." B340-41(249:23-250:7). These lost opportunities are exactly the harm prejudgment interest addresses. Claude cites no Delaware law that losing access to *borrowed* funds used for a plaintiff's business is any different than losing access to funds already on its books. Either way, Plaintiffs lost use of that $70 million after Defendants breached and refused to indemnify.

Moreover, Claude's suggestion that Plaintiffs had the burden to present "evidence that the measure of damages [from these lost opportunities] would bear any relationship to the prejudgment interest they sought," OB.45, would turn prejudgment-interest law on its head. Prejudgment interest is a matter of right; plaintiffs are not required to prove that the amount is proportional to their actual harm.

Claude identifies just two Delaware cases that he claims apply his proposed rule. OB.42-43. Neither helps him. *Deane v. Maginn*, 2024 WL 3043968, at *2 (Del. Ch. June 18, 2024), involved rescissory damages, and unlike contract damages, "[p]re-judgment interest on rescissory damages is not awarded as a matter of right" but "rests within the [court's] discretion." *LG Electronics Inc. v. Invention Investment Fund I, L.P.*, 2025 WL 1545444 (Del. Super. Ct. May 15, 2025), also

provides no support. For one, that court appears to have concluded it had discretion to deny prejudgment interest based on two inapposite Court of Chancery cases exercising discretion to determine the *rate* of interest, not whether to award interest at all. *See id.* at *4 & nn.36-37. Regardless, the court denied prejudgment interest because under the parties' "contractual arrangement," plaintiff had "not been deprived of any funds." *Id.* at *4. Because of extensive redactions, the specifics of that "contractual arrangement" are obscured. *See* Trial.Order.4. In this case, however, the Superior Court specifically found that Plaintiffs lost the use of their funds. Trial.Order.5.

Without supporting Delaware law, Claude turns to *Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co.*, 697 F.2d 481 (2d Cir. 1983). But *Bulk* is neither factually similar nor persuasive—indeed, New York courts frequently limit it to its "particular set of circumstances," *Century Indem. Co. v. Brooklyn Union Gas. Co.*, 207 N.Y.S.3d 916, 919 (Sup. Ct. 2024). First, prejudgment interest arose under New York statute, not Delaware law. *Bulk*, 697 F.2d at 484-85. New York appears not to include Delaware's disgorgement-based rationale. *Id.* Second, *Bulk*'s holding that prejudgment interest is unnecessary "[w]hen the aggrieved party has been awarded its actual interest charges," *id.* at 485, directly conflicts with *Brandywine*,

34 A.3d at 485-86, and Claude cannot harmonize the two (nor does he try). This Court should decline to import *Bulk*'s inapposite rule.

V. The Superior Court Erroneously Denied Recovery of Plaintiffs' Enforcement Expenses

A. Question Presented

Whether the Superior Court erred in concluding the MIPA's indemnification provision excluded Plaintiffs' indemnification enforcement expenses. Plaintiffs preserved this at A696-98.

B. Scope of Review

Courts review contract interpretation *de novo*. *See supra* p.25.

C. Merits of Argument

Under Delaware law, "litigants are normally responsible for paying their own litigation costs," unless a contract or statute provides otherwise. *Mahani v. Edix Media Grp., Inc.*, 935 A.2d 242, 245 (Del. 2007). Delaware courts require a "clear and unequivocal articulation" of intent to cover attorneys' fees for first-party claims (claims between the parties to a contract), *TranSched Sys. Ltd. v. Versyss Transit Sols., LLC*, 2012 WL 1415466, at *2 (Del. Super. Ct. Mar. 29, 2012), but do not "require that an indemnity clause expressly state that it covers first-party claims," *Schneider Nat'l Carriers, Inc. v. Kuntz*, 2022 WL 1222738, at *31 (Del. Super. Ct.Apr. 25, 2022). Since "[e]ach provision is unique and must be decided under the facts of that particular case," *TranSched*, 2012 WL 1415466, at *2, courts have

rejected that "specific language" or "magic words" must be used. *Menzies v. Seyfarth Shaw LLP*, 2024 WL 2804813, at *3 (D. Del. May 31, 2024).

Instead, Delaware courts "construe [an] agreement[] 'as a whole,'" considering "clues" throughout to determine whether they reveal the requisite "clear and unequivocal intent." *Id.* at *4.

MIPA Article 8—"Indemnification"—reflects the parties' "clear and unequivocal intent" to provide fee-shifting in indemnification enforcement claims, and the Superior Court erred in holding otherwise.

In particular, § 8.3(a) sets forth the MIPA's $100-million indemnification cap, but expressly excludes from the cap "claim[s] for indemnification based on … the expenses of the Indemnified Party from enforcing its rights under … Article 8 [Indemnification]." A1014. In other words, "claims for indemnification" *include* "the expenses of the Indemnified Party from enforcing its [indemnification] rights," and indemnified parties are entitled to those expenses *above and beyond* the $100 million cap. This provision reflects the parties' unmistakable understanding that enforcement expenses *were* indemnified—and that the indemnitor could not benefit from forcing costly litigation that elevated the indemnitee's damages beyond the cap. *See also* A963 (including as "Damages" "any … expenses (including … the fees and disbursements of counsel)"). Claude has never provided any explanation

for what this text means if the MIPA does not indemnify enforcement expenses. Nor could he. This language makes sense only if enforcement expenses are indemnified. The Superior Court's denial of these expenses improperly renders this language surplusage.

Although that suffices, the MIPA contains other indications that the parties understood the indemnification provision covered enforcement expenses. In *Schneider*, the contract's notice-of-claims provision included separate procedures for "third-party" indemnification claims. 2022 WL 1222738, at *30. "This distinction reflect[ed] that the parties understood that claims within the scope of the indemnity clause were not limited to third-party claims." *Id.* The MIPA is even clearer: §§ 8.4 and 8.5 expressly distinguish between procedures for "Inter-Party Claims" and "Third Party Claims," A1015-16, demonstrating that "Inter-Party Claims" unequivocally fall within the indemnity and its promise of reimbursement for "the fees and disbursements of counsel." A963.

Despite this clear text, the Superior Court concluded the MIPA did not reflect an intent to indemnify enforcement expenses. This was incorrect. First, the court downplayed § 8.3 as a "mere[] mention[] [of] enforcement expenses" and reasoned that the Damages provision, standing alone, could not show intent to indemnify enforcement fees. Trial.Op.53 & n.320. This approach isolated each provision,

rather than reading them together, and effectively imposed a magic-words requirement unsupported by Delaware law. *See Chi. Bridge*, 166 A.3d at 926 n.60 (court should not interpret contracts to produce "surplusage"); *Carbonyx License & Lease LLC v. Carbonyx Inc.*, 2019 WL 6701910, at *8 (S.D.N.Y. Dec. 9, 2019) ("[T]he requirement that parties express their intent with 'unmistakable clarity' is not the same as a 'magic words' test, and courts have interpreted indemnification provisions to cover litigation expenses between the parties even where that coverage was not explicitly mandated in such words but, nonetheless, the intent was clear.").

Second, Plaintiffs never argued that the Damages definition, standing alone, showed intent to indemnify enforcement fees. Rather, Plaintiffs contend that the Damages definition—read alongside the neighboring provisions in Article 8—shows that the parties intended to indemnify Plaintiffs for attorneys' fees and costs incurred in enforcement actions, an approach consistent with Delaware law. *E.g.*, *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2015 WL 5829461, at *7 (Del. Super. Ct. Aug. 10, 2015) (looking to policy's defined term to determine insurer's duties).

Finally, the Superior Court mistakenly concluded that because an ancillary contract attached to the MIPA has a separate fee-shifting provision, the MIPA by implication did not. Trial.Op.53-54. That the Contingent Closing Note uses different language to shift fees, A1042, does not mean that §§ 8.2, 8.3, 8.4, and 8.5

were not clear enough. Delaware law does not require specific fee-shifting language. "Each provision is unique" and must be assessed based on its text. *TranSched*, 2012 WL 1415466, at *2. Here, § 8.3(a)'s language in particular makes unmistakably clear the parties' intent to indemnify enforcement expenses.

This Court should reverse and remand for the Superior Court to award Plaintiffs their enforcement expenses in this action.

VI. The Superior Court Erroneously Concluded the [redacted] Cost Was Not Indemnifiable

A. Question Presented

Whether the MIPA's indemnification provision, which covers all "payments," including "amounts paid in settlement," encompasses the [redacted] that Plaintiffs received as part of the settlement. Plaintiffs preserved this at B121-22; A674-78.

B. Scope of Review

Courts review contract interpretation *de novo*. *See supra* p.25.

C. Merits of Argument

VOI paid $70 million to settle with DePuy, and that settlement included the [redacted]. Yet the Superior Court concluded VOI's payment for the [redacted] was non-indemnifiable, misinterpreting the term "settlement" as including only [redacted]. This Court should correct that error and hold that Plaintiffs are entitled to the payment associated with the [redacted].

The indemnification provision covers "any … payments" related to the Patent Litigation, "*including* amounts paid in settlement." A963; A1013. As an initial matter, even if a [redacted] does not fit within the definition of "amounts paid *in settlement*," surely the payment for the [redacted] was a "payment" incurred "as a result of, or in connection with, the Patent Litigation." *Id.*

But at any rate, the court erred in concluding that "amounts paid in settlement" omits [redacted] The language reveals no intention to limit indemnifiable settlement payments only to [redacted]. "Settlement" is capacious—Black's Law Dictionary defines it as "[a]n agreement ending a dispute or a lawsuit." *Settlement*, *Black's Law Dictionary* (12th ed. 2024).

Here, the indemnity includes payments to settle all "Actions" "related to" the Patent Litigation, which expressly includes "injunctions." A961, A968. Patent litigation routinely seeks both [redacted]. *E.g.*, *Tristrata Tech, Inc. v. Mary Kay, Inc.*, 423 F. Supp. 2d 456, 470-71 (D. Del. 2006), *aff'd*, 214 F. App'x 979 (Fed. Cir. 2007). Thus, parties frequently include [redacted] in settlement agreements. *See* [redacted] Just so here: DePuy sought to enjoin [redacted] in the Patent Litigation. *Supra* p.20. [redacted].

The Superior Court erred in concluding otherwise. It found that "amounts paid in settlement," A963, "are properly understood as payments to 'release[] a party from potential liability,'" and thus that the term "settlement" did not cover a [redacted] because releases are [redacted]

Trial.Op.35 & n.221 (alteration in original) (quoting *Ketler v. PFPA, LLC*, 32 A.3d 746, 747-48 (Del. 2016)). But *Ketler* did not construe the term "amounts paid in settlement," nor did it consider an indemnification provision or the nature of settlements. 32 A.3d at 747-48. *Ketler* considered whether a signed release of liability in a gym-membership agreement was enforceable. *Id.* That sheds no light on whether a "settlement" is *always* [redacted]

The other cases cited by the court are similarly inapposite. *Losstuter v. Kentucky* distinguished pardons from licenses in a First-Amendment challenge to Kentucky's felon-reenfranchisement scheme. 2023 WL 4636868 (6th Cir. July 20, 2023). *Universal Oil Products Co. v. Vickers Petroleum Co. of Delaware*, rejected the argument that a [redacted] could create a [redacted] reasoning that [redacted] 19 A.2d 727, 729 (Del. 1941). And *Cellport Systems, Inc. v. Harman International Industries Inc.*, interpreted a release to determine whether it was forward-looking. 2024 WL 1337338, at *7 (E.D. Tex. Mar. 28, 2024). None of these cases interpreted the term "settlement," much less held that settlements are always [redacted]

The trial record confirms that VOI's payment for the [redacted] to secure peace with DePuy constitutes Damages suffered by VOI "as a result of, or in connection with, the Patent Litigation." As discussed above, the court found that

"VOI, at Patrick's direction, made C/V a part of the Patent Litigation," meaning that "settling the Patent Litigation without addressing" C/V "was not realistic." Trial.Op.34; *supra* pp.16-17, 37. Indeed, because of the Sellers' Representative's actions in defending the case, DePuy sought to add those C/V plates to the injunction in post-trial briefing, directly putting them at issue. The court correctly found that payment for a *release* for past C/V sales was indemnifiable. Trial.Op.34-35. The fact that [redacted] confirms that the payment for the [redacted] was an "amount paid in settlement" and is indemnifiable.

VII. The Superior Court Erroneously Halved Plaintiffs' Award of Patent Litigation Fees

A. Question Presented

Whether the Superior Court erred in awarding Plaintiffs only half of the Patent Litigation fees and expenses paid by VOI. Plaintiffs preserved this at A655-57 & n.3.

B. Scope of Review

Courts review contract interpretation *de novo*. *See supra* p.25.

C. Merits of Argument

Plaintiffs sought Claude's share of $8.6 million of VOI's Patent Litigation attorneys' fees and expenses as damages at the trial below. To prove their claim, Plaintiffs introduced extensive evidence that each dollar sought was incurred on behalf of VOI and actually paid by VOI. The court credited this evidence, but nevertheless reduced the award by half, holding that because VOI and Fidelio were co-represented for part of the Patent Litigation, half of the fees were *not* VOI's fees, even though VOI paid them with the Sellers' Representative's approval. That approach contravened the MIPA's text and Delaware law.

1. The $8.6 Million in Fees Were All VOI's Recoverable Damages

First, the Superior Court erred in holding that attorneys' fees must, as a matter of law, be divided equally between co-clients. All Patent Litigation fees and

expenses Plaintiffs sought below were incurred *and paid* by VOI, with Sellers' Representative's approval. VOI was therefore entitled to recover the full amount.

Under Delaware law, contract obligations, like VOI and Fidelio's obligations to pay their attorneys' fees, "shall be joint and several, unless otherwise expressed." 6 *Del. C.* § 2701. Because VOI thus jointly incurred and was liable for *all* the attorneys' fees and expenses at issue—and because it actually paid each dollar of attorneys' fees and expenses it seeks—all these fees and expenses were VOI's Damages "suffered … as a result of, or in connection with, the Patent Litigation." A1013.

The Superior Court derived a novel fifty-fifty rule, reasoning that because VOI and Fidelio were co-clients, each was responsible for only and exactly half of the total fees. Trial.Op.47-48. The cases it relied on do not support this outcome here. In *Valeant Pharmaceuticals International v. Jerney*, 921 A.2d 732, 755 (Del. Ch. 2007), and *Levy v. Hli Operating Co.*, 2007 WL 2801383, at *11 n.62 (Del. Ch. May 16, 2007), the Court of Chancery apportioned fees equally because of the burden that line-by-line apportionment would impose on the court. Here, though, Plaintiffs have *already* proven (at Defendants' request) that all the relevant fees were both incurred and paid by VOI. Plaintiffs provided complete billing records, and Vimian's general counsel testified that he reviewed them to ensure that each entry

for which Plaintiffs seek indemnification (1) constituted work performed on behalf of VOI, as opposed to Fidelio, and (2) was actually paid by VOI. B342-45(257:18-260:10); B1102-1762; *see* B294-97(22:15-25:15); B1765 (Patrick directing Finnegan to bill VOI for joint VOI/Fidelio work). Plaintiffs excluded all fees invoiced to Fidelio. B343-44(258:20-259:11). And Plaintiffs painstakingly excised any entries billed to VOI that appeared to relate entirely or primarily to Fidelio, and did not seek indemnification for those fees. B344-45(259:21-260:10). And the Superior Court found that "Claude did not rebut [the] testimony that Plaintiffs' request excludes defense costs solely tied to Fidelio." Trial.Op.48. The record is therefore clear and indisputable: as a factual matter, the $8.6 million sought consisted of VOI's fees, incurred on behalf of VOI, that VOI paid for the Patent Litigation. No extra apportionment labor would have fallen on the Superior Court. Plaintiffs are entitled to the fees they proved below.

2. The Indemnification Provision Covers Fidelio's Patent Litigation Fees Anyway

Even if half the fees at issue were Fidelio's fees, the MIPA covered them, VOI paid them, and they fall within the scope of indemnification.

The MIPA provides that Defendants shall indemnify "the Buyer [Movora] [and] its Affiliates," including Fidelio, "from and against any and all Damages arising out of or relating to … any Damages suffered by the Company as a result of,

or in connection with, the Patent Litigation." A1013. The natural reading of this provision covers Fidelio's Damages, including Fidelio's attorneys' fees, suffered in connection with VOI's Damages in the Patent Litigation.

The court, however, concluded that "suffered by the Company" limited the indemnifiable Damages to VOI's Damages and that the term "Affiliates" only "expand[ed] who Claude must indemnify, not what losses are subject to indemnification." Trial.Op.37. But § 8.2(a) indemnifies Fidelio's Damages "*arising out of or relating to* … any Damages suffered by the Company," not just Damages suffered by VOI directly. A1013. As discussed extensively above, Delaware courts recognize that terms like "arising out of" and "relating to" are "paradigmatically broad terms." *Lillis*, 904 A.2d at 331; *see supra* p.28. Here, Fidelio's Patent Litigation fees undoubtedly related to VOI's Damages because they were incurred in the same litigation to defend against the same, joint-and-several patent liability. Accordingly, they are indemnifiable too.

CONCLUSION

Appellees/Cross-Appellants respectfully request that the Court deny Claude's appeal and grant Plaintiffs' cross-appeal, and remand to the Superior Court for awards in favor of Plaintiffs of (1) Plaintiffs' enforcement costs, (2) Claude's pro-rata portion of the full $70 million settlement, and (3) Claude's pro-rata portion of VOI's full Patent Litigation fees and expenses, and other appropriate related relief.

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