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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, v. 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** Court Below: Superior Court of the State of Delaware C.A. No. N23C-05-034-MAA [CCLD]

APPELLANTS' REPLY BRIEF/ ANSWERING BRIEF ON CROSS-APPEAL

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REPLY BRIEF (APPEAL)

I. The Superior Court Erred in Holding That the MIPA Indemnifies Plaintiffs for Damages Arising from Their Own Independent Post-Transaction Business Decisions.

The MIPA provides that Sellers shall indemnify Buyers for "Damages suffered by [VOI] as a result of, or in connection with, the Patent Litigation." A1013. The question before the Court is whether this language encompasses damages from Plaintiffs' independent post-Transaction[1] decisions to launch new products and infringe a newly issued patent.

The answer is no. Where, as here, the indemnitee seeks damages arising from its own fault, the indemnification provision must be "crystal clear" and "unequivocal" that it covers such damages. *State v. Interstate Amiesite Corp.*, 297 A.2d 41, 44 (Del. 1972). The MIPA's broad, general language is precisely the type of language that does not meet that threshold.

A. Plaintiffs' Unbounded Construction of the MIPA Has No Basis in Law.

The MIPA's indemnification provision covers "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. Plaintiffs offer an extraordinarily expansive interpretation of this provision. They contend it covers damages arising from their

[1] As in the opening brief, this reply brief uses "Transaction" to refer to the sale of VOI in June 2020 pursuant to the MIPA.

own post-Transaction business decisions, such as their decision to develop and sell entirely new product lines that infringed a new patent that had not even been applied for before the Transaction.

Yet Plaintiffs identify no specific language in the MIPA suggesting that they would be indemnified for damages arising from post-Transaction business decisions. Instead, they contend that those damages are indemnifiable because the MIPA's phrases such as "arising out of," "related to," and "in connection with," are "paradigmatically broad." AB 28. That argument contradicts well-settled Delaware law. For an indemnification agreement to cover damages arising from the indemnitee's independent decisions, there must be specific language contemplating such damages. Broad, vague language like "arising out of," "related to," and "in connection with" is not specific enough.

In *Amiesite*, a road repair contractor entered into an indemnification agreement with the State Highway Department that sought to indemnify the Department "from all suits, actions, or claims of any character brought because of any injuries or damage received or sustained by any person, persons, or property on account of the operations of the said contractor." 297 A.2d at 43. The contractor and the State were named as co-defendants in a personal-injuries action arising from a road accident. *Id.* After the jury apportioned 45% of the fault to the contractor and only 20% to the State, the State argued that its damages exposure fell within the

scope of indemnity. *Id.* at 44. Much like Plaintiffs here, the State argued that the broadly-worded indemnification agreement covered the State's share of the verdict: after all, because the contractor was the primary responsible party, those damages arose from a "suit[]" that was "brought because of … injuries" sustained "on account of the operations of the said contractor." *Id.* at 43. But the Court held that the indemnity agreement was "not crystal clear and sufficiently unequivocal to require [the contractor] to indemnify the State for damages collected for the State's own negligence." *Id.* at 44. *Amiesite* therefore announced a principle directly applicable here: when a party seeks to stretch an indemnification agreement to cover the consequences of its *own* conduct, "crystal clear" and "unequivocal" language is needed. *Id.* Indeed, this case follows *a fortiori*: if clear and unequivocal language is needed to indemnify against negligence, it is surely needed to indemnify against willful misconduct. And here, as in *Amiesite*, broad, general language like "relating to" fails that standard.

Rather than confront *Amiesite*'s legal standard, Plaintiffs attempt to distinguish *Amiesite* on its facts. They point out that contractors lack a common-law duty to indemnify the principal for the principal's own negligence, and infer that *Amiesite* therefore applies *only* to contractor agreements that indemnify against the contractor's future negligence. AB 31-32. That misreads *Amiesite*. First, there is also no common-law duty to indemnify a contractual counterparty for the

counterparty's future willful infringement. Second, Plaintiffs' suggestion that *Amiesite* is limited to "construction-contractor case[s]," *id.* at 32, is wrong. Nothing in *Amiesite* hinged on the specifics of a construction contract. Subsequent cases have cited *Amiesite*'s requirement of clear and unequivocal language beyond the construction context. *See, e.g.*, *James v. Getty Oil Co. (E. Operations), Inc.*, 472 A.2d 33, 36 (Del. Super. Ct. 1983); *Rizzo v. John E. Healy & Sons, Inc.*, 1990 WL 18378, at *1 (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).

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), further confirms the necessity of unequivocal indemnification language. The indemnitee there, Glencore, was the seller of an aluminum refinery that sought indemnification from the indemnitor-buyer, Alcoa, for Glencore's costs incurred in settling a contract dispute arising out of the refinery's environmental contamination. *Id.* at *2, *7. That settlement was the result of a separate indemnification agreement that Glencore had independently entered into with the previous owner of the refinery, years before Glencore's sale to Alcoa. *Id.* at *2. Like Plaintiffs here, Glencore relied on a broad, general provision that required indemnification "with respect to … all Environmental Conditions" without limitation. *Id.* at *3, *7. Plaintiffs' description of *Alcoa*—"the indemnitor assumed

only listed obligations, and the relevant contract was not listed," AB 30—misdescribes the case; Glencore was relying on the broad indemnification provision, not the listed obligations.

Plaintiffs cannot reconcile their position with *Alcoa*'s reasoning—and do not even try. Although a literal reading of the broad indemnity would have covered Glencore's damages arising from an environment-related contract dispute, the court nonetheless rejected indemnification. The court held that "Delaware courts construe indemnification agreements strictly against the indemnitee, and do not permit enforcement of broad or ambiguous indemnity provisions." *Alcoa*, 2016 WL 521193, at *7. Further, to cover "Glencore's contractual liability" arising from an agreement that Glencore had voluntarily executed, "[t]he indemnification clause must clearly and unambiguously express such an intention through specific language that clearly manifests such an intent." *Id.* at *7-8 (cleaned up). Thus, "an indemnification clause that 'holds the indemnitee harmless from and against any and all loss, damage, injury liability and claims against the indemnitee' is not sufficiently specific." *Id.* at *8 (cleaned up); *see also Beloit Power Sys., Inc. v. Hess Oil V.I. Corp.*, 757 F.2d 1431, 1434 (3d Cir. 1985) (broad indemnity agreement could not cover indemnitee's liability from a contract that indemnitee voluntarily executed). The same reasoning forecloses Plaintiffs' position and, indeed, applies with greater force here: if specific language is needed to cover liability in connection with an

indemnitee's *valid contractual obligations*, it surely must be needed to cover liability in connection with an indemnitee's *willful patent infringements*. Generic language like "relating to" does not clearly and unambiguously demonstrate Claude's intent to cover damages arising from post-Transaction business decisions that Plaintiffs executed of their own volition.

B. Plaintiffs' Interpretation of the MIPA Ignores the Logic of the Transaction.

Demanding "crystal clear" and "unequivocal" language here not only is required by Delaware case law but also makes sense. Plaintiffs' interpretation creates grave moral hazard concerns: Plaintiffs can freely profit off willful infringements of new patents through new products, knowing that Claude will pick up the tab. Thus, Plaintiffs' interpretation would be "commercially unreasonable" and would "produce absurd results"—and the Court should not adopt such an interpretation unless the parties unequivocally say so. *Manti Hldgs., LLC v. Authentix Acq. Co.*, 261 A.3d 1199, 1211 (Del. 2021).

Plaintiffs throw a slew of arguments to defend that commercially unreasonable interpretation. None sticks.

First, Plaintiffs state:

> "[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 [584] (Del. 2025).

AB 33. But as the brackets indicate, *Aearo* concerned insurance policies, not indemnification contracts like the MIPA. *Cf. Laughlin v. Delmarva Power & Light Co.*, 1991 WL 269893, at *2 (Del. Super. Ct. Nov. 20, 1991) ("Indemnification and insurance are separate principles and governed by separate standards."). Moral hazard is *not* inherent in indemnification; it does not arise in the typical scenario where the indemnitee is indemnified for liabilities that are not its fault. Even in the insurance context, Plaintiffs cite no examples of a valid insurance against the policyholder's willful patent infringement, which would implicate perverse incentives absent in a garden-variety insurance policy. Plaintiffs' *Aearo* quotation comes from a law review article that praises self-insured retention (SIR) provisions for *reducing* moral hazard, so it does not help Plaintiffs' attempt to trivialize the severe moral hazard concerns here. As for Plaintiffs' examples of cases about risk-allocating provisions, none of them concerned indemnifying the indemnitee for the indemnitee's own post-agreement business decisions. *See White v. Curo Tex. Hldgs., LLC*, 2016 WL 6091692, at *11 (Del. Ch. Sept. 9, 2016) (stock purchase agreements where sellers agreed to indemnify buyer for breach of warranties or representations in the agreements and for losses connected to investigation of sellers' pre-closing business conduct); *EMSI Acq., Inc. v. Contrarian Funds, LLC*, 2017 WL 1732369, at *9 (Del. Ch. May 3, 2017) (stock purchase agreement including indemnity for breach of warranties or representations).

Second, Plaintiffs stress that Sellers' offer of indemnity in exchange for the sale of VOI was the crux of the Transaction. AB 35. Even if true, that would not answer whether the indemnity covered Plaintiffs' post-Transaction damages. The fact that Buyers were concerned about "[t]he uncertainty of the Patent Litigation's effect on VOI's business" (*id.* at 34) means only that Buyers were concerned about the effects from *Sellers'* pre-Transaction conduct that triggered the Patent Litigation—not that Buyers were concerned about *their own* post-Transaction business decisions (a bizarre thing to be concerned about).

Third, Plaintiffs attempt to transform the legal question of contract interpretation into a question of fact by relying on Professor Subramanian's testimony. To begin, Subramanian's opinions were not accompanied by any reported case—ever—enforcing, or even noting the existence of, the carte-blanche indemnification provision that Plaintiffs claim exists here. In any event, Subramanian's opinions are unhelpful. Subramanian insisted that the MIPA is not a "my watch, your watch" agreement (AB 26), but Claude does not make that claim: Claude does not dispute that the indemnification covers the reasonable and expected continuation of VOI's pre-Transaction conduct. OB 17. Subramanian also stressed that the MIPA's broad indemnity provision was important to the deal. True enough, but again, that observation does nothing to clarify the *scope* of that provision—

specifically, whether it covered damages from Plaintiffs' own post-Transaction decisions.

Plaintiffs lean especially hard into Subramanian's testimony that any moral hazard concerns were mitigated by the fact that Patrick Gendreau served as "Sellers' Representative," thereby placing a guardrail on VOI's post-Transaction business decisions. AB 36. But that is cold comfort to Claude. Patrick was also appointed by Buyers as the CEO of VOI following the Transaction. A1045, A1054. In that capacity, he reported to, and was terminable at will by, Buyers. A570, A1045, A1785. As VOI's CEO, his job was to maximize VOI's profits, not reduce Claude's exposure—and if he refused to do that job, he could be replaced by someone who would. Plaintiffs' post-Transaction willful infringements were not in the purview of the Sellers' Representative, whose role was limited to "control[ling] the defense of the Patent Litigation and any settlement negotiations." A1004.

Indeed, a closer examination of Patrick's role demonstrates clearly why Plaintiffs' interpretation makes no commercial sense. Patrick wore two hats after the Transaction: he was both Seller's Representative and VOI's CEO. Under Claude's interpretation, those roles were not in tension. Regarding *pre-Transaction* business decisions, Patrick could be loyal to Claude and seek to minimize his damages, while regarding *post-Transaction* business decisions, Patrick could be loyal to VOI. Plaintiffs' interpretation, however, would bind Patrick in an impossible

position post-Transaction, forced to simultaneously advance VOI's interests in ramping up sales and Claude's interest in reducing damages exposure by curbing those very sales. The Court should not adopt an interpretation yielding such a commercially unreasonable outcome—particularly not when Plaintiffs' interpretation hinges on a limitlessly overbroad reading of the phrases "relating to" and "in connection with."

C. The Court Should Clarify That the Correct Interpretation of the MIPA Does Not Cover C/V and NXT-Related Damages.

If the Court agrees with Claude's legal interpretation of the MIPA, it should clarify that C/V and NXT-related damages are not indemnifiable. Contrary to Plaintiffs' assertion (AB 37), Claude does not challenge any factual findings by the Superior Court; Claude's arguments pertain solely to how the law should be applied to the facts under the correct legal standard.

As to C/V plates, the Superior Court explicitly held that those damages were indemnifiable based on its *legal* determination that there was no "temporal limitation on Section 8.2(a)," which meant that it did not matter that "VOI developed and sold C/V after the Transaction closed." OB Ex. B ("Post-Trial Op.") at 33. Claude does not dispute, and indeed embraces, the Superior Court's factual finding that "VOI

developed and sold C/V after the Transaction closed." *Id.* Claude's argument is that under a correct *legal* interpretation, the MIPA does not cover C/V damages.[2]

As to NXT plates, the Superior Court again applied the wrong *legal* standard. OB 27-28. There are no disputed facts—VOI concedes that DePuy applied for the '728 Patent *after* the Transaction (AB 16), and the Superior Court correctly noted that after the Transaction, "DePuy filed its Third Amended complaint" which added the "newly issued" '728 Patent and "alleged VOI's NXT plates infringed the '728 Patent." Post-Trial Op. 9. Claude only contends that, as a matter of law, the MIPA does not cover Plaintiffs' unilateral post-Transaction business decisions to continue selling NXT plates in the face of DePuy's allegation that the NXT infringed the newly-issued '728 Patent. Plaintiffs insist that it was "unsurprising" and "common practice" to apply for and obtain continuation patents. AB 38. That is irrelevant to the contract-interpretation question. Plaintiffs made their own decision to infringe the '728 Patent after it issued. Under the correct legal interpretation of the MIPA, that decision is not indemnifiable.

[2] Plaintiffs attempt to displace blame to Patrick for having "injected C/V into the Patent Litigation." AB 37. But Plaintiffs omit that C/V was a brand-new product that Patrick decided to start selling in his capacity as VOI's CEO, terminable at will by Buyers.

II. The Superior Court Erred in Concluding That the MIPA Can Be Read as a Matter of Public Policy to Indemnify Post-Transaction Willful Conduct by Indemnitees.

If the MIPA's indemnification provision is broad enough to cover Plaintiffs' willful infringement of patents, it is unenforceable as against public policy.

The Court should follow *James v. Getty Oil Co. (Eastern Operations), Inc.*, which held, citing the Williston treatise, 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." 472 A.2d. at 38 (citing 15 WILLISTON ON CONTRACTS § 1750A (3d ed.)). Although *James* is a Superior Court decision, Plaintiffs offer no good reason for this Court to reject this hornbook law. Plaintiffs claim that the current Williston treatise characterizes this issue as raising "difficult policy concerns," AB 48, but Williston makes that point when discussing indemnification for "grossly negligent conduct," 8 WILLISTON ON CONTRACTS § 19:20 (4th ed. 2025)—not willful patent infringement.

James is consistent with this Court's recognition of the "well-established common law principle that an insured should not be allowed to profit, by way of indemnity, from the consequences of his own wrongdoing in a context where no announced Delaware public policy applies." *USAA Cas. Ins. Co. v. Carr*, 225 A.3d 357, 362 (Del. 2020) (cleaned up). Plaintiffs cite a subsequent case characterizing this statement as "dicta," AB 46, but that subsequent case merely held that if there *is*

an overriding "announced public policy," that "common law principle" falls away. *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 904 (Del. 2021). Plaintiffs identify no "announced public policy" that endorses allowing indemnitees to profit off their own willful patent infringement.

Plaintiffs urge the Court to disregard *James* because it lacks "statutory support." AB 42. To the extent Plaintiffs' claim is that this Court lacks the common law authority to invalidate contracts as against public policy, they are simply wrong. *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1067 (Del. 2011) ("Under Delaware common law, contracts that offend public policy or harm the public are deemed *void* as opposed to voidable.").

To the extent Plaintiffs claim that no statute supports the policy against willful infringement, they are again wrong. Federal law bans patent infringement and authorizes treble damages for willful infringement, which requires "egregious cases of misconduct beyond typical infringement." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 110 (2016); *see* 35 U.S.C. §§ 271, 284. For a *state* to condone violations of *federal* law would raise grave federalism and comity concerns.[3] Plaintiffs' citation to *SNI Sols., Inc. v. Univar USA, Inc.*, 2020 WL 1976340 (S.D. Ind. Apr. 24,

[3] Contrary to Plaintiffs' claim (AB 49), Claude did not waive this argument. Throughout this case, he has argued that it would violate public policy to permit Plaintiffs to be indemnified for willful patent infringement. Claude has not "waived" the observation that willful patent infringement is a creature of federal law.

2020) is inapposite. There, Univar sought indemnification from RSI "to the extent Plaintiffs' infringement allegations [brought against Univar] concern RSI's sales." *Id.* at *2. The indemnification agreement served to transfer liability to the party who actually sold the goods and therefore aligned incentives rather than encouraging infringements.

Plaintiffs rely on four inapt cases. *Whalen v. On-Deck, Inc.*, 514 A.2d 1072 (Del. 1986); *RSUI*, 248 A.3d 887; *Sycamore P'rs Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 761639 (Del. Super. Ct. Feb. 26, 2021); *CNX Res. Corp. v. CONSOL Energy Inc.*, 2024 WL 4929171 (Del. Super. Ct. Nov. 8, 2024). None of them involved the issue at stake here: whether the Court should enforce an indemnification agreement that relieves a party of liability for its own post-contract willful misconduct.

At the outset, three of these four cases concerned the scope of *insurance* policies. *See Whalen*, 514 A.2d at 1072; *RSUI*, 248 A.3d at 890; *Sycamore*, 2021 WL 761639, at *1. But "the language of an insurance contract is always construed most strongly against the insurance company which has drafted it[,]" *USAA*, 225 A.3d at 360 (cleaned up)—which is opposite from the governing presumption here that indemnification contracts are construed strictly against the indemnitee. *Cf.* 6 *Del. C.* § 2704(a), (b) (prohibiting indemnification agreements for indemnitee's

negligence in construction contracts but permitting insurance policies covering the same conduct).

The cases are factually distinguishable anyway. *Whalen* explicitly stated that there was "no evidence of intentional or willful conduct" by the insured. 514 A.2d at 1073. While Plaintiffs stress that *Whalen* involved wanton conduct, wantonness reflects a lower degree of fault than willfulness. *Id.* at 1073; *cf. Del. Admin. v. Jones*, 1995 WL 44479, at *6 (Del. Super. Ct. Jan. 23, 1995) ("The distinction between conduct which is 'wilful' and that which is 'wanton' is an important one. The term 'wilful' implies actual, specific or evil intent.").

In *RSUI*, the Court held that a corporation's excess liability insurance policy could cover directors and officers' funds used to settle a derivative shareholder action alleging the directors and officers' bad faith and breach of fiduciary duty. 248 A.3d at 902-03. Crucially, and unlike this case, the entity that purchased the insurance, and that would be the ultimate recipient of the proceeds, was the *corporation itself*—the party *victimized* by the misconduct. Thus, the corporation was protecting *itself* from injuries occasioned by the directors' fraud. Here, by contrast, the indemnification agreement's beneficiary was the *tortfeasor* (*i.e.*, Plaintiffs). Moreover, *RSUI* featured overwhelming legislative evidence against the asserted public policy: 8 *Del. C.* § 145 entitled directors and officers to *excess insurance* "against *any* liability," even as it conditioned a *corporation's indemnification* of

directors and officers on their good-faith conduct. *RSUI*, 248 A.3d at 903; *compare* 8 *Del. C.* § 145(g), *with id.* § 145(a).

In *Sycamore*, the court's conclusion was narrow: "[T]he Court will not hold that restitution or disgorgement is uninsurable as a matter of Delaware public policy unless a Delaware statute commands it to do so." 2021 WL 761639, at *11. The insurance policy at issue excluded coverage in cases where there was a "final, non-appealable" decision in the underlying litigation that the insured gained funds to which it was not entitled. *Id.* at *12. The *Sycamore* court declined to rewrite that provision to exclude coverage in a case where the underlying litigation had settled. *Id.* That reasoning has little to do with this case. Of note, here, there *was* a final judgment in the underlying litigation that VOI engaged in willful misconduct—VOI stipulated to a consent judgment to that effect. A1126.

The only non-insurance case cited by Plaintiffs is *CNX*. But as Claude explained in his opening brief, *CNX* is irrelevant, both because it addressed the allocation of *past* liabilities and because it involved unique considerations about corporate spinoffs. 2024 WL 4929171, at *6. As such, the core public policy concern here about incentivizing misconduct was absent in *CNX*.

The Court should also look to other jurisdictions, which have reached conclusions consistent with *James*. OB 33-34. Plaintiffs claim that some cases cited by Claude "concern liability waivers, not indemnification," AB 48, but waivers

create the same basic problem as Plaintiffs' reading of the MIPA: they relieve a party of consequences of its own wrongdoing. *See Zachry Constr. Corp. v. Port of Houston Auth. of Harris Cnty.*, 449 S.W.3d 98, 116-17 (Tex. 2014) (reasoning that enforcing a pre-injury liability waiver "would incentivize wrongful conduct" and "allow one party to intentionally injure another with impunity").

By contrast, Plaintiffs cannot locate *any* contrary authority where an indemnification agreement was construed to cover post-agreement intentional misconduct and nonetheless enforced. Plaintiffs offer two cases as counterexamples. *See Dixon Distrib. Co. v. Hanover Ins. Co.*, 641 N.E.2d 395 (Ill. 1994); *Sinclair Oil Corp. v. Columbia Cas. Co.*, 682 P.2d 975 (Wyo. 1984). Neither helps them.

For starters, both *Dixon* and *Sinclair* are insurance cases. Insurance contracts are subject to special rules designed to protect policyholders from sophisticated insurers: for instance, insurance contracts are construed in favor of the policyholder, whereas indemnification contracts are construed against the indemnitee. *Supra*, p. 14-15. Accordingly, courts may be hesitant to void provisions that insurers themselves drafted as excessively favorable to insureds. Plaintiffs cannot identify *any* non-insurance case endorsing their proposed rule.

Dixon and *Sinclair* are also factually off-point. *Dixon* acknowledged that even for insurance policies, the general rule is that "a contract of insurance to indemnify a person for damages resulting from his own intentional misconduct is void as

against public policy." 641 N.E.2d at 401. *Dixon* declined to apply that rule when the insured sought insurance coverage from its employee's retaliatory discharge claim, *id.* at 401-02—a far cry from this case, where Plaintiffs engaged in willful violations of federal patent law to rack up profits. (An employer has no profit-driven motive to discharge employees that it dislikes.)

As for *Sinclair*, the court rested on the insurance-specific "reasonable expectation of coverage" doctrine, 682 P.2d at 981, while qualifying its holding by explaining that an insurance contract covering willful misconduct would be contrary to public policy if "the fact of insurance coverage can be related in some substantial way to the commission of such wrongful acts." *Id.* Here, that "substantial" relationship exists: Plaintiffs themselves claim that the "forward-looking indemnity" was "*the crux of* this transaction." AB 35. Claude disagrees with Plaintiffs as a matter of contract-interpretation. But if Plaintiffs were right, it would only go to show that the MIPA is *designed* to incentivize willful infringement—exactly what public policy forbids.

Plaintiffs worry that Claude's position would "severely hamper Delaware M&A transactions involving patent rights" and would make "buying and selling companies with patent litigation exposure … difficult if not impossible." AB 45-46. But Plaintiffs have not identified a single case in any jurisdiction where a court has enforced an indemnification agreement that indemnified against willful patent

infringement—or any other type of willful misconduct. It is easy to see why. Prohibiting indemnification against *backward-looking* infringement might well deter buying and selling companies with litigation exposure. But prohibiting indemnification against *forward-looking* infringement would not. It would simply put companies into the position they are *always* in: facing liability if *they themselves* commit misconduct.

Plaintiffs close by noting that the Superior Court did not formally resolve whether they committed willful infringement. AB 49-50. True enough, but VOI formally stipulated that it had committed willful infringement in the patent litigation, and the district court entered that stipulation as a consent judgment. A1126. Plaintiffs cannot now deny this formal admission.[4] At a minimum, this Court should remand to the Superior Court to conduct the factual inquiry of whether Plaintiffs committed willful misconduct, which the Superior Court expressly declined to do. Post-Trial Op. 40 n.247.

[4] Plaintiffs muddy the waters by insisting that Claude "owned VOI" and was "personally involved in all relevant facts." AB 50. Claude concedes that indemnification is permissible for damages arising from the period when he owned VOI and was personally involved. Claude's narrow claim is that there can be no indemnification for damages arising from *post*-Transaction willful misconduct by Plaintiffs after Claude *ceased* to be "personally involved in all relevant facts." *Id.*

III. At a Minimum, the Superior Court Erred in Concluding as a Matter of Law That Plaintiffs Did Not Violate the Implied Covenant of Good Faith and Fair Dealing.

If the Court construes the MIPA to permit Plaintiffs to recover damages from their own post-Transaction misconduct and upholds the MIPA under that construction, then the Court should at least interpret the MIPA to require Plaintiffs to adhere to the implied duty of good faith and fair dealing.

In a recent decision, this Court reiterated that one of the "two primary" contexts in which the implied covenant operates is "when a contract allocates discretionary authority to one party over a central aspect of the contract." *Johnson & Johnson v. Fortis Advisors LLC*, __ A.3d __, 2026 WL 89452, at *16 (Del. Jan. 12, 2026). That principle, which has "deep roots in Delaware law," means that a contract's grant of unlimited discretion to one party is "implicitly conditioned on sincerity, honesty, fair dealing and good faith." *Id.* (cleaned up). That fits this case to a T: Plaintiffs had discretion to conduct their business in a manner that affects Claude's liability and should not be permitted to abuse that discretion.

Plaintiffs insist that "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." AB 52-53. But Claude is not claiming that Plaintiffs had to manage their business *in Claude's*

interest. Claude is merely claiming that Plaintiffs had to manage their business *in good faith*.

Plaintiffs invent the rule that the duty of good faith is triggered only when needed to avoid rendering a provision meaningless. *Id.* at 53. But no Delaware court has ever imposed this artificial restriction on the duty of good faith. In any event, Plaintiffs' interpretation *would* render meaningless the provision appointing Sellers' Representative to control the patent litigation. Such control is an illusory guardrail if Claude lacks control over the *conduct that gives rise to liability*. Patrick's ability to be at the negotiating table on behalf of Sellers means little if Plaintiffs are free to destroy all of Claude's negotiating leverage by intentionally inflating damages.

Plaintiffs also claim that this Court may not "rewrit[e] a heavily negotiated agreement between sophisticated parties." *Id.* at 55. Plaintiffs ignore that under well-settled Delaware law, the duty of good faith "attaches to every contract," including between sophisticated parties. *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005). The Court should vacate the grant of summary judgment and allow Claude the opportunity to show that the duty was breached.

IV. The Superior Court Erred in Awarding Prejudgment Interest.

Plaintiffs are not entitled to receive prejudgment interest. Rather than pay the settlement out of pocket, Plaintiffs borrowed funds to pay the settlement, and Claude paid interest on that loan as part of the damages award. An award of prejudgment interest *on top* of loan interest would be economically irrational. If Plaintiffs obtain prejudgment interest, they would be compensated for the time value of money twice: they would get interest on the $70 million *on the hypothesis that they could not invest that amount*, and interest on the $70 million *that they actually could invest*. OB 44. And for similar reasons, Claude would be forced to disgorge the time value of money twice. *Id.*

Plaintiffs do not, and cannot, dispute that awarding prejudgment interest would be economically irrational. Instead, they claim that, under *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482 (Del. 2011), courts must always award prejudgment interest, even when irrational. But *Brandywine* does not force Delaware courts to throw elementary economics out the window. To the contrary, as the opening brief explains, *Brandywine* carefully demonstrated why prejudgment interest was sensible on the facts of that case. OB 45-46.

Plaintiffs point to language in *Brandywine* 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." AB 57. That is true but also irrelevant. The plaintiff in

Brandywine had sustained losses such as lost sales and property damage—for which it was entitled to prejudgment interest—and separately had to take out a loan to cover expenses arising from those losses—additional expenses that formed "one component of [plaintiff's] alleged actual damages." 34 A.3d at 486. The loaned funds did not make the plaintiff *whole*; they merely prevented the harm to the plaintiff from getting *worse*. Therefore, the court explained, there was no double counting: rather, the additional interest expenses were a "conceptually separate and distinct …. element of damages on which Brandywine Smyrna was entitled to *receive* prejudgment interest." *Id.* Here, by contrast, prejudgment interest results in double counting. The loan was a *substitute* for Claude's indemnification. Hence, if Plaintiffs receive prejudgment interest, they would recover both interest on funds that they ostensibly *could not* invest, *and* interest on those very funds that they *could* invest.

Moreover, Plaintiffs' quote from *Brandywine* at most stands for the proposition that a prevailing party can claim prejudgment interest that accrues on the loan *interest*. *Brandywine* never said (even on its facts) that a prevailing party can claim prejudgment interest that accrues on the loan *principal*, which is what Plaintiffs demand here.

Plaintiffs also manufacture a new theory of how they lost the use of the $70 million settlement payment. Before the Superior Court, Plaintiffs asserted that

they were harmed by the loan because they lost opportunities to engage in corporate transactions. A933-34. Claude addressed that argument in the opening brief—in short, Plaintiffs' claimed harm was entirely speculative, unsubstantiated, and unrelated to the prejudgment interest being sought. OB 45. Perhaps recognizing that their lost-opportunities theory below was baseless, Plaintiffs abandon that approach and replace it with a different theory. They now claim that the lender, *Vimian*—a corporate affiliate of Plaintiffs and a non-party to this litigation—was harmed by the loan because *Vimian* could not use the funds to invest in "other opportunities." AB 57-58. This argument is both waived and irrelevant, given that Plaintiffs cannot recover for *Vimian*'s alleged harms.

Plaintiffs claim that they "are not required to prove that the [prejudgment interest] amount is proportional to their actual harm." *Id.* at 58. But prejudgment interest is meant to quantify the "actual harm" from the lost use of money. *See Brandywine*, 34 A.3d at 486. When Plaintiffs do not claim the lost use of money (which, indeed, they never lost) but instead vaguely claim that the existence of the loan might have deterred unspecified investment opportunities by an entity that is not even a litigant in this case, awarding prejudgment interest ceases to make sense.

This Court should follow the Second Circuit's decision in *Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co.*, which is indistinguishable from this one. 697 F.2d 481 (2d Cir. 1983). Although Plaintiffs are correct that *Bulk* arose under New York law

(AB 59), there is no meaningful difference between the two states' laws on this point. Plaintiffs insist New York courts do not adhere to Delaware's disgorgement rationale, but that is both wrong, *see SEC v. Tourre*, 4 F. Supp. 3d 579, 591 (S.D.N.Y. 2014), and irrelevant because Plaintiffs' position irrationally leads to double disgorgement.

NATURE OF PROCEEDINGS (CROSS-APPEAL)

In addition to the discussion at Pages 1-3 of Claude's opening brief, Claude adds the following discussion:

- The Superior Court denied Plaintiffs' claim for recovery of attorneys' fees arising from the indemnification litigation itself, holding that the MIPA covered only attorneys' fees incurred in the underlying patent litigation. Post-Trial Op. 52.
- The Superior Court denied Plaintiffs' claim for the cost of a forward-looking license for selling C/V products, concluding that the MIPA did not show Defendants specifically assumed the liability for a forward-looking indemnification. *Id*. at 35-36.
- VOI (which was an indemnified party) and Fidelio (which was not) were co-defendants in the patent litigation. A single law firm defended both. The Superior Court held that Claude was responsible for half of the attorneys' fees, corresponding to VOI's share. It rejected Plaintiffs' argument that because VOI paid Fidelio's fees out of its own pocket, Claude should be responsible for those fees. *Id*. at 48.

SUMMARY OF ARGUMENT

As to Cross-Appeal:

1. **Denied.** The Superior Court correctly construed the contract to require indemnification for the attorneys' fees incurred in the underlying *patent litigation*, not the instant litigation. The MIPA's language, which covers "Damages … as a result of, or in connection with, the Patent Litigation," does not express a clear intent to shift attorneys' fees in litigation to enforce indemnification. A1013. The Contingent Closing Note's explicit fee-shifting provision proves the parties knew how to memorialize such a right but chose not to do so in the MIPA.

2. **Denied.** The Superior Court correctly held that the MIPA's definition of "Damages" does not include the cost of a license, which was not part of any amount to settle any claims. A license is a forward-looking business deal permitting future conduct, not a retrospective release from liability, and the Settlement and License Agreement itself distinguishes between the two in separate articles.

3. **Denied.** The Superior Court correctly concluded that because VOI and Fidelio shared the same counsel, and Claude agreed to indemnify damages suffered by VOI, Claude was responsible for only VOI's share of the patent litigation expenses. Delaware law requires that co-indemnitees who retain joint counsel are responsible for their pro rata share of litigation fees when their defense is jointly conducted. Plaintiffs cannot circumvent this rule by having VOI pay Fidelio's share.

STATEMENT OF FACTS

In addition to the discussion at pages 7-16 of the opening brief, Claude offers the following facts relevant to the cross-appeal.

A. The Contingent Closing Note and the MIPA

In June 2020, Buyers purchased VOI for $100 million. A972; A1033. One component of that payment was a $20 million Contingent Closing Note, executed contemporaneously with the MIPA as part of the Transaction. A1033. Section 5(g) of the Contingent Closing Note includes express language shifting attorneys' fees for the enforcement of the note: "If the Seller commences a proceeding to enforce and collect upon this Note and prevails in such proceeding, the Buyer shall pay all reasonable costs incurred by the Seller in connection therewith, including attorneys' fees and disbursements." A1042. By contrast, the MIPA includes no fee-shifting language. Instead, it states that Sellers would indemnify Buyers against "Damages suffered by the Company as a result of, or in connection with, the Patent Litigation." A1013.

The Superior Court denied Plaintiffs' request to recover their attorneys' fees incurred in the instant litigation, holding that "[t]he MIPA lacks a clear statement evidencing the parties intended to shift responsibility for attorneys' fees." Post-Trial Op. 52.

B. Finnegan's Joint Representation of VOI and Fidelio

After the Transaction, DePuy filed an amended complaint adding Fidelio as a defendant in the patent litigation. A1457. The complaint alleged that in addition to being aware of and controlling VOI's business decisions, "Fidelio is using VOI as a mere alter ego to sell infringing copies of [Depuy's] products." A1458-59.

Patrick hired Finnegan, Henderson, Farabow, Garrett & Dunner ("Finnegan") to defend VOI in the patent litigation. A371-74. Rather than hiring its own counsel, Fidelio decided to hire Finnegan to jointly represent it and VOI throughout the Patent Litigation. AR14-15; AR21; B1765. Finnegan's engagement agreement acknowledged that "all the Clients [VOI and Fidelio] share the same issues (e.g., same accused products) and share the same common defense against DePuy's patent infringement allegations." AR3. The expenses billed to VOI included work performed jointly for VOI and Fidelio. B1765.

Fidelio's conduct featured prominently throughout the patent litigation trial and post-trial proceedings. DePuy's opening statement at trial told the jury that Fidelio "was actively involved in the illegal activity." AR45. DePuy's trial evidence showed that Fidelio controlled VOI's business strategy, including its sale of infringing plates. A1785-90. DePuy's post-trial motions continued to emphasize Fidelio's liability. A1628, A1652, A1660.

The Superior Court determined that Plaintiffs were "entitled to half of the Patent Litigation costs and fees incurred in VOI and Fidelio's joint defense." Post-Trial Op. 48. This conclusion was based on the Superior Court's factual finding that "[t]he trial evidence shows VOI and Fidelio jointly defended the Patent Litigation." *Id.*

C. Plaintiffs' Discussion of C/V License Leading up to Settlement

As VOI, Fidelio, and DePuy negotiated settlement in the shadow of pending contempt proceedings, VOI and Fidelio were determined to hold onto the business from their C/V sales, despite the fact that they likely infringed the '728 Patent. OB 12-14. Although Plaintiffs could have stopped selling C/V and thus avoid incurring additional liability, they were eager to insulate C/V from any potential stop sale, given the substantial revenue streams they expected from these products. AR28-30; AR53-54. To that end, VOI and Fidelio negotiated the Settlement and License Agreement, which included not only a release of liability from DePuy's claims (memorialized in Article 6 of the agreement) but also a license to continue selling C/V (Article 5). A1118-19.

The Superior Court held that Plaintiffs may not recover damages associated with the C/V license because they were not covered by the MIPA's definition of "Damages." Post-Trial Op. 35-36.

ARGUMENT

I. The Superior Court Correctly Denied Plaintiffs' Recovery of Attorneys' Fees.

A. Question Presented

Whether the MIPA's indemnification provision expresses a clear and unequivocal intent to shift attorneys' fees. A631-32, A761 n.15.

B. Scope of Review

This Court reviews questions of contract interpretation *de novo*. *Urdan v. WR Cap. P'rs, LLC*, 244 A.3d 668, 674 (Del. 2020).

C. Merits of Argument

The Superior Court correctly concluded that the MIPA's indemnification provision does not express a clear and unequivocal intent to shift attorneys' fees. As the Superior Court explained, Post-Trial Op. 52, "Delaware law follows the American Rule, under which litigants are generally responsible for paying their own litigation costs." *DeMatteis v. RiseDelaware Inc.*, 315 A.3d 499, 508 (Del. 2024). Absent "specific language" evidencing "a clear and unequivocal" intent to shift fees, a party is not entitled to attorneys' fees for its enforcement of an indemnity right. *Ashland LLC v. Samuel J. Heyman 1981 Continuing Tr. for Heyman*, 2020 WL 6582958, at *6 (Del. Super. Ct. Nov. 10, 2020) (citation omitted).

No such language is present here. Section 8.2(a) of the MIPA applies to "Damages suffered by [VOI] as a result of, or in connection with, the Patent

Litigation," with "Damages" defined to include "fees and disbursements of counsel." A963, A1013. The natural interpretation of this language is that Plaintiffs can recover attorneys' fees incurred *in the patent litigation*—not in the indemnification litigation. As the Superior Court held: "No provision of the MIPA establishes an affirmative right to attorneys' fees in enforcement actions." Post-Trial Op. 53.

The fact that the Contingent Closing Note *does* include a provision expressly shifting attorneys' fees only reinforces that conclusion. Contingent Closing Note Section 5(g) provides: "If the Seller commences a proceeding to enforce and collect upon this Note and prevails in such proceeding, the Buyer shall pay all reasonable costs incurred by the Seller in connection therewith, including attorneys' fees and disbursements." A1042. As the Superior Court explained, "[t]his evidences the parties knew how to memorialize such a right, but chose not to do so in the MIPA." Post-Trial Op. 53-54. Plaintiffs do not even attempt to account for this discrepancy. Plaintiffs simply insist that the inclusion of a fee-shifting provision in the Contingent Closing Note "does not mean" that the MIPA's indemnification provision was "not clear enough." AB 64-65. But that is exactly what it means. Courts "give a consistent reading to interrelated agreements." *CA, Inc. v. Ingres Corp.*, 2009 WL 4575009, at *47 (Del. Ch. Dec. 7, 2009), *aff'd*, 8 A.3d 1143 (Del. 2010); *see Ashall Homes Ltd. v. ROK Ent. Grp. Inc.*, 992 A.2d 1239, 1250-51 (Del. Ch. 2010) (applying "the rule that related contemporaneous documents should be read

together" where two agreements "effectuated separate steps of a single integrated scheme"). Here, the MIPA and the Contingent Closing Note were executed contemporaneously as part of the same Transaction. Because the Contingent Closing Note includes a fee-shifting provision but the MIPA's indemnification provision does not, "the omission is presumed intentional." *Torrent Pharma, Inc. v. Priority Healthcare Distrib., Inc.*, 2022 WL 3272421, at *9 (Del. Super. Ct. Aug. 11, 2022). This Court should give effect to that omission.

Unable to locate anything in Section 8.2(a) of the MIPA, Plaintiffs cobble together "other indications" from "the neighboring provisions." AB 63-64. Plaintiffs' creative attempts to rewrite the contract fail.

First, Plaintiffs point to language in Section 8.3(a) of the MIPA that excludes "the expenses of the Indemnified Party from enforcing its rights under [this] Article 8" from the $100-million indemnification cap. *Id.* at 62 (quoting A1014). According to Plaintiffs, this language creates an implied right to recover attorneys' fees in this litigation so long as those fees do not exceed the cap. But far from creating a right to attorneys' fees, this language merely defines how to decide whether the cap has been satisfied. As the Superior Court explained, "merely mentioning enforcement expenses is not a clear and unequivocal statement evidencing an intent to permit recovery of attorneys' fees" and "[t]his hesitancy is

well-founded when considering whether a contract overrides the general rule that each party is responsible for their own litigation costs." Post-Trial Op. 53 n.320.

Moreover, there is a natural explanation for the language in Section 8.3(a) that would not require the exceptional decision to depart from the American Rule or to otherwise create implied obligations. The language does not *itself* create a right to recover attorneys' fees, but instead says that *if* attorneys' fees are recoverable under a distinct source of law, *then* such fees do not count towards the cap. For example, prevailing parties can recover fees in "instances of 'bad faith' litigation." *Id.* at 52 n.316. *If* Plaintiffs were entitled to recover attorneys' fees under that doctrine, *then* those fees would not trigger the $100-million cap. Of course, that "narrow exception … does not apply here as neither party advances a bad faith argument." *Id.*

Second, Plaintiffs rely on Section 8.4 and Section 8.5's distinction between "Inter-Party Claims" and "Third Party Claims." AB 63. These sections do not help Plaintiffs. Section 8.4, titled "Procedure," merely sets forth the procedure by which inter-party claims can be brought—such as how and when to deliver notice of claims. A1015. It nowhere mentions attorneys' fees or otherwise indicates that these procedural instructions somehow alter the substantive scope of indemnity in Section 8.2(a). And Section 8.5 simply notes that the indemnitor "may assume the defense of any Third Party Claim," A1016, an irrelevant fact that no one disputes.

Plaintiffs' reliance on *Schneider Nat'l Carriers, Inc. v. Kuntz*, 2022 WL 1222738 (Del. Super. Ct. Apr. 25, 2022), is misplaced. For starters, the agreement there "d[id] not provide for fee shifting elsewhere in the agreement." *Id.* at *31. As already explained, here, the Contingent Closing Note exemplifies a clear fee-shifting provision that is lacking in the indemnification provision. In addition, the parties in *Schneider* disputed whether an indemnity clause covered first-party claims involving alleged breaches of *other* obligations in the contract. *Id.* at *30. Because the indemnity clause there expressly referenced payment obligations contracted between the parties, the court construed the indemnity clause to cover inter-party claims. *See id.* ("None of those payments would arise from a third-party claim."). By contrast, the MIPA allows indemnification for damages arising out of *the patent litigation*, not breach of other provisions in the MIPA.

II. The Superior Court Correctly Concluded the C/V License Was Not Indemnifiable.

A. Question Presented

Whether the MIPA's indemnification provision covers Plaintiffs' payment to DePuy in exchange for the C/V license. A612-15, A738-44.

B. Scope of Review

This Court reviews questions of contract interpretation de novo. *See supra*, p. 31.

C. Merits of Argument

As Claude explained in his appeal, indemnification provisions are construed "strictly against the indemnitee," and cover liability only that the indemnitor "specifically assume[s]." *Alcoa*, 2016 WL 521193, at *7. The Superior Court correctly held, under that standard, the MIPA's "Damages" provision cannot be read to encompass a forward-looking license.

To begin with, if the Court agrees with Claude that the MIPA's indemnification provision does not apply to damages arising from Plaintiffs' independent post-Transaction business decisions (OB 17), the provision certainly would not cover Plaintiffs' decision to obtain a forward-looking license for a new product line that did not even exist at the time of the MIPA and was accused of infringing a patent that did not exist at the time of the MIPA. Plaintiffs could and should have stopped the sale of C/V products, which invited the district court's rebuke and triggered

contempt proceedings. *Id.* at 12-14. Instead, Plaintiffs chose to keep the profits from C/V sales by paying for a license and now attempt to pass the costs to Claude, who had nothing to do with the development of C/V or its infringement of the '728 Patent. Plaintiffs' theory that they deserve to be protected from the consequences of their independent decisions finds no home in any "crystal clear" and "sufficiently unequivocal" text of the MIPA. *Id.* at 20 (quoting *Amiesite*, 297 A.2d at 44).

Even accepting *arguendo* that the indemnification provision applies to Plaintiffs' post-Transaction business decisions, the provision could not cover a license that is not "Damages." As relevant here, the MIPA defines "Damages" as "any losses, liabilities, … payments (including amounts paid in settlement)." A963. The Superior Court correctly concluded: "'Amounts paid in settlement' are properly understood as payments to 'release[] a party from a potential liability otherwise imposed by law.'" Post-Trial Op. 35 n.221 (quoting *Ketler v. PFPA, LLC*, 132 A.3d 746, 748 (Del. 2016)). While Plaintiffs nitpick the cases cited by the Superior Court (AB 68), they fail to cite any case stating that indemnification for "settlement" of a dispute encompasses payments unrelated to resolving claims actually at issue in the underlying dispute.

This reasoning is consistent with the settlement agreement itself. DePuy's two main promises in the "Settlement and License Agreement" were (1) "License and Patent Rights" under Article 5, and (2) "Releases" under Article 6. A1116,

A1118. The natural reading of the phrase "Settlement and License Agreement" is that "License" corresponds to Article 5's "License and Patent Rights," while "Settlement" corresponds to Article 6's "Releases." In other words, the "License" is not a "Settlement."

Plaintiffs cite Black's Law Dictionary, which defines "Settlement" as "[a]n agreement ending a dispute or a lawsuit." AB 67. But the subject of the lawsuit between DePuy and VOI/Fidelio was the alleged infringements that had already occurred—not hypothetical future sales. It was the release of liability for those infringements that ended the lawsuit. This is clear from the unambiguous terms of the settlement. Between Article 5 and Article 6 of the Settlement and License Agreement, only Article 6—the "Releases" section—mentions ending a dispute or a lawsuit. A1118 ("DePuy … does hereby now and forever release and discharge VOI/Fidelio from all Claims … DePuy had or claims to have had against VOI/Fidelio."). Article 5—the "License" section—makes no mention of such claims or otherwise references a dispute or lawsuit.

Plaintiffs offer the novel argument that because the MIPA defines "Damages" to cover "any … payments" "*including* amounts paid in settlement," the C/V license is covered. AB 66. But the bare use of the word "including" does not imply that Claude must cover any payment in the world with any relationship whatsoever to a patent settlement. Plaintiffs' conception of "Damages" has no limiting principle: it

would cover, for example, the costs of building a new factory to manufacture C/V units on the theory that such costs are "payments" made "in connection with" the patent litigation.

Plaintiffs also shift attention away from the fact that "Damages" is the defined term under the MIPA. The "meaning of the definition is almost always closely related to the ordinary meaning of the word being defined." *Delligatti v. United States*, 604 U.S. 423, 438 (2025) (quoting A. Scalia & B. Garner, *Reading Law* 228 (2012)). Here, Plaintiffs' theory would depart dramatically from the "plain, ordinary meaning" of "Damages." *Daniel v. Hawkins*, 289 A.3d 631, 645 (Del. 2023). The plain, ordinary meaning of "Damages" refers to compensation for injury that has already been incurred. *See* RESTATEMENT (SECOND) OF TORTS § 902 (1979) ("'Damages' means a sum of money awarded to a person injured by the tort of another."); *Town of Georgetown v. DeRiemer ex rel. DeReimer*, 1990 WL 80463, at *3 (Del. Ch. May 31, 1990) ("[M]oney damages would afford compensation only for past injury."). A payment in exchange for a license to engage in future business is not "Damages" because there is no injury that it compensates for. It is instead a forward-looking business deal that benefits both sides.

Plaintiffs' remaining arguments about the C/V license are also meritless. First, Plaintiffs remark that the MIPA's definition of "Patent Litigation" references "Actions," which in turn is defined to include "injunction[]." AB 67. But as the

Superior Court rightly pointed out (and Plaintiffs neglect to acknowledge), the word "injunction" only "expands the types of proceedings giving rise to indemnifiable Damages, *not* the class of injuries subject to indemnification." Post-Trial Op. 35. Moreover, a license is essentially the opposite of an injunction: an injunction prohibits conduct, while a license permits it. In any event, the C/V plates were not even subject to an injunction, so the fact that the word "injunction" appears in the MIPA is irrelevant.

Second, Plaintiffs' commentary about customary practices in patent lawsuits is irrelevant. AB 67. No one disputes that settlement agreements can be accompanied by license agreements or other such business deals. But bundling the settlement with a license agreement does not suggest that the license payments are "paid in settlement" (*id.*) under the MIPA—and certainly not when the indemnification agreement is construed "strictly against the indemnitee." *Alcoa*, 2016 WL 521193, at *7.

Third, Plaintiffs complain that they felt the need "to secure peace with DePuy" by reaching a global deal, given DePuy's intent to add C/V plates to the case. AB 68-69. But under the objective theory of contract interpretation, whatever VOI and Fidelio thought about their settlement prospects with DePuy in 2023 is irrelevant to construing "the words found in the [MIPA]," executed in 2020. *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008). The legal question before

this Court is whether Claude, at the time of contracting, "specifically assume[d]" liabilities resulting from Plaintiffs' wish to secure a forward-looking license. Claude's agreement to indemnify for "Damages" does not meet that high threshold.

III. The Superior Court Correctly Concluded Plaintiffs Can Recover Only Half of the Patent Litigation Fees.

A. Question Presented

Whether Plaintiffs are entitled to more than half of the patent litigation fees and expenses incurred by VOI. A629-31.

B. Scope of Review

Although Plaintiffs' contract-interpretation arguments are reviewed *de novo*, the bulk of Plaintiffs' arguments are about challenging the Superior Court's factual finding that "VOI and Fidelio jointly defended the Patent Litigation." Post-Trial Op. 48. That finding is reviewed for clear error. *Nationwide Emerging Managers, LLC v. Northpointe Hldgs., LLC*, 112 A.3d 878, 889 (Del. 2015). Plaintiffs also challenge the calculation of damages, including the Superior Court's determination that "[p]arsing Finnegan's invoices to assign each entry to VOI or Fidelio is unduly burdensome." Post-Trial Op. 48. That determination is reviewed for abuse of discretion. *Bhole, Inc. v. Shore Invs., Inc.*, 67 A.3d 444, 449 (Del. 2013).

C. Merits of the Argument

VOI and Fidelio were both named defendants in the patent litigation. They jointly defended the case through a single counsel, meaning that most of counsel's work benefited both clients simultaneously. However, VOI paid *all* of the fees out of pocket, including Fidelio's share. Having covered Fidelio's entire share, VOI now seeks indemnification from Claude for the full amount of patent litigation expenses.

The Court should reject Plaintiff's attempted end-run around the plain language of the indemnification provision, which provided indemnification for "Damages suffered by [VOI]," not Fidelio. A1013.

The Superior Court relied on well-settled Delaware law that "co-indemnitees who retained joint counsel [are] responsible for their pro rata share of advanced fees and litigation costs." *Levy v. HLI Operating Co.*, 2007 WL 2801383, at *11 n.62 (Del. Ch. May 16, 2007); *see* Post-Trial Op. 46-47. Even if one of two co-defendants "was the focus of attention throughout th[e] litigation," each co-defendant bears responsibility "for half of all fees and litigation costs" where "there is no doubt that their defense was, by and large, jointly conducted." *Valeant Pharms. Int'l v. Jerney*, 921 A.2d 732, 755 (Del. Ch. 2007); *see* Post-Trial Op. 47. This rule makes sense: otherwise, co-defendants in Fidelio's position could skirt the limits on who is indemnified merely by having an indemnified party pay their share of the litigation expenses.

Plaintiffs' primary contention is that it seeks indemnification for "work performed on behalf of VOI, as opposed to Fidelio." AB 72. But the Superior Court made the factual finding that "[t]he trial evidence shows VOI and Fidelio jointly defended the Patent Litigation." Post-Trial Op. 48. Plaintiffs do not suggest that finding is clearly erroneous. In any event, the record amply supports the Superior Court's finding that much of counsel's work in the patent litigation was performed

on behalf of VOI and Fidelio collectively. AR3 ("Our understanding here, though, is that all the Clients share the same issues (e.g., same accused products) and share the same common defense against DePuy's patent infringement allegations."); AR14-15; AR21; AR50. Fidelio benefitted substantially from counsel's work because the patent litigation heavily featured Fidelio's participation in infringing sales, including by directing VOI's business strategy. AR45; A1785-90. Plaintiffs cannot pretend, in the face of the Superior Court's factual finding to the contrary, that Fidelio derived no value from its high-priced attorneys just because it paid its expenses through VOI.

Having determined that Finnegan jointly defended both VOI and Fidelio, but that "[p]arsing Finnegan's invoices to assign each entry to VOI or Fidelio is unduly burdensome," the Superior Court concluded that "Plaintiffs are entitled to half of the Patent Litigation costs and fees incurred in VOI and Fidelio's joint defense." Post-Trial Op. 48. The Superior Court's selection of a methodology for computing damages is subject to abuse-of-discretion review, *Bhole*, 67 A.3d at 449, and Plaintiffs never contend that the Superior Court abused its discretion or even cite the applicable standard of review.

Plaintiffs' various attempts to undermine the Superior Court's reasoning fail. Citing 6 *Del. C.* § 2701, which imposes joint and several liability for co-contracting parties "unless otherwise expressed," Plaintiffs insist it was jointly and severally

liable to pay all of its attorneys' fees. Plaintiffs waived this argument, having never argued below that Section 2701 renders VOI liable for Fidelio's litigation expenses.[5] The argument also fails on the merits: VOI's contractual arrangement with its counsel is irrelevant to Claude's contractual arrangement with Plaintiffs.

Plaintiffs next argue that the indemnification provision by its terms covers Fidelio's portion of the patent litigation expenses. That too is wrong.[6] The indemnification provision states that Claude will indemnify "Buyer" and "its Affiliates" from "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 "Company" means VOI. Therefore, as the Superior Court correctly concluded, "[o]nly Damages 'suffered by [VOI]' are indemnifiable." Post-Trial Op. 37. The word "Affiliates" only expands whom Claude must indemnify, not what losses are subject to indemnification. *Id.*

Plaintiffs claim that because the indemnification provision covers damages "arising out of or relating to … Damages suffered by the Company," it includes

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[5] Plaintiffs below cited Section 2701 only to argue that Fidelio's portion of the $70 million settlement payment resulted in joint and several liability for VOI. A655, B120.

[6] Plaintiffs' position that Claude must pay Fidelio's litigation expenses is particularly perverse given Buyers' repeated insistence that Sellers' Representative *does not* control Fidelio's defense. B99, B102; AR4. Indeed, Sellers' Representative was excluded from meetings with Fidelio's counsel, Williams & Connolly LLP. A591, A747-48.

damages *not* suffered by VOI. That reading violates two cardinal rules of contract interpretation. First, it renders the phrase "suffered by the Company" superfluous. *See Intel Corp. v. Am. Guar. & Liab. Ins. Co.*, 51 A.3d 442, 451 (Del. 2012) ("[N]o part of an agreement should be rendered superfluous."). Second, it renders "meaningless or illusory," *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023) (citation omitted), the MIPA's careful distinction between *who* is indemnified ("Buyer" and "its Affiliates") and *what* is indemnifiable ("suffered by the Company"). In keeping with the basic principle that indemnification agreements are construed strictly against the indemnitee, the Court should reject Plaintiffs' argument that the bare phrase "related to" transforms "Damages suffered by the Company" into a provision covering damages *not* suffered by the Company.

The Letter of Intent ("LOI") from January 2020 cements the conclusion that Plaintiffs are not entitled to Fidelio's patent litigation expenses. The LOI had included broader indemnification language, stating that Sellers would indemnify Buyers and its affiliates for damages "suffered or incurred by *any of them* resulting from the Patent Litigation." A1130 (emphasis added). But the parties chose to omit this language in the MIPA. The Court should give effect to the parties' decision to narrow the LOI.

Finally, Fidelio's patent litigation expenses are not indemnifiable for an independent reason: they are not damages "as a result of, or in connection with, the

Patent Litigation." At the time of the Transaction, Fidelio was not even named as a defendant in DePuy's lawsuit. The MIPA cannot be construed to encompass damages arising from DePuy's post-Transaction decision to sue a new entity for its post-Transaction conduct.

CONCLUSION

The judgment should be reversed as to the appeal and affirmed as to the cross-appeal.

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