IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

US WORLDMEDS PARTNERS, LLC,	)	
	)	***Public Version***
Plaintiff,	)	
	)	C.A. No. N25C-07-121 KMM
v.	)	(CCLD)
	)	
SUPERNUS PHARMACEUTICALS, INC.,	)	
	)	
	)	
Defendant.	)	

Date Submitted: March 4, 2026
Date Decided: June 5, 2026

Plaintiff's Motion for Summary Judgment – ***GRANTED***

Defendant's Partial Cross-Motion for Summary Judgment – ***DENIED***

MEMORANDUM OPINION

Daniel M. Silver, Sarah E. Delia, MCCARTER & ENGLISH, LLP, Wilmington, Delaware; Mary Beth Maloney, Jonathan D. Fortney, Mark H. Mixon, Jr. (argued), GIBSON, DUNN & CRUTCHER LLP, New York, New York; Luke Dougherty, GIBSON, DUNN & CRUTCHER LLP, Denver, Colorado, *Attorneys for Plaintiff*.

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Miller, J.

I. INTRODUCTION

Plaintiff US WorldMeds Partners, LLC ("US WorldMeds") sold assets to Supernus Pharmaceuticals, Inc. ("Supernus"). The purchase price included an upfront cash payment and the possibility of additional compensation through milestone payments if certain products reached the specified milestone. When an acquired infusion pump satisfied the milestone metrics, Supernus owed US WorldMeds $30 million. The parties agree to this point.

Supernus, however, did not make the full milestone payment, asserting a right of set-off under the sale agreement. Supernus based its set-off, in part, on pending litigation in which Supernus alleges that US WorldMeds breached its obligations under the sale agreement and committed fraud in the sale transaction. Therefore, Supernus asserts US WorldMeds "is liable" to Supernus, as that phrase is used in the sale agreement's set-off provision.

Supernus also based its set-off on a second litigation pending against US WorldMeds and Supernus arising, in part, out of US WorldMeds' actions before the sale, which both parties are defending. Supernus asserts that because it "is seeking recovery" of its defense costs under the sale agreement's warranty insurance policy, the set-off provision has been triggered on this separate ground.

US WorldMeds filed this breach of contract action to enforce its right to the milestone payment. It asserts that a set-off cannot be effectuated unless a final judgment (a mature debt) is entered and because the litigation against it is still pending, Supernus has no set-off right on the "is liable" ground. US WorldMeds further asserts that Supernus misconstrues the sale agreement and merely seeking coverage under the warranty policy does not trigger a right to set-off.

US WorldMeds moved for summary judgment. Supernus cross-moved on the "is seeking recovery" ground. It argues that disputes of fact preclude summary judgment in US WorldMeds' favor on the "is liable" ground.

The parties offer different interpretations of the set-off provision. Only one interpretation, however, is reasonable. Therefore, because the agreement is unambiguous, the Court may determine the parties' rights as a matter of law and the Court need not address the alleged factual disputes.

Unless the parties contractually agree otherwise, and here they did not, set-off requires two mutual final judgments. No judgment has been entered against US WorldMeds and Supernus' mere allegations are insufficient to effectuate a set-off under the "is liable" provision.

Supernus construes the set-off provision to provide for a second, independent ground for set-off when it "is seeking recovery" under the warranty insurance policy. But, construing the contract as a whole, as the Court must, the provision on which Supernus relies simply clarifies the right to set-off and is not an independent ground for set-off. Therefore, Supernus has no right to withhold the milestone payment on this basis.

Supernus had no right of set-off against the milestone payment, and therefore, summary judgment is entered in US WorldMeds' favor. US WorldMeds' motion is **GRANTED** and Supernus' motion is **DENIED**.

II. BACKGROUND

A. *The Sale and Purchase Agreement*

1. *Supernus purchases a portfolio of products from US WorldMeds.*

On April 28, 2020, US WorldMeds and Supernus entered into a Sale and Purchase Agreement (the "Agreement"),[1] pursuant to which Supernus purchased a portfolio of products that treat central nervous system diseases, as well as a product candidate in late-stage development (the "Infusion Pump").[2] The transaction closed on June 9, 2020. Supernus continued marketing the products and further developed the Infusion Pump.[3]

2. *The milestone payments*

The Agreement required Supernus to pay US WorldMeds $300 million at closing, plus up to $230 million in contingent milestone payments.[4] Relevant here,

[1] Answer (D.I. 11) ¶ 11 (admitting the allegations); Compl., Ex. A (the Agreement).
[2] Answer ¶ 12 (admitting the allegations).
[3] *Id.* ¶ 13 (admitting the allegations).
[4] Agreement, § 4.

milestone (iv) requires payment of "$30 million upon the first commercial sale of Infusion [Pump] in the United States at any time."[5] Milestone payment (iv) must be paid within [redacted] Business Days.[6]

3. *The Agreement's warranties and recovery scheme*

The Agreement contains several representations and warranties, including US WorldMeds' warranty that prior to the closing, it conducted its business within the confines of the law.[7] The parties contractually agreed to a complex limitation of liabilities scheme and sources of recovery for breaches of various types of warranties. Under the Agreement, Supernus may bring claims against US WorldMeds solely with respect to Fundamental Warranty Claims,[8] Business Warranty Claims,[9] [redacted] Claims,[10] Retained Group Claims,[11] Fraud Claims, Core Covenant Claims,[12] or Covenant Claims.[13]

The Agreement provides for a Purchase Price Cap[14] of $530 million, however, US WorldMeds is not obligated to make a cash payment to Supernus for

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[5] Agreement § 4.6.
[6] *Id.* § 4.6.2.
[7] *Id.*, Sched. 4 §§ 13.1 (representing that US WorldMeds conducted its business in accordance with applicable Competition Laws), 16.1 (representing that US WorldMeds conducted its business in accordance with all applicable Laws).
[8] "Fundamental Warranties" are warranties relating to incorporation, capacity, authority to act, and the capital structure of the relevant entities. *Id.*, Sched. 4 § 1.1.
[9] Business Warranty Claims are not defined under the Agreement, however, "Business Warranties" are defined as "the Warranties other than the Fundamental Warranties" and Tax Warranties. *Id.*
[10] [redacted] Claims are tax obligations US WorldMeds agreed to pay. *Id.* § 10.1.3.
[11] Retained Group Claims are claims arising out of the assets, liabilities, and operation of the business prior to closing. *Id.* § 10.1.5.

Fundamental Warranty, Retained Group, Core Covenant, Tax Warranty, or [redacted] Claims that exceed the total amount of cash payments Supernus has made to US WorldMeds as of the date of the claim. Supernus has the right to set-off against future milestone payments for any claim that is "in excess of the aggregate amount of cash payments" paid to US WorldMeds as of the date of such claim.[15]

The Agreement required Supernus to purchase a buyer-side warranty liability insurance policy (the "Warranty Insurance Policy").[16] In Schedule 6 of the Agreement, the parties agreed that US WorldMeds has no liability for Business Warranty Claims and that Supernus' only source of recovery on any such claim is the Warranty Insurance Policy.[17] The limitation on US WorldMeds' liability is subject to being increased by "an amount equal to the lesser of" (i) the amount of claims that were not Business Warranty Claims paid out by the Warranty Insurance Policy, and (ii) the amount the Warranty Insurance Policy cannot cover, in the

[12] Core Covenant Claims are claims for breach of any covenant, agreement, or obligation pursuant to the Further Assurance clause and certain acts Seller agreed not to take or to take from signing to closing, and acts Seller agreed not to take after closing. *Id.* § 10.1.7.

[13] Core Covenant Claims are for breach of any covenant, agreement, or obligation pursuant to the Agreement other than [redacted] Claims, [redacted] Claims and the [redacted] Covenant Claims. *Id.* § 10.1.8.

[14] *Id.* § 1.1.

[15] *Id.*

[16] The Warranty Insurance Policy provides buyer-side coverage up to $35 million. *Id.* "Warranty Insurance Policy."

[17] *Id.*, Sched. 6 § 1.1 (Seller's liability for Business Warranty Claims "shall not exceed $0").

aggregate, of the Business Warranty Claims due to policy proceeds being paid on prior non-Business Warranty Claims.[18]

For Fundamental Warranty, Retained Group, and Tax Warranty Claims, Supernus is required to first seek recovery from the Warranty Insurance Policy, then it is permitted to seek recovery from US WorldMeds,[19] up to the Purchase Price Cap. Supernus may seek recovery for Covenant Claims directly from US WorldMeds, (but not the Warranty Insurance Policy),[20] with its liability being capped at [redacted]% of the Purchase Price Cap.[21] US WorldMeds' liability for Fraud Claims is not capped and Supernus may not seek recovery for any such claim under the Warranty Insurance Policy.[22]

4. *The set-off provision*

At the heart of this dispute is the set-off provision in the Agreement,[23] which provides:

> [Supernus] shall have a right of set-off in respect of claims for which [US WorldMeds] is liable under this Agreement; …. For the avoidance of doubt, [Supernus'] right of set-off shall also apply in respect of claims for which it is seeking recovery under the Warranty Insurance Policy; provided, that in the event [Supernus] recovers the

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[18] *Id.*, Sched. 6 § 1.1.
[19] *Id.*, Sched. 6 § 1.2-.5.
[20] *Id.*, Sched. 6 § 1.3.
[21] *Id.*, Sched. 6 § 1.2-.5.
[22] *Id.*, Sched. 6 § 1.6.
[23] *Id.*, Sched. 6 § 11.1.

> amount sought under the Warranty Insurance Policy, [Supernus] shall promptly pay to [US WorldMeds] such set-off amounts.[24]

If US WorldMeds is the prevailing party in an action asserting improper set-off, Supernus is required to pay US WorldMeds' legal fees and costs.[25] If Supernus fails to make a milestone payment when due, interest accrues each day at the rate of prime plus [redacted]%.[26]

B. *The Pending Litigations*

1. *The Delaware antitrust action*

In October 2022, a third party commenced an action[27] against US WorldMeds, its officers and directors, and Supernus over a product in the portfolio purchased by Supernus, alleging violations of antitrust laws (the "Delaware Litigation").[28] The action remains pending.

Supernus tendered the claim to the primary Directors and Officers Insurance Policy (the "D&O Policy") carrier.[29] After the carrier initially denied the claim, the claim was accepted and Supernus learned that US WorldMeds also submitted a claim against the D&O Policy for the Delaware Litigation.[30] While both US

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[24] *Id.*
[25] *Id.*
[26] *Id.* § 22.1.
[27] *Sage Chemical, Inc. v. Supernus Pharmaceuticals, Inc.*, 22-cv-1302 (D. Del.).
[28] Supernus' Combined Answering Brief and Opening Brief for Cross-motion for Partial Summary Judgment (D.I. 33) ("AB"), Affidavit of Janeen M. Thomas ("Thomas Aff."), ¶ 12.
[29] *Id.*
[30] *Id.* ¶¶ 13-14.

WorldMeds and Supernus received payment of defense costs from the D&O Policy, US WorldMeds received a large majority and Supernus received approximately $500,000.[31] The primary D&O Policy is exhausted and first layer excess is nearly exhausted.[32] The secondary excess D&O Policy carrier has denied Supernus' claim.[33]

In total, the D&O Policy provides $10 million in coverage.[34] Supernus asserts that it has incurred more than $10 million in defense costs in the Delaware Litigation.[35]

2. *The Kentucky fraud action*

In September 2024, Supernus sued US WorldMeds, and others, in Kentucky asserting fraud for interfering and/or encumbering Supernus' rights under the D&O Policy (the "Kentucky Litigation").[36] Supernus alleges that US WorldMeds, surreptitiously and improperly, added itself to the D&O Policy and improperly obtained policy proceeds.[37] US WorldMeds also allegedly failed to secure tail

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[31] *Id.* ¶ 63.
[32] *Id.* ¶¶ 16, 58.
[33] *Id.* ¶ 59.
[34] *Id.* ¶ 60.
[35] *Id.* ¶ 61.
[36] *Id.* ¶¶ 54-56, 62. Because the Kentucky Litigation asserts a claim for fraud, any potential recovery would be directly from [redacted], not from the [redacted]. *See* Agreement, Sched. 6 § 1.6.
[37] Thomas Aff., ¶¶ 18-19, 24-31. The disputes over available coverage sparked several insurance coverage actions. *See id.*, Exs. O, S, T.

coverage for the D&O Policy.[38] Supernus seeks recovery of over $9.5 million in the Kentucky Litigation, representing the available D&O Policy proceeds that would have been available to Supernus had US WorldMeds not interfered.

US WorldMeds denies the allegations and is defending the Kentucky Litigation.[39] The action remains pending.

C. ***The Infusion Pump Milestone Payment becomes due and Supernus withholds payment.***

In April 2025, Supernus sold the first Infusion Pump, thereby satisfying milestone (iv).[40] Thus, the Agreement required Supernus to pay US WorldMeds $30 million within [redacted] business days (the "Milestone Payment").[41]

On April 30, 2025, asserting a right of set-off under the Agreement, Supernus withheld the Milestone Payment (held in a separate interest-bearing account) and so notified US WorldMeds.[42] Supernus is withholding $9,517,232.66 on account of US WorldMeds improperly drawing on/interfering with the D&O Policy, as asserted in the Kentucky Litigation.[43] Supernus initially paid $2,294,758.20 and retained the balance of the Milestone Payment based on the fees and expenses it is

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[38] *Id.* ¶¶ 20-32.
[39] *See* Affidavit of Susan P. Welch, detailing the applicable insurance policies, available coverages and pending coverage actions (¶¶ 3-22) and the claims asserted in the Kentucky Litigation (¶¶ 24-26), with a copy of the complaint attached as Exhibit K.
[40] Agreement § 4.6(iv); Answer ¶¶ 29-30.
[41] Agreement §§ 4.6(iv), 4.6.2(i); Answer ¶ 30.
[42] Compl., Ex. C.
[43] AB at 21.

incurring in the Delaware Litigation. After receiving a payment under the Warranty Insurance Policy, Supernus released another $1,862,018.22. Thus, Supernus continues to hold the remaining $16,325,990.90 of the Milestone Payment on account of the Delaware Litigation.[44]

III. PARTIES' CONTENTIONS

US WorldMeds asserts that Supernus breached the Agreement by improperly withholding the Milestone Payment because the set-off provision has not been triggered. US WorldMeds requests judgment in its favor in the amount of $25,843,223.58, plus an award of attorneys' fees and expenses under the prevailing party provision, and interest at the contractual rate.[45]

Supernus responds that it has the right to withhold the Milestone Payment because US WorldMeds is liable to Supernus for a liquidated amount in the Kentucky Litigation. It further asserts that the Court cannot grant summary judgment on this ground because there are disputes of fact relating to the Kentucky Litigation. Supernus seeks summary judgment on its right to withhold the balance of the Milestone Payment because it is seeking recovery for the Delaware Litigation under the Warranty Insurance Policy.

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[44] Opening Brief in Support of US WorldMeds' Motion for Summary Judgment (D.I. 24) ("OB"), Ex. 4; OB at 11.

[45] The complaint seeks $27,705,241.80. The parties, however, agree that Supernus released additional payment of $1,862,018.22 on August 8, 2025. OB, Ex. 4.

IV. STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[46] The moving party bears the initial burden of demonstrating that no material issues of fact are in dispute and that it is entitled to judgment as a matter of law.[47]

If "parties file cross-motions for summary judgment, the parties implicitly concede the absence of material factual disputes and acknowledge the sufficiency of the record to support their respective motions."[48] However, a party only concedes the absence of factual issues and the truth of the opposing party's allegations "for the purposes of its own motion, and does not waive its right to assert that there are disputed facts that preclude summary judgment in favor of the other party."[49]

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[46] Del. Super. Civ. R. 56; *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).
[47] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[48] *Smith v. Liberty Mut. Ins. Co.*, 201 A.3d 555, 558 (Del. Super. 2019).
[49] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

V. ANALYSIS

A. *Construing the set-off provision*

1. *Principles of contract construction*

When interpreting a contract, the court must "give effect to the intent of the parties[,]" and "read the specific provisions of the contract in light of the entire contract."[50] "'Unless there is ambiguity, Delaware courts interpret contract terms according to their plain, ordinary meaning.'"[51]

Delaware applies an objective theory of contract interpretation – that which would be "understood by an objective, reasonable third party."[52] The court "endeavor[s] 'to give each provision and term effect' and not render any terms 'meaningless or illusory.'"[53] "'Moreover, the meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or

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50 *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023).

51 *White v. Curo Texas Holdings, LLC*, 2016 WL 6091692, at *21 (Del. Ch. Sept. 9, 2016) (quoting *Alta Berkeley VI C.V. v. Omneon, Inc.,* 41 A.3d 381, 385 (Del. 2012)).

52 *Weinberg*, 294 A.3d at 1044 (quoting *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1208 (Del. 2021)); *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006) ("the true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.").

53 *Weinberg*, 294 A.3d at 1044 (quoting *Manti Holdings*, 261 A.3d at 1208).

plan.'"[54] "The basic business relationship between parties must be understood to give sensible life to any contract."[55]

Contract language is not ambiguous simply because the parties dispute the meaning.[56] Rather, a contract provision "'is ambiguous if it is susceptible to more than one reasonable interpretation.'"[57] "An interpretation is unreasonable if it 'produces an absurd result' or a result 'that no reasonable person would have accepted when entering the contract.'"[58] Whether a contract is ambiguous is a determination that "lies within the sole province of the court."[59] Absent ambiguity, contract interpretation is a question of law and the court "'will not destroy or twist [contract] language under the guise of construing it.'"[60]

2. *Does the Agreement's set-off provision require a final judgment?*

The set-off provision states: "[Supernus] shall have a right of set-off in respect of claims for which [US WorldMeds] *is liable* under this Agreement."[61]

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[54] *White*, 2016 WL 6091692, at *21 (quoting *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985)).
[55] *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co, LLC*, 166 A.3d 912, 927 (Del. 2017).
[56] *White*, 2016 WL 6091692, at *21 (quoting *Alta Berkeley VI C.V.*, 41 A.3d at 385).
[57] *Weinberg*, 294 A.3d at 1044 (quoting *Manti Holdings*, 261 A.3d at 1208); *BitGo Holdings, Inc. v. Galaxy Digital Holdings, Ltd.*, 319 A.3d 310, 323 (Del. 2024) ("A provision in a contract is ambiguous when the provision in controversy is reasonably or fairly susceptible of different interpretations or may have two or more different meanings.") (internal quotations and citations omitted).
[58] *Weinberg*, 294 A.3d at 1044 (quoting *Manti Holdings*, 261 A.3d at 1208).
[59] *Id.* (quoting *Manti Holdings*, 261 A.3d at 1208).
[60] *Magellan Pipeline Co, L.P. v. Suncor Energy (U.S.A.) Inc.*, 2026 WL 766429, at *9 (Del. Super. Feb. 26, 2026); *White*, 2016 WL 6091692, at *21 (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.,* 6161 A.2d 1192, 1195 (Del. 1992)).
[61] Agreement, § 11.1 (emphasis added).

Because the set-off right is not defined in the Agreement, US WorldMeds argues the court should apply the common law principles of this established legal concept.[62] It urges the Court to apply "hornbook principles" of set-off, which require mutual, mature liabilities (debts) owed between the parties.[63]

While Supernus does not dispute US WorldMeds' recitation of these common law principles, Supernus argues that parties are free to contractually modify such common law principles and that the parties did so here. It contends that the Agreement "explicitly" permits set-off before a judgment on the underlying claim is rendered.[64] Supernus relies on Section 11.1's use of "is liable" to support its position.

Under common law, "[a] set-off is a counterdemand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of plaintiff's cause of action."[65] "'A contingent or unmatured obligation that is not presently enforceable cannot be the subject of set-off."[66] "'[T]here is no right to set-off of a possible unliquidated liability against a liquidated claim that is due and payable.'"[67]

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[62] OB at 22-26.
[63] *Id.* at 16-18.
[64] AB at 27-28.
[65] *CanCan Dev., LLC v. Manno*, 2011 WL 4379064, at *5 (Del. Ch. Sept. 21, 2011) (quoting 80 C.J.S., *Set-Off and Counterclaim* § 3 (2011)).
[66] *Id.* (quoting 80 C.J.S., *Set-Off and Counterclaim* § 3 (2011)).
[67] *Id.* (quoting 80 C.J.S., *Set-Off and Counterclaim* § 58 (2011)); *Viacom Int'l, Inc. v. Winshall,* 2012 WL 3249620, at *18 n.131 (Del. Ch. Aug. 9, 2012) (ruling that to allow a deduction from the judgment entered against Viacom based on its claim seeking recovery for indemnification in a separate action against Winshall "would be contrary to settled law" as Viacom's indemnification

Delaware's contractarian policy permits and respects "parties' right to self-order their agreements."[68] And when the parties exercise their right to further define or refine the conditions for a set-off, the court will analyze the set-off right within the context of the parties' agreement.[69]

Here, Supernus contends that nothing in the Agreement limits set-off to a final judgment.[70] Supernus makes two arguments to support its position. First, "set-off" is used in the Purchase Price Cap (§ 1.1) and "Liability for Tax" (Schedule 8, § 1.1), neither of which contemplates a final judgment. Second, the word "liable" or "liability" is used elsewhere in the Agreement, such as current liabilities and tax liabilities used to calculate Working Capital, which apply a broader meaning than requiring a final judgment. In Supernus' view, the "is liable" language simply

claim was only a "possible unliquidated liability" and Viacom's liability to Winshall was "due and payable."); *Post Holdings, Inc. v. NPE Seller Rep LLC*, 2018 WL 5429833, at *6 (Del. Ch. Oct. 29, 2018) (quoting *CanCan Dev.*, 2011 WL 4379064, at *5); *see also Tenet Healthcare Corp. v. Steward Health Care Sys., LLC*, 2023 WL 2778295, at *3 (Del. Ch. Apr. 4, 2023) (finding that contract provision permitting set-off of amounts "due or payable" was not triggered under "common law and the language" of the agreement because the claims had not been liquidated).

[68] *Biomedical Statistical Consulting LLC v. Cordio Medical, Ltd.*, 2026 WL 1166220, at *4 (Del. Super. Apr. 29, 2026) (citing *Outbox Sys., Inc. v. Trimble Inc.*, 2022 WL 3696773, at *7-8 (Del. Super. Aug. 24, 2022)); *Post Holdings*, 2018 WL 5429833, at *6 (quoting *Brace Indus. Contracting, Inc. v. Peterson Enterprises, Inc.*, 2017 WL 2628440, at *4 (Del. Ch. June 19, 2017)) ("Delaware law, of course, 'encourages parties to contract freely to create those contractual rights they see fit.'").

[69] *See Post Holdings*, 2018 WL 5429833, at *6 (interpreting provision allowing set-off of a payment "owed" and noting that the parties did not choose to allow set-off for an indemnification "claim").

[70] AB at 31.

means the “assum[ed] responsibilit[y]” of the risk for which “a party has financial responsibility” under the Agreement.[71]

Supernus’ interpretation of the Agreement is unreasonable. Starting with the plain “is liable” language in the set-off provision, it uses the present tense “is.”[72] These are sophisticated parties[73] who negotiated a significant transaction with a complex liability scheme. If they intended the set-off provision to include contingent, future liabilities or claims, they could have done so. They did not.

The Agreement’s use of “set-off” and “liable” or “liability” in other sections does not change the context of “is liable” in the set-off provision. Schedule 8 contains the Tax Covenant. Section 1 of Schedule 8 includes several definitions, which, by its terms, “apply in this Tax Covenant.”[74] “Liability for Tax” is defined in Schedule 8 to allow for “the use or setting off of any Relief of [Supernus] . . . where, but for that set off or use, any Person that was an Acquired Group Member at [closing] would have had a liability to make payment” as described in the previous clause.[75] This definition is expressly limited to the Schedule 8 Tax

[71] *Id.*
[72] *See ITG Brands, LLC v. Reynolds Am., Inc.*, 2019 WL 4593495, at *11-12 (Del. Ch. Sept. 23, 2019) (noting the agreement’s use the word “does” which indicated that the condition must presently exist); *Winshall v. Viacom Int’l Inc.*, 2012 WL 6200271, at *6 (Del. Ch. Dec. 12, 2012) (interpreting contract’s “current use” language in context of present tense verb in “*has* adequate rights”) (emphasis in original), *aff’d* 76 A.3d 808 (Del. 2013).
[73] Supernus represented that it “is a sophisticated purchaser.” Agreement, § 11.5.
[74] *Id.*, Sched. 8 § 1.
[75] *Id.*, Sched. 8 § 1.1.

Covenant. Nothing in this section can be construed to alter or inform the meaning of Section 11.1[76]

Supernus' reliance on the definition of "Working Capital" in Schedule 7, which references "current liabilities" and the example of a Working Capital Calculation, identifying a category for "Current Liabilities," fares no better. It is clear from the context of these terms that "liabilities" is being used in connection with financial statements, which US WorldMeds was required to prepare under the Agreement.[77]

Supernus' reliance on the "Purchase Price Cap" definition stating that "[Supernus] shall have a right to set off future milestone payments . . . with respect to any *claim* in excess of the aggregate amount of cash payments that have actually paid to (or on behalf of) [US WorldMeds] . . . in full or partial satisfaction of such claim, . . ."[78] is misplaced. The Purchase Price Cap definition incorporates part of the complex limitation on US WorldMeds' liability under the Agreement. It limits

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[76] *PJT Holdings, LLC v. Costanzo*, 339 A.3d 1231, 1247 (Del. Ch. 2025) (quoting *E.I. du Pont de Nemours & Co.*, 498 A.2d at 1113) ("[T]he meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan."); *Motors Liquidation Co. DIP Lenders Tr. v. Allianz Ins. Co.*, 2017 WL 2495417, at *11-12 (Del. Super. June 8, 2017), *as corrected* (June 19, 2017), *aff'd*, 191 A.3d 1109 (Del. 2018) ("[W]hen it is clear from the context that the term has obviously different meanings throughout the contract and these cannot be reconciled," the concept of "uniform meaning" does not apply.); *JJS, Ltd. v. Steelpoint CP Holdings, LLC*, 2019 WL 5092896, at *6 (Del. Ch. Oct. 11, 2019) (citing *Chi. Bridge & Iron Co.*, 166 A.3d at 913–14) (there exists an "overarching principle that context is the primary determinant of meaning, and that the structure and relationship of the parts of a contract reveal the drafters' intent.").

[77] Agreement, Schedule 7, § 2.1.

[78] *Id.* § 1.1 "Purchase Price Cap" (emphasis added).

the requirement for US WorldMeds to "make any cash payment" on the specified claims to the amount of cash US WorldMeds received in the transaction. Of course, US WorldMeds would not have to actually make a cash payment on any of the specified claims [redacted] Warranty Claim, [redacted] Claim, etc.) unless US WorldMeds was found to have breached the warranty and was declared liable for the damages. The definition goes on to clarify that Supernus has the ability to set-off "as of the date of such claim" against a milestone payment with respect to any claim in excess of the cash US WorldMeds received, up to the $530 million cap. Thus, this provision refers back to the warranty claims in the previous sentence, which would again, require that US WorldMeds to have been found liable.

The legal authority on which Supernus relies provides it no relief. In *Brace Industrial Contracting, Inc. v. Peterson Enterprises, Inc.*, plaintiff argued that the defendant had no right of set-off because "contingent, unliquidated claims cannot support a set-off."[79] Plaintiff's argument was based on common law set-off. The parties in *Brace*, however, contractually modified the common law standard. The agreement permitted a party "at its sole discretion" to "set off all or any portion of the *claimed amount* of any . . . Direct Claim against any amount otherwise payable

[79] 2017 WL 2628440, at *4.

under this Agreement."[80] Unlike the agreement in *Brace*, here, the parties did not contractually modify the common law standard.

Supernus also relies on the Delaware Uniform Fraudulent Transfers Act (the "Act"), which defines a "debtor" as someone who is "liable on a claim." A "claim" is defined to mean "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured."[81] Having such a broad definition is consistent with the remedial purpose of the Act—to protect creditors from improper transfers.[82] Supernus offers no reason why such a broad definition is the commonly understood meaning of "liable" under this private agreement.

Supernus next asserts that the amount for which US WorldMeds is liable is a fixed, liquidated sum ($9,517,232.66), so that element under US WorldMeds' theory of set-off is satisfied here. To support this contention, Supernus relies on *Trader v. Wilson.*[83] The issue in *Trader* was whether the claim for the amount due under outstanding promissory notes was liquidated or unliquidated, in the context

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[80] *Id.*
[81] 6 *Del. C.* § 1301(3), (6); *CLP Toxicology, Inc. v. Casla Bio Holdings LLC*, 2020 WL 3564622, at *21 (Del. Ch. June 29, 2020) (judgment not needed to pursue a fraudulent transfer claim).
[82] *See Burkhart v. Genworth Financial, Inc.*, 275 A.3d 1259, 1268 (Del. Ch. 2022) (the "UFTA is generally considered a remedial statute"); *JP Morgan Chase Bank, N.A. v. Ballard,* 213 A.3d 1211, 1227 (Del. Ch. 2019) (the DUFTA is designed to protect creditors).
[83] 2002 WL 499888 (Del. Super. Feb. 1, 2002).

of determining whether the notes were paid by virtue of accord and satisfaction.[84] "A liquidated claim is one which has been fixed by agreement or can be exactly determined by the application of rules of arithmetic or of law."[85] The authenticity of the promissory notes was not in dispute and because the amount due under the notes was calculatable from the face value of the notes and application of the stated interest rate, the court found that the claim was liquidated.[86]

While Supernus' damages model involves a math computation ($10 million in coverage less the policy proceeds Supernus received), US WorldMeds disputes the premise of the claim and the amount claimed. Unliquidated damages are "when they have not been adjusted, or settled, or agreed on by the parties."[87] The amount Supernus is seeking in the Kentucky Litigation is unliquidated, unlike *Trader*.

As outlined above, Supernus inserts into this case the factual basis for its claims against US WorldMeds for fraud, for which it is responsible (*i.e.*, is liable) under the Agreement. It argues that because US WorldMeds disputes those contentions, and included its own fifteen-page affidavit and 250 pages of exhibits in response, summary judgment cannot be granted.[88] The factual dispute in the Kentucky Litigation, however, is not relevant to this Court's interpretation of the

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[84] *Id.* at *3.
[85] *Id.*
[86] *Id.*
[87] *IronRock Energy Corp. v. Pointe LNG, LLC,* 2021 WL 3503807, at *8 (Del. Super. July 19, 2021 (citation omitted).
[88] AB at 34-36.

Agreement. The Court has determined that the Agreement is unambiguous and therefore, factual disputes outside of the Agreement are not relevant.[89]

Finally, Supernus is not actually seeking to effectuate a set-off. It is attempting to withhold payment as security in the event that it is later successful in the Kentucky Litigation. Indeed, it admits that if it is unsuccessful in Kentucky, it must pay the $9.5 million being withheld to US WorldMeds.[90] Sophisticated parties are "presumed to understand the consequences of the language they have chosen…."[91] Had the parties intended to permit a holdback against a potential future liability, they could have done so. The Court is required to construe the Agreement to give effect to the objective meaning of its provisions. It cannot, under the guise of construing the contract, grant a party rights it failed to secure for itself at the bargaining table.[92]

* * *

The parties did not define set-off in the Agreement. Therefore, the Court applies the plain and ordinary meaning to the set-off provision under the objective theory of contract construction. US WorldMeds' interpretation is reasonable. The

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[89] Additionally, as Supernus concedes, this Court is not adjudicating the fraud claim. Tr. at p. 74. Thus, the alleged factual disputes are irrelevant for this additional reason.
[90] Transcript of Oral Argument (D.I. 54) ("Tr.") at pp. 48-53.
[91] *Re DG BF, LLC v. Ray*, 2020 WL 3867123, at *4 (Del. Ch. July 9, 2020); *TrueBlue, Inc. v. Leeds Equity Partners IV, LP*, 2015 WL 5968726, at *10 (Del. Super. Sept. 25, 2015) (the court cannot rewrite a contract to include terms a party wished it had included).
[92] *See Re DG BF*, 2020 WL 3867123, at *4.

Court finds that the set-off provision in the Agreement requires mutual, mature debts and Supernus' claims of fraud do not satisfy the set-off requirement.

3. *Does the Agreement provide a second ground to set-off?*

After the sentence providing for set-off, the next sentence states: "For the avoidance of doubt, [Supernus'] right of set-off shall also apply in respect of claims for which it is seeking recovery under the Warranty Insurance Policy[.]"[93] Focusing on the use of "also," Supernus construes this sentence to provide a second ground for set-off when it is seeking coverage under the Warranty Insurance Policy.[94] Under Supernus' interpretation, use of "is seeking" shows that the parties contemplated set-off where US WorldMeds "is not liable or not yet liable."[95]

US WorldMeds counters that the second sentence clarifies the first sentence, as indicated by use of "for avoidance of doubt," and does not provide a separate ground for set-off.[96] US WorldMeds argues that its position is further supported by the Agreement's liability limitation scheme. The Delaware Litigation falls in the category of a Business Warranty Claim and under the Agreement, unless the Warranty Insurance Policy is exhausted, Supernus' sole source of recovery on such

[93] Agreement § 11.1.
[94] AB at 26, 28, 38-39.
[95] *Id.* at 28.
[96] PRB at 26.

claim is the insurance policy. Therefore, US WorldMeds asserts, it makes no sense to construe this sentence as granting a set-off right.

The parties cross-moved for summary judgment on this ground, each offering its own interpretation of the provision. Applying the principles of contract construction discussed above, the Court finds that only one reading is reasonable.

The starting point to finding the parties' intent is the contract language. The lead-in to the second sentence is "for the avoidance of doubt," a phrase Supernus ignores in its interpretation of the provision. After setting out the parties' right to set-off in the first sentence, the second sentence—"for the avoidance of doubt"—confirms and clarifies the preceding sentence.[97]

This interpretation also makes sense in the context of the Agreement's limitation of liability scheme. The parties agree that the Delaware Litigation is a Business Warranty Claim. Under the Agreement, US WorldMeds has no liability for Business Warranty Claims and Supernus' only source of recovery on any such claims is the Warranty Insurance Policy.[98] If US WorldMeds has no liability for Business Warranty Claims, there is nothing to set-off against.

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[97] *LGM Holdings, LLC v. Schurder*, 340 A.3d 1134, 1145 (Del. 2025) (finding the interpretation of the phrase "for the avoidance of doubt," as reiterating the limited scope of the preceding provision, a reasonable reading); *White*, 2016 WL 6091692, at *21 ("for the avoidance of doubt" confirms and recognizes what was previously stated).
[98] Agreement, Sched. 6 § 1.1 (Seller's liability for Business Warranty Claims "shall not exceed $0").

Confronted with the plain language of the Agreement, Supernus argues that the set-off provision is "meant to function in some instances as a security or escrow against its insurance recovery, rather than to act as funds that cancel out [US WorldMeds'] debt."[99] Under this interpretation, Supernus is entitled to withhold a milestone payment when it makes a claim against the insurance policy. If the carrier denies the claim (and Supernus does not challenge that decision), Supernus must pay US WorldMeds the withheld funds. If the carrier pays the claim, Supernus must pay US WorldMeds the withheld funds to the extent of the payment received by Supernus.[100] Supernus explained that this provides Supernus with security if the carrier "plays games" and delays paying a claim.[101] During this game-playing period (and until any legal challenge to a denial is final), Supernus contends it is conferred the benefit of using the milestone payment to earn interest.[102]

Supernus' interpretation is not reasonable. First, nothing in the Agreement suggests that Supernus is entitled to a set-off right for funds it never gets to keep. Under all scenarios, Supernus is required to pay the withheld funds to US WorldMeds.[103] Second, this purported set-off right makes no commercial sense in

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[99] Supernus' Reply Brief (D.I. 49) ("DRB") at 13; Tr. at pp. 47-51.
[100] Tr. at pp. 47-48.
[101] *Id.* at pp. 49-50 ("And so, [Supernus is] holding onto the money while [it is] waiting for the carrier to do the right thing. If they don't do the right thing in the first instance, there's a series of appeals, and ultimately, [Supernus is] vindicated.").
[102] *Id.* at pp. 51-52.
[103] *Id.* at pp. 48-53.

the context of the parties' Agreement. The parties agreed to a recovery scheme for a breach of a Business Warranty, which requires Supernus to look solely to the Warranty Insurance Policy (except as discussed below) for recovery.[104] If the carrier fails to abide by its contractual obligations (Supernus' expressed concern), US WorldMeds will have its milestone payment withheld based on actions of a third party (the carrier), which is out of its control and for which it did not assume any responsibility under the Agreement.[105] Supernus' interpretation, which would allow it to hold a milestone payment captive, runs counter to US WorldMeds having "$0" liability for a Business Warranty Claim. The Agreement simply does not contemplate a holdback right as security for the Warranty Insurance Policy carrier to comply with its contractual obligations.

Finally, turning to Supernus' "also" argument, it contends that failing to read the second sentence of the set-off provision as a separate ground for set-off would ignore "also" in that sentence, in violation of the obligation to give meaning to all

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[104] The Agreement confirms this in Schedule 6, § 11.7, which provides:

> Notwithstanding anything to the contrary in this Agreement, to the extent that the Purchaser is unable to recover under the Warranty Insurance Policy the full amount of any claim (***other than a Business Warranty Claim***) by reason of the Warranty Insurance Policy's retention amount, the Purchaser may recover the shortfall from the Seller. (emphasis added).

[105] The Agreement requires Supernus to purchase and maintain the policy (Agreement §§ 1.1, 11.2, 11.3) and US WorldMeds relied on Supernus purchasing the policy as an inducement to enter into the Agreement. Agreement § 11.3.2 (Supernus "acknowledges that the [US WorldMeds] has entered into this Agreement in reliance on the fact that [Supernus] has obtained the Warranty Insurance Policy.").

contractual terms.[106] Supernus' interpretation finds no support under the Agreement.

US WorldMeds has no liability for Business Warranty Claims except when the Warranty Insurance Policy is exhausted and eroded by non-Business Warranty Claims.[107] Because the policy is Supernus' sole source of recovery for Business Warranty Claims, this exception ensures that Supernus gets the full benefit of the policy proceeds for Business Warranty Claims. The Agreement provides an example of how this exception works:

> …if the Warranty Insurance Policy had a policy limit of $35,000,000, but the amount of available coverage was reduced by $20,000,000 as a result of Retained Group Claims reimbursed under the Warranty Insurance Policy, the Seller would be liable for future Business Warranty Claims to the extent they may exceed, in the aggregate, $15,000,000 (the amount of remaining coverage under the Warranty Insurance Policy), but only to a maximum liability to the Seller of $20,000,000 (the amount of insurance coverage used on claims that were not Business Warranty Claims).[108]

Thus, if the policy has been eroded in part by non-Business Warranty Claims, and Supernus holds a final judgment (as required by the first sentence) on a Business Warranty Claim, Supernus' first avenue of recovery is the policy, so it seeks policy proceeds from the carrier. But, US WorldMeds may have direct

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[106] DRB at 4-5; *Weinberg*, 294 A.3d at 1044 (quoting *Manti Holdings*, 261 A.3d at 1208) (the court "endeavor[s] 'to give each provision and term effect' and not render any terms 'meaningless or illusory.'").
[107] Agreement, Sched. 6 § 1.1.
[108] *Id.*

liability for the judgment if it exceeds the policy proceeds (*i.e.*, the claim exhausts policy limits), subject to the stated cap. In this scenario, Supernus' seeking recovery under the Warranty Insurance Policy does not eliminate its set-off right while the claim is pending, which would occur without the exception, as the policy is the sole source of recovery on Business Warranty Claims. Stated differently, for the avoidance of doubt, Supernus may effectuate a set-off at the same time it is seeking recovery under the policy for a final judgment.

* * *

Supernus' argument requires ignoring the lead-in phrase of the second sentence—for avoidance of doubt— which signals a clarification and confirmation of the preceding sentence. Giving meaning to all the terms in the second sentence of the set-off provision, results in only one reasonable reading: it does not provide a second ground for set-off.

B. Did Supernus breach the Agreement?

To success on a breach of contract claim, a plaintiff must prove (1) the existence of a contract, (2) a breach of the contract, and (3) resulting damages.[109] The parties do not dispute elements (1) (the Agreement is a valid contract), and (3)

[109] *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

(the Milestone Payment was not paid in full).[110] The dispute in this action is whether Supernus was permitted to set-off the Milestone Payment.

Having decided that the set-off provision requires a final judgment, Supernus had no contractual right to withhold any portion of the Milestone Payment based on the allegations in the Kentucky Litigation.

Further, Supernus has no right of set-off simply because it is seeking defense costs under the Business Warranty Policy. There are no allegations that the Warranty Insurance Policy has been exhausted, therefore, US WorldMeds currently has no liability for the asserted Business Warranty Claims in the Delaware Litigation. For these reasons, Supernus breached the Agreement by failing to pay the full Milestone Payment when it was due.

C. *Is US WorldMeds is entitled to Attorneys' Fees and Interest?*

The Agreement provides that if US WorldMeds pursues legal action against Supernus for "improper use of this right of set-off and [US WorldMeds] ultimately prevails," Supernus "agrees to reimburse [US WorldMeds] for the total cost of any legal fees, costs and expenses incurred by [US WorldMeds] in connection with such legal action."[111] The parties agree that effectuating a set-off without a contractual right to do so is an "improper use of [the] right of set-off."[112] Supernus does not

[110] Answer ¶¶ 11-13, 29, 32.
[111] Agreement, Sched. 6 § 11.1
[112] Tr. at pp. 30-31, 56.

dispute that if US WorldMeds is successful in this action, it is entitled to an award of attorneys' fees and costs.[113]

Under the American Rule, parties to litigation bear their own costs.[114] However, the court will enforce a contractual fee shifting provision.[115] Having found Supernus breached the Agreement by improperly setting-off the Milestone Payment, US WorldMeds is entitled to an award of attorneys' fees and costs.

US WorldMeds also seeks an award of pre- and post- judgment interest at the contractual rate of prime plus [redacted]%. It argues that in the alternative, interest should be awarded at the statutory interest rate (prime plus 5%).[116] Supernus does not challenge the right to contractual interest rate but argues that there is no basis to impose the statutory rate.[117]

In a breach of contract action, interest begins to accrue when the payment was due.[118] Pre- and post- judgment interest is awarded as a matter of right.[119] The

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[113] AB at 41.

[114] *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 545 (Del. 1998) ("Under the American Rule . . . each party is normally obliged to pay only his or her own attorneys' fees, whatever the outcome of the litigation.").

[115] *Mahani v. Edix Media Grp., Inc.*, 935 A.2d 242, 245 (Del. 2007) (when parties include a fee-shifting provision in their contract, Delaware courts will enforce that provision as written).

[116] OB at 27-28; 6 *Del. C.* § 2301.

[117] AB at 41-42.

[118] *See Schneider Nat'l Carriers, Inc. v. Kuntz*, 2022 WL 1222738, at *32 (Del. Super. Apr. 25, 2022) ("Interest begins to accrue from the date payment is due.").

[119] *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482, 485 (Del. 2011) (quoting *Moskowitz v. Mayor and Council of Wilmington*, 391 A.2d 209, 210 (Del. 1978)) ("[i]nterest is awarded in Delaware as a matter of right and not of judicial discretion."); *Winklevoss Capital Fund, LLC v. Shaw*, 2024 WL 3888757, at *22 (Del. Ch. Aug. 21, 2024) (post-judgment interest is a matter of right and not dependent on the trial court's discretion).

Delaware statute sets the default interest rate.[120] However, the parties may contractually set a different rate of interest, and this contractually agreed upon rate applies to both pre-judgment and post-judgment interest.[121]

The parties agreed to an interest rate, which by the express terms of the Agreement, applies pre- and post- judgment.[122] US WorldMeds is, therefore, awarded pre-judgment interest on the amount withheld at the rate of prime plus [redacted]% from the day the Milestone Payment was due. US WorldMeds is also awarded post-judgment interest at a rate of prime plus [redacted]%.

Within 10 days, US WorldMeds is to submit its application for attorneys' fees and expenses. If Supernus objects to the application, the parties shall confer on a briefing schedule and submit a stipulation and proposed order.

The parties are to confer and file a proposed form of implementing Order.

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[120] *Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc.*, 269 A.3d 974, 976 (Del. 2021) (quoting 6 *Del. C.* § 2301(a)) ("Where there is no expressed contract rate, the legal rate of interest shall be 5% over the Federal Reserve discount rate including any surcharge as of the time from which interest is due").

[121] *Parexel Int'l (IRL) Ltd. v. Xynomic Pharm., Inc.*, 2021 WL 3074343, at * 19 (Del. Super. July 21, 2021) ("When the parties have contractually expressed an interest rate, the Court will abide by that expressed interest rate."); *Millcreek Shopping Ctr., LLC v. Jenner Enterprises, Inc.*, 2017 WL 1282068, at *2 (Del. Super. Mar. 31, 2017) (In a commercial dispute, the contractual rate applies to both pre- and post- judgment interest); *Sequoia Presidential Yacht Grp. LLC v. FE Partners, LLC*, 2014 WL 2610577, at *2 (Del. Ch. June 12, 2014).

[122] Agreement § 22.1, 22.2 (the defaulting party "shall pay" interest from the due date until the payment is made, "whether before or after judgment.")

VI. CONCLUSION

The Agreement is unambiguous. Applying plain and ordinary meaning to its terms, the set-off provision requires a final, liquidated debt. Because Supernus did not hold a debt against US WorldMeds to set-off, it breached the Agreement by failing to pay the Milestone Payment within 10 days. Accordingly, US WorldMeds' motion for summary judgment is **GRANTED**, and Supernus' partial cross-motion for summary judgment is **DENIED**.

Additionally, US WorldMeds' request for pre-judgment interest, attorneys' fees, and costs is **GRANTED**.

/s/Kathleen M. Miller
Kathleen M. Miller, Judge