



IN THE SUPREME COURT OF THE STATE OF DELAWARE

CLAUDE GENDREAU and THE )  
CLAUDE GENDREAU INVESTMENT )  
TRUST U/A/D MARCH 16, 2013, )

No. 447, 2025

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.), )

Case Below:

Superior Court of The State of )  
Delaware )  
C.A. No. N23C-05-034-MAA )  
[CCLD]

Plaintiffs/Counterclaim )  
Defendants-Below/Appellees. )

**PLAINTIFFS-BELOW/APPELLEES’  
REPLY BRIEF ON CROSS-APPEAL**

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**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
ARGUMENT.....	1
I.    THE SUPERIOR COURT ERRONEOUSLY DENIED RECOVERY OF PLAINTIFFS’ ENFORCEMENT EXPENSES .....	1
II.   THE SUPERIOR COURT ERRONEOUSLY CONCLUDED THE [REDACTED] COST WAS NOT INDEMNIFIABLE .....	10
III.  THE SUPERIOR COURT ERRONEOUSLY HALVED PLAINTIFFS’ AWARD OF PATENT LITIGATION FEES .....	20
A.  The \$8.6 Million in Fees Were All VOI’s Recoverable Damages.....	20
B.  Section 8.2(a) Covers Fidelio’s Patent Litigation Fees Anyway .....	25
CONCLUSION .....	28

## TABLE OF AUTHORITIES

CASES	Page
<i>Ashall Homes Ltd. v. ROK Ent. Grp. Inc.</i> , 992 A.2d 1239 (Del. Ch. 2010).....	8, 9
<i>Bhole, Inc. v. Shore Invs., Inc.</i> , 67 A.3d 444 (Del. 2013) .....	21
<i>CA, Inc. v. Ingres Corp.</i> , 2009 WL 4575009 (Del. Ch. Dec. 7, 2009).....	8
<i>Core-Vent Corp. v. Implant Innovations, Inc.</i> , 53 F.3d 1252 (Fed. Cir. 1995).....	15
<i>Delligatti v. United States</i> , 604 U.S. 423 (2025).....	17
<i>Holifield v. XRI Inv. Holdings LLC</i> , 304 A.3d 896 (Del. 2023) .....	20
<i>Intel Corp. v. Am. Guarantee &amp; Liab. Ins. Co.</i> , 51 A.3d 442 (Del. 2012) .....	25, 26
<i>Levy v. Hli Operating Co.</i> , 2007 WL 2801383 (Del. Ch. May 16, 2007).....	23
<i>Lillis v. AT&amp;T Corp.</i> , 904 A.2d 325 (Del. Ch. 2006).....	2, 12
<i>Lorillard Tobacco Co. v. Am. Legacy Found.</i> , 903 A.2d 728 (Del. 2006) .....	17
<i>Menzies v. Seyfarth Shaw LLP</i> , 2024 WL 2804813 (D. Del. May 31, 2024).....	2, 5
<i>Molon Motor &amp; Coil Corp. v. Nidec Motor Corp.</i> , 946 F.3d 1354 (Fed. Cir. 2020).....	15

**Cases—continued:**

*New Castle County v. Hartford Accident & Indem. Co.*,  
673 F. Supp. 1359 (D. Del. 1987) .....17

*Rag Am. Coal Co. v. AEI Res., Inc.*,  
1999 WL 1261376 (Del. Ch. Dec. 7, 1999).....7

*Schneider Nat’l Carriers, Inc. v. Kuntz*,  
2022 WL 1222738 (Del. Super. Ct. Apr. 25, 2022).....2, 4, 5

*Torrent Pharma, Inc. v. Healthcare Distrib., Inc.*,  
2022 WL 3272421 (Del. Super. Ct. Aug. 11, 2022) .....6, 7

*TranSched Sys. Ltd. v. Versyss Transit Sols., LLC*,  
2012 WL 1415466 (Del. Super. Ct. Mar. 29, 2012) .....1

*Valeant Pharms. Int’l v. Jerney*,  
921 A.2d 732 (Del. Ch. 2007).....23

*Weinberg v. Waystar, Inc.*,  
294 A.3d 1039 (Del. 2023) .....2, 4

**STATUTES**

6 *Del. C.* § 2701 .....21

10 *Del. C.* § 6305 .....22

**OTHER AUTHORITIES**

 .....15, 16

 .....16

 .....16

*Patent Litigation: Patent Settlement Agreements*, Practical Law, Westlaw  
7-558-8845 .....16

**Other Authorities—continued:**

*Settlement*, *Black’s Law Dictionary* (12th ed. 2024) .....13

[REDACTED]  
[REDACTED] <https://www.dechert.com/knowledge/event-and-webinar>  
[REDACTED] .....16

## ARGUMENT<sup>1</sup>

### **I. The Superior Court Erroneously Denied Plaintiffs’ Enforcement Expenses**

Indemnification provisions require “a clear and unequivocal articulation of ... intent” to cover a party’s indemnification enforcement expenses. *TranSched Sys. Ltd. v. Versyss Transit Sols., LLC*, 2012 WL 1415466, at \*2 (Del. Super. Ct. Mar. 29, 2012). The MIPA reflects just that, and this Court should reverse and remand for the Superior Court to award Plaintiffs’ indemnification enforcement expenses.

Article 8 of the MIPA, which governs “Indemnification,” demonstrates the parties’ clear intent to indemnify enforcement expenses. Section 8.2(a) provides for indemnification of “Damages,” which expressly include “expenses (including ... the fees and disbursements of counsel).” A963, A1013. All the indemnitees’ attorneys’ fees are therefore covered if they are incurred “as a result of, or in connection with, the Patent Litigation.” A1013. As Plaintiffs have explained, these terms are “paradigmatically broad” and “clearly envision[] *any dispute* plausibly related to the subject-matter of the indemnification is within its purview.” AB.28 (cleaned up)

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<sup>1</sup> Unless noted, emphases are added; internal citations, footnotes, and quotation marks are omitted. In addition to the abbreviations used in Plaintiffs’ opening brief, AB.1 n.1, Appellee/Cross-Appellants’ Answering Brief is cited as “AB.[page]”; and Appellant/Cross-Appellee’s Reply Brief/Answering Brief on Cross-Appeal is cited as “CAB.[page].”

(quoting *Lillis v. AT&T Corp.*, 904 A.2d 325, 331-32 (Del. Ch. 2006)). An indemnification dispute arising from the Patent Litigation settlement fits comfortably within the provision’s plain language.

Additionally, § 8.2(a) indemnifies “Damages”—again, specifically including “the fees and disbursements of counsel”—“arising out of or relating to ... a breach of any covenant or agreement of [Claude] ... in this Agreement.” A1013; *contra* CAB.35. As the Superior Court found, Claude breached his indemnification agreement, and Plaintiffs incurred “fees and disbursements of counsel” as a result.

Delaware courts “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), and 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, courts read contracts as a whole, considering their plain language and “clues” throughout to determine whether the contract reveals the requisite “clear and unequivocal intent.” *Id.* at \*4. Courts must “give each provision and term effect” to avoid rendering any terms “meaningless or illusory.” *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023).

Following that approach, beyond § 8.2(a)’s plain text, the MIPA contains three additional clear indications that the parties intended and expected § 8.2(a) to

cover indemnification of the expenses Plaintiffs incurred enforcing their rights under Article 8.

First, § 8.3(a) includes a cap, limiting Defendants’ indemnification obligation to the \$100 million purchase price. A1014. But that cap expressly excludes “any claim for indemnification *based on ... the expenses of the Indemnified Party in enforcing its rights under this Article 8.*” A1014. The natural reading of this provision is that “[c]laims for indemnification” *include* claims “based on” a party’s “expenses ... in enforcing its rights” to indemnification under Article 8, and that those expenses are recoverable even above the cap.

Over nearly two years of litigation below, Claude failed to identify any other possible interpretation for that language. On appeal, Claude for the first time suggests this language means that “if attorneys’ fees are recoverable under a distinct source of law”—as in instances of bad-faith litigation—“then such fees do not count towards the cap.” CAB.34.

That reading fails. The provision governs enforcement expenses that are part of a “claim *for indemnification*” owed pursuant to a party’s “indemnification obligation *under this Agreement.*” A1014. Fee shifting awarded as a sanction is not part of the party’s “claim for indemnification,” nor is it owed “under this Agreement.”

Instead, if the parties had intended to exclude only statutory or sanctions-related fee shifting from the cap, they would have said so, rather than excluding “any claim for indemnification based on” enforcement expenses, without limitation. A1014. Because Claude still cannot explain what work this language does in the MIPA if enforcement expenses were not indemnified, this Court should hold that they are. Doing otherwise would read this language in § 8.3(a) out of the MIPA, rendering it “meaningless.” *Weinberg*, 294 A.3d at 1044.

Second, § 8.4(a) provides procedures for “Inter-Party” (that is, first-party) indemnification claims. A1015. This provision thus specifically contemplates that inter-party claims *themselves* fall within indemnification. Claude dismisses this provision as “merely set[ting] forth the procedure by which inter-party claims can be brought.” CAB.34. That misses the point. The “express reference to litigation between the parties” within the indemnification provision “demonstrates the clear and unequivocal articulation of the ... drafters to indemnify first-party disputes.” *Schneider*, 2022 WL 1222738, at \*30. Courts have found that similar notice-of-claim provisions that distinguish between “Inter-Party Claims” and “Third Party Claim[s],” A1015, “reflect[] that the parties understood that claims within the scope of the indemnity clause were not limited to third-party claims.” *Schneider*, 2022 WL 1222738, at \*30. Claude notes that the agreement in *Schneider* also had other,

different indicia of intent to indemnify first-party claims. CAB.35. True, but irrelevant. Plaintiffs' point has never been that *Schneider*'s language is identical to the MIPA's, only that § 8.4(a), like the "notice-of-claim" provision in *Schneider*, reflects the parties' understanding that first-party indemnification claims are themselves indemnifiable. 2022 WL 1222738, at \*30. That further confirms § 8.3(a)'s clear statement that "claim[s] for indemnification [can be] based on ... the expenses of the Indemnified Party in enforcing its rights under this Article 8." A1014.

Finally, § 8.5 addresses procedures and the parties' rights regarding third-party indemnification claims. A1016. Claude minimizes this provision as "irrelevant." CAB.34. But like notice-of-claim provisions, courts have found that provisions specifically referencing third-party claims support the conclusion that indemnification is *not* limited only to such claims.<sup>2</sup> *See supra*.

Getting nowhere with the MIPA's text, Claude relies largely on the Contingent Closing Note ("CCN"), an ancillary agreement executed contemporaneously with the MIPA. Claude argues that the MIPA does not

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<sup>2</sup> Plaintiffs' argument is thus not that §§ 8.3(a), 8.4, or 8.5 "create[] an implied right" to recover enforcement expenses, *contra* CAB.33-34, but that they *make clear* the scope of § 8.2(a)'s indemnification right. *Menzies*, 2024 WL 2804813, at \*4 ("clues" throughout agreement inform interpretation of indemnity's scope).

indemnify enforcement costs because it did not use the same fee-shifting language as the CCN. CAB.32-33. He is wrong.

To begin, the parties had good reason to use different language in the CCN. That contract's indemnification provision was much narrower than the broad, complex indemnity in the MIPA. The MIPA indemnified third-party claims (including the Patent Litigation), numerous representations and warranties, other contractual breaches, and matters related to government loans. A1013. Conversely, the CCN was a simple, \$20-million note payable to Defendants after the Patent Litigation concluded and indemnifiable Damages were deducted. Trial.Op.7.n.34. The *only* indemnification obligation in the CCN was for the Buyers to pay the Sellers' "attorneys' fees and disbursements" if Sellers had "to enforce and collect upon this Note." A1042. The contracts are so different as to render any analogy between them unconvincing. Indeed, the indemnification article in the MIPA, A1013-17, is longer than the entire CCN, A1039-42.

Ignoring this point, Claude cites *Torrent Pharma, Inc. v. Healthcare Distribution, Inc.* for the principle that "omission[s] [are] presumed intentional." 2022 WL 3272421, at \*9 (Del. Super. Ct. Aug. 11, 2022). First, there is no omission; the MIPA accomplishes the same effect through different language. *See supra* pp.1-5. At any rate, this maxim—better known as *expressio unius est exclusio alterius*—

is not the trump card Claude makes it out to be, for it “is not a rule of universal application,” and should not be applied “to defeat the [parties’] apparent intention.” *Rag Am. Coal Co. v. AEI Res., Inc.*, 1999 WL 1261376, at \*7 n.26 (Del. Ch. Dec. 7, 1999).

*Torrent Pharma* is also distinguishable. First, the discussion there has nothing to do either with indemnification or interpretation of interrelated contracts. That court interpreted “neighboring provisions” in a single contract, some of which qualified an obligation by imposing a standard of care on a party and some of which included no qualification. 2022 WL 3272421, at \*9. The case does *not* say that differences in language in interrelated contracts carry the same weight as neighboring, parallel provisions in the same contract. Second, the provision in *Torrent Pharma* included *no* standard of care and no other qualifications of liability, while the other surrounding provisions expressly included such qualifications. *Id.* Thus, the court unremarkably concluded the parties intended to impose strict liability for that provision alone. By contrast, while the MIPA does not use the precise language the CCN used to cover indemnification of enforcement expenses, *different* language in the MIPA does indicate enforcement expenses are covered. *See supra.* Claude’s proposed reading would render those indications meaningless and defeat

the parties' intent just because the parties, doubtless basing these very different contracts on different forms, used different language to achieve a similar outcome.

Moreover, the two cases Claude cites for the uncontroversial proposition that related contemporaneous documents should be read together actually demonstrate that using different language across related contracts is *not* dispositive. In *CA, Inc. v. Ingres Corp.*, for example, the court reached the *opposite* conclusion Claude suggests here. There, the parties executed several related agreements: most had a forum-selection clause, but one narrower agreement did not. 2009 WL 4575009, at \*47 (Del. Ch. Dec. 7, 2009), *aff'd*, 8 A.3d 1143 (Del. 2010). The forum-selection clauses still governed claims brought under the agreement without the clause, in part because the latter agreement was “part and parcel of a larger contractual relationship.” *Id.* Far from holding that the absence of language in one interrelated contract indicated an intent to omit that language, the court effectively read the missing clause into the narrower agreement.

And in *Ashall Homes Ltd. v. ROK Entertainment Group Inc.*, the parties executed one agreement to “submit to the *exclusive* jurisdiction of the English courts,” and one providing only that “English courts *shall have* jurisdiction over any disputes arising hereunder.” 992 A.2d 1239, 1246-47, 1250 (Del. Ch. 2010).

Despite these differences, the court concluded the second provision still mandated *exclusive* jurisdiction in the English courts. *Id.* at 1250-51.

Under Claude's supercharged *expressio unius* principle, these cases should have reached different results. But these courts declined to reach such outcomes, given the need to read contracts in context and as a whole. This Court should too.

## II. The Superior Court Erroneously Concluded the [REDACTED] Cost Was Not Indemnifiable

The Superior Court erred in holding that VOI's payment for [REDACTED] as part of the Patent Litigation settlement was not an "amount paid in settlement" indemnifiable under the MIPA. To begin, the MIPA's indemnification extends beyond merely amounts "paid in settlement." Moreover, [REDACTED] [REDACTED] and that is exactly what happened here. This Court should hold that payment for [REDACTED] is indemnifiable.

1. First, Claude argues that "if the Court agrees with" him that the MIPA does not indemnify "Plaintiffs' independent post-Transaction business decisions," then indemnification would exclude [REDACTED] CAB.36-37.

To the contrary, even if this Court somehow agrees with Claude's atextual argument, it should still find that the [REDACTED] (along with all the other damages at issue) is indemnifiable. The Superior Court found that "VOI, *at Patrick's direction*, [REDACTED]" Trial.Op.34. Patrick's actions, including [REDACTED] [REDACTED] were taken "as [Claude's] *Sellers' Representative*." Trial.Op.34. And the court found those actions led DePuy to [REDACTED] [REDACTED] Trial.Op.34. It was therefore Claude's conduct through the Sellers' Representative, not Plaintiffs'

independent business decisions, that [REDACTED] in the Patent Litigation. Trial.Op.34. That is why the Superior Court held that [REDACTED] qualifies as ‘Damages suffered ... as a result of, or in connection with, the Patent Litigation.’ Trial.Op.34. The Superior Court treated [REDACTED] differently only because of its mistaken view that “[a]mounts paid in settlement” under the MIPA include only the resolution of [REDACTED] Trial.Op.35.

As to that last, narrow holding, the Superior Court erred.

2. To start, Claude’s indemnification obligation encompasses “*any ... payments*” incurred by VOI “as a result of, or in connection with, the Patent Litigation.” A963; A1013. While that “includ[es] amounts paid in settlement,” A963, it is not limited *only* to settlement payments. It could, for example, include [REDACTED] incurred “as a result of, or in connection with, the Patent Litigation.”

The [REDACTED] even if it were not technically a “settlement” payment, was undoubtedly paid “as a result of, or in connection with, the Patent Litigation.” The Superior Court found that the threat of [REDACTED] [REDACTED] in the Patent Litigation required resolution. Trial.Op.34. The [REDACTED] [REDACTED] was accordingly both “a result of” and “in connection with” that litigation.

This Court therefore does not need to reach the technical question of whether “amounts paid in settlement” covers only settlement of [REDACTED]

Claude appears to argue that “payments” are included within “Damages” *only* to the extent they are settlement payments. CAB.38-39. The MIPA refutes that position. “Damages” include “*any ... payments (including amounts paid in settlement)*”—language that on its face extends beyond settlement payments. And the MIPA provides that “wherever the word ... ‘including’ is used in this Agreement, it shall be deemed to be followed by the words ‘without limitation.’” A1020. Claude’s indemnification obligation therefore clearly extends beyond settlement payments—including to [REDACTED] incurred “as a result of, or in connection with, the Patent Litigation.”

Claude’s only other argument on this point is that this “conception of ‘Damages’ has no limiting principle” and would cover, for example, payments for “the costs of building a new factory to manufacture C/V units.” CAB.38-39. That is absurd. The scope of payments “as a result of, or in connection with, the Patent Litigation” assuredly has some outer bound. While broad, the language “in connection with” still requires that the damages are “*plausibly related* to the subject-matter of indemnification.” AB.28 (quoting *Lillis*, 904 A.2d at 332). This is an easy case. As the Superior Court found, the [REDACTED] here directly resulted from

the Patent Litigation and was part of the Patent Litigation’s resolution. Trial.Op.13. It was clearly “plausibly related” to the Patent Litigation. Just as clearly, paying to build a new C/V factory is not “plausibly related” to Defendants’ indemnification obligation. Plausibility’s outer limits are not at issue here.

3. Although this Court need not reach the issue, the Superior Court also erred in holding that payment for [REDACTED] as part of a patent litigation settlement agreement is not an “amount paid in settlement.” AB.66-69. As Plaintiffs’ cross-appeal brief explained, AB.67, “Settlement” is “[a]n agreement ending a dispute or a lawsuit.” *Settlement, Black’s Law Dictionary* (12th ed. 2024). Because the Patent Litigation included [REDACTED] the \$70-million payment fits comfortably within the commonsense understanding of settling the Patent Litigation.

Claude’s contrary argument is based on the fiction that “the subject of the lawsuit between DePuy and VOI/Fidelio was the alleged infringements that [REDACTED] [REDACTED] CAB.38; *see also* CAB.37 (arguing [REDACTED] was “unrelated to resolving claims actually at issue in the underlying dispute”).

But from the lawsuit’s beginning in 2018, DePuy sought [REDACTED] [REDACTED] B426. DePuy even obtained a permanent

injunction barring VOI from selling the infringing products and any “not colorably different” products. Trial.Op.12. DePuy then moved, again *in the Patent Litigation*, for an order that the C/V products were “not colorably different” from the infringing products and thus encompassed within the permanent injunction. A2034. The Patent Litigation therefore related both to [REDACTED]—including, specifically, [REDACTED]

The settlement agreement’s text confirms as much. [REDACTED]

[REDACTED] A1116. One of those “issues” was [REDACTED]. *See supra.* [REDACTED] aspect of the Patent Litigation was settled in two ways: first by [REDACTED]

[REDACTED] A1117-18. And by [REDACTED]

[REDACTED] A1118. [REDACTED]

[REDACTED]<sup>3</sup>

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<sup>3</sup> Claude argues that because the contract’s name is [REDACTED] [REDACTED] CAB.37-38. But that agreement made clear its “headings ... shall not affect the construction, meaning, or interpretation of this Agreement,” A1121, and nothing else in the agreement (Continued . . .)

Claude concedes, as he must, that patent litigation settlements often are

[REDACTED] But he argues these [REDACTED] are not “paid in settlement,” but are independent “business deals.” CAB.40.

Claude misunderstands patent litigation. [REDACTED]

[REDACTED]

[REDACTED] Copious authority establishes that [REDACTED]

[REDACTED] As the Federal Circuit observed, “settlements of patent infringement litigation, [REDACTED]

[REDACTED]

[REDACTED] *Core-Vent Corp. v. Implant Innovations, Inc.*, 53 F.3d 1252, 1256-57 (Fed. Cir. 1995); *id.* at 1257 (noting “the settlement agreement itself ... set forth the [REDACTED] that the settlement provided”); *id.* at 1258 (referring to “the [REDACTED] in the settlement agreement”). As such, a leading treatise on [REDACTED] dedicates an entire chapter to [REDACTED]” [REDACTED]

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distinguishes [REDACTED] Anyway, the titles of settlement agreements frequently refer to “Releases,” for example, but Claude concedes releases are quintessential components of settlement. CAB.38 (arguing “Settlement” “corresponds to ... Releases”); *e.g.*, *Molon Motor & Coil Corp. v. Nidec Motor Corp.*, 946 F.3d 1354, 1356 (Fed. Cir. 2020) (discussing settlement agreement titled [REDACTED]).

[REDACTED]

[REDACTED] As that treatise explains, [REDACTED]

[REDACTED]

[REDACTED]

Indeed, a [REDACTED]

[REDACTED]

[REDACTED] In the context of patent litigation, the cost of [REDACTED]

[REDACTED].<sup>4</sup> Claude’s pretense that [REDACTED]

was merely a convenient “business deal” and not used to settle [REDACTED]

[REDACTED]

[REDACTED] has no basis either in patent litigation custom and practice or this case’s

facts.

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<sup>4</sup> See also, e.g., [REDACTED]

[REDACTED] <https://www.dechert.com/knowledge/event-and-webinar/> [REDACTED] (“Most

patent suits are settled ...,” [REDACTED] Practical Law, Westlaw [REDACTED]

[REDACTED] *Patent Litigation: Patent Settlement Agreements*, Practical Law, Westlaw 7-558-8845 (“ensur[ing] that the settlement effectively resolves the claims of the litigation” may require including [REDACTED]

[REDACTED]

Next, Claude argues that despite “Damages” being defined in the MIPA, it should nevertheless be given its “plain, ordinary meaning,” which he claims covers only “compensation for injury [REDACTED]

[REDACTED] CAB.39. This argument fails for many reasons. First, courts applying Delaware law interpret the ordinary meaning of “damages” to “make[] no distinction between actions at law and actions in equity,” meaning that costs associated with injunctive claims (such as future costs of environmental cleanup) fall within the “ordinary definition” of damages. *E.g.*, *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1365 (D. Del. 1987).

Second, “Damages” is a carefully defined term in the MIPA, and “Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are *not* defined in a contract.” *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006). *Delligatti v. United States*, 604 U.S. 423, 438 (2025), is not to the contrary. There, the Supreme Court, interpreting a federal statute, remarked that where a statutorily defined term is ambiguous, courts should “consider” as a “factor[]” the “statutory definition in light of the conventional meaning of the term it defines.” *Id.* Nothing in that case, or any other, suggests that courts must rewrite defined contractual terms to limit them to their common-law meanings, much less that this Court should import *tort law* principles about the

accrual of tort damages into a paragraph-long contractual definition of “Damages” for *contractual indemnification* of patent infringement liability.

Moreover, the MIPA definition of “Damages” on its face extends more broadly than tort damages. It includes, among other things, “any losses, liabilities, *damages*, awards, deficiencies, fines, penalties, charges, Taxes, assessments, payments ..., costs and expenses.” A963. The parties defined “Damages” broader than (Claude’s view of) traditional tort damages. This Court should give effect to that choice.

Next, even if “damages” were limited to [REDACTED] would be covered. Claude must indemnify *VOI’s* Damages, not DePuy’s. From *VOI’s* perspective, the relevant injury *had already occurred*: through the Patent Litigation, DePuy had [REDACTED] [REDACTED] after Claude’s Sellers’ Representative [REDACTED] [REDACTED]. To remove that cloud, *VOI* settled the case, including [REDACTED] [REDACTED] BR9-10(205:1-206:4) (Flesher testifying [REDACTED] [REDACTED]; Trial.Op.34.n.216 (“The Court finds Flesher to be one of the most credible witnesses at trial.”). Both the [REDACTED] (resulting from Defendants’ conduct) and the [REDACTED] were a completed injury—[REDACTED]—from *VOI’s* perspective as indemnitee.

Finally, Claude argues it is irrelevant that the MIPA’s definition of “Patent Litigation” encompasses “Actions,” including “injunctions,” “related” to the Patent Litigation. CAB.39-40. But that the MIPA indemnifies “Damages”—including “unaccrued” “losses”—for any “injunctions” “related” to the Patent Litigation, A961, A968, certainly supports the commonsense reading that losses associated with [REDACTED] are indemnifiable. Claude’s contrary view, that Defendants owed no indemnification even if the Patent Litigation [REDACTED] [REDACTED] Plaintiffs purchased from Claude, would frustrate the purpose and logic of indemnification in this transaction, which the Superior Court found to be that Buyer required Defendants “to cover any potential risk of the Patent Litigation.” Trial.Op.6 (cleaned up).

### **III. The Superior Court Erroneously Halved Plaintiffs' Award of Patent Litigation Fees**

Plaintiffs sought below Claude's share of VOI's \$8.6 million in Patent Litigation attorneys' fees and expenses. Every one of those dollars was incurred and paid by VOI. Claude does not dispute Patent Litigation fees and expenses are indemnifiable. The Superior Court halved VOI's award, reasoning that because VOI and Fidelio were jointly represented for a portion of the Patent Litigation, half the fees were *not* VOI's fees. The court erred.

#### **A. The \$8.6 Million in Fees Were All VOI's Recoverable Damages**

VOI has the right to seek indemnification for all the Patent Litigation fees and expenses it incurred and paid. Claude proffers only meritless procedural arguments.

Claude first attempts to muddy the standard of review, asserting that Plaintiffs challenge the Superior Court's factfinding and calculation of damages. CAB.42. That is incorrect. Plaintiffs do not challenge on appeal the finding that "VOI and Fidelio jointly defended the Patent Litigation." Trial.Op.48; *contra* CAB.42. Plaintiffs acknowledge these fees were "jointly incurred." AB.71. The purely legal question, however, is whether VOI can seek indemnification for the jointly incurred fees it paid, or whether the joint representation means it is limited to half, notwithstanding that it paid far more. This Court reviews that question *de novo*. AB.70; *Holifield v. XRI Inv. Holdings LLC*, 304 A.3d 896, 937 (Del. 2023) (legal

issues “embedded” in a court’s damages award are reviewed *de novo*); *Bhole, Inc. v. Shore Invs., Inc.*, 67 A.3d 444, 449 (Del. 2013) (where trial court’s damages determinations raised “issues of contract interpretation” and required “formulation and application of legal principles,” review was *de novo*).

On any standard, the Superior Court erred. 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. In other words, VOI was liable to its lawyers for *all* the \$8.6 million in fees. All the fees VOI paid were therefore VOI’s attorneys’ fees and were “suffered by [VOI] as a result of, or in connection with, the Patent Litigation,” regardless of whether someone else was also liable for them. A1013.

Claude again tries to confuse the issue. He does not dispute that VOI was jointly-and-severally liable to its lawyers for all of VOI and Fidelio’s fees, because he cannot. He instead argues that Plaintiffs “waived” this argument by failing to cite § 2701 below. CAB.45. That is nonsense. In response to Claude’s arguments below, Plaintiffs specifically cited § 2701’s joint-and-several rule, and two paragraphs later argued that “[a]ttorneys’ fees and costs ‘for both VOI and Fidelio collectively’ are plainly covered by the MIPA *because they are joint-and-several liabilities.*” A655-56 & n.3. This argument is preserved.

Because VOI was jointly-and-severally liable for all jointly incurred attorneys' fees, the amounts it paid toward those fees are "Damages suffered by [VOI] as a result of, or in connection with, the Patent Litigation," and therefore indemnifiable. A1013. Fidelio's separate liability is irrelevant. If Fidelio refused to pay or went bankrupt, VOI would still be on the hook to pay its lawyers the entire amount, and Defendants would be on the hook to indemnify VOI. Fidelio's liability does not diminish VOI's liability—that is what joint-and-several means.

Claude's real argument is therefore not that these fees are not VOI's Damages, but that VOI should have sought *contribution* from Fidelio *before* seeking indemnification from Claude. But he cites no law requiring VOI to do that, and in fact Delaware law is the opposite. Delaware law specifically provides that a party's right of contribution "does not impair any right of indemnity." 10 *Del. C.* § 6305; A655 (making this argument below). And as the Superior Court held below, nothing in the MIPA "imposes[s] an obligation to apportion indemnifiable damages." MSJ.Op.19-20. In other words, VOI had the right to seek its out-of-pocket damages directly from Defendants without first apportioning its fees liability with Fidelio or seeking contribution. If Claude wished to force apportionment of damages between VOI and Fidelio, he could have attempted to implead Fidelio and assert contribution himself. He did not.

Claude nevertheless contends that “well-settled Delaware law” requires that co-clients are “responsible for their pro rata shares of advanced fees and litigation costs,” citing only *Valeant Pharmaceuticals International v. Jerney*, 921 A.2d 732 (Del. Ch. 2007) and *Levy v. Hli Operating Co.*, 2007 WL 2801383 (Del. Ch. May 16, 2007). CAB.43. He overreads these cases, which arose in a different context. In *Valeant*, a company sought reimbursement of expenses advanced to an officer. 921 A.2d at 754-55. The officer sought “equitable apportionment” in a “supplemental proceeding” to allocate the advancements between himself and another jointly represented officer to whom the company also advanced fees. *Id.* The Chancery Court refused to take on the burden of apportionment, and, after “[w]eighing all of the circumstances” *in that case*, it found that the “fair outcome” was for the officer to reimburse half the advanced fees. *Id.* at 755. *Levy*, citing only *Valeant*, observed that “this court has held purported co-indemnitees who retained joint counsel responsible for their pro rata share of advanced fees and litigation costs” based on the burden of undertaking “a time-consuming supplemental hearing.” 2007 WL 2801383, at \*11 n.62.

But this is an indemnification case between Plaintiffs and Claude, not an apportionment case involving VOI and Fidelio. Moreover, these cases do not establish that co-clients owe attorneys’ fees pro rata in all circumstances as a matter

of law. And their convenience-based reasoning is inapplicable here, where Plaintiffs already presented un rebutted evidence and proved that all the requested fees were incurred and paid by VOI for VOI-focused work, and that VOI excluded Fidelio-focused work from its demand. AB.71-72; Trial.Op.48. There were no invoices left for the Superior Court to “[p]ars[e],” CAB.44, nor did any party ask the court to undertake such an apportionment.

Nor does a fifty-fifty rule “make sense,” as Claude suggests. Claude theorizes that a hypothetical co-defendant could “skirt the limits” on indemnity by forcing an indemnified co-defendant to pay its share. CAB.43. But presumably, in that situation, the indemnitor would have some remedy of contribution against the non-indemnified co-defendant. And anyway, the undisputed record shows the opposite happened here. AB.72 (citing B1765 and B294-97(22:15-25:15)). Patrick, as Sellers’ Representative, directed Finnegan to “send the invoices to VOI” for payment of joint VOI/Fidelio work—agreeing VOI, not Fidelio, should pay them. B1765. All the fees and expenses Plaintiffs seek were incurred by VOI, the Sellers’ Representative directed that they be paid by VOI, and they were actually paid by VOI. Moreover, contrary to Claude’s assertion, the record shows that Fidelio *was* separately billed and separately paid Patent Litigation fees, and VOI excluded even fees it actually paid that related primarily to Fidelio. AB.72. Claude is simply wrong

that “VOI paid all of the fees out of pocket, including Fidelio’s share.” CAB.42. Claude’s rule would under-compensate VOI.

**B. Section 8.2(a) Covers Fidelio’s Patent Litigation Fees Anyway**

Even if half the fees at issue were only Fidelio’s fees (despite VOI being jointly-and-severally liable for them), the MIPA’s indemnification provision covers them. The Superior Court erred in concluding that only VOI’s Damages, not Fidelio’s Damages, are indemnifiable. Trial.Op.37. Section 8.2(a) sweeps broader: it indemnifies “Buyer” and “its Affiliates,” undisputedly including Fidelio, from “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. As Plaintiffs have explained, Fidelio’s attorneys’ fees not only arise out of and relate to VOI’s attorneys’ fees; because they are joint-and-several, they are *the very same fees*. AB.73.

Claude’s contrary arguments fail. He first argues Plaintiffs’ interpretation makes “suffered by [VOI]” superfluous. CAB.46. But *Claude’s* interpretation, not Plaintiffs’, injects superfluity. If, as Claude contends, “Damages arising out of or relating to ... any Damages suffered by [VOI]” *actually* means “only Damages suffered by VOI,” CAB.45 (cleaned up), then the phrase “Damages arising out of or relating to” would be “read out” of § 8.2(a). *Intel Corp. v. Am. Guarantee & Liab.*

*Ins. Co.*, 51 A.3d 442, 451 (Del. 2012). By contrast, Plaintiffs’ reading of § 8.2(a) “give[s] meaning to each of its provisions”: both VOI’s Damages and Fidelio’s Damages arising out of or relating to VOI’s Damages are covered. *Id.* at 451 n.22.

The Letter of Intent (“LOI”) Claude cites does not help him. CAB.46. As Claude concedes, the LOI to which he agreed *plainly* included Fidelio’s damages within the indemnity. CAB.46. Claude argues “the parties chose to omit” that language. CAB.46. But they did not: the undisputed trial testimony was that Buyer’s deal counsel took the LOI and embodied it in the MIPA’s indemnification provisions, specifically by including reference to Fidelio’s “Damages arising out of or relating to ... [VOI’s] Damages.” A1013; BR2-6(11:11-13:4, 71:17-72:17). There is no contrary testimony. Section 8.2(a) thus reflects the exact bargain memorialized in the LOI and, if there is any ambiguity, the LOI supports Plaintiffs’ reading.

As a last-ditch effort, Claude argues that because Fidelio “was not even named as a defendant in DePuy’s lawsuit” at the time of the MIPA, Claude cannot be liable for Fidelio’s defense fees. CAB.46-47. The Superior Court squarely rejected Claude’s effort to read a temporal limitation into § 8.2(a). Trial.Op.22-23. And as the Superior Court found, the indemnification provision was written broadly because “it was impossible [for Fidelio] to ... judge the risk ... given DePuy’s continual

expansion of the Patent Litigation's scope." Trial.Op.6. That expansion had already included adding a new defendant. AB.9. Fidelio's broad coverage for any Damages *it* might incur related to the Patent Litigation was a core aspect of its willingness to pay \$100 million for VOI, of which Claude received more than \$55 million. AB.12; AB.15.

**CONCLUSION**

Appellees/Cross-Appellants respectfully request that the Court grant the relief sought in their opening brief. AB.74.

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**CERTIFICATE OF SERVICE**

I, Phillip Reytan, hereby certify that on March 24, 2026, I caused a true and correct copy of a *Public Version of Plaintiffs Below-Appellees' Reply Brief on Cross Appeal*, to be served on the following counsel via File & ServeXpress:

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