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,	§	Court Below—Superior Court of the State of Delaware
v.	§	C.A. No. N23C-05-034 CCLD
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.	§	

Submitted: June 3, 2026
Decided: September 24, 2026

Before **SEITZ**, Chief Justice; **TRAYNOR** and **GRIFFITHS**, Justices.

Upon appeal from the Superior Court of the State of Delaware. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

David E. Ross, Esq., S. Reiko Rogozen, Esq., Benjamin M. Whitney, Esq., ROSS ARONSTAM & MORITZ LLP, Wilmington, Delaware; Adam Unikowsky, Esq. *(argued)*, In Kyu Chung, Esq., JENNER & BLOCK LLP, Washington, D.C.; Andrew W. Vail, Esq., Benjamin J. Bradford, Esq., Yusuf Esat, Esq., JENNER & BLOCK LLP, Chicago, Illinois, *for Appellants.*

Megan Ward Cascio, Esq., Phillip Reytan, Esq., MORRIS NICHOLS ARSHT & TUNNELL LLP, Wilmington, Delaware; Kevin M. Downey, Esq., R. Kennon Poteat III, Esq., Eden Schiffmann, Esq. *(argued)*, Ilana B. Frier, Esq., WILLIAMS & CONNOLLY LLP, Washington, D.C., *for Appellees.*

GRIFFITHS, Justice:

This appeal turns on the meaning and scope of an indemnification provision negotiated in a corporate acquisition. A Swedish private equity firm that invests in companies specializing in veterinary products agreed to acquire a company that sells orthopedic implants for domestic animals. During the negotiations, a third party filed suit against the target company alleging patent infringement by some of its products. The private equity firm valued the target company at about $100 million but could not quantify the litigation exposure. To account for the litigation risk, the company's owners agreed to an indemnification provision that covered any losses suffered "as a result of, or in connection with" the patent litigation.

Following the closing, the patent litigation plaintiff amended its complaint, including a newly-issued patent and alleging infringement by more of the company's products. The company eventually agreed to settle the patent litigation for $70 million and a license for one of its products. The company financed the settlement payment with a bank loan.

The new owners sued the former owners in the Superior Court when they refused to indemnify the company for the settlement and patent litigation-related expenses. All former owners settled, except the company's founder. After cross-motions for summary judgment, the court granted the company's summary judgment motion directed to the owner's implied covenant defense but otherwise denied the motions. The case then proceeded to trial.

Following trial, the Superior Court held that the founder must indemnify the buyers for damages arising from the patent litigation but not the cost of the patent license. The court also awarded the buyers prejudgment interest on the loan-interest expense to fund the settlement. But the court awarded the company only half of its requested attorneys' fees for expenses incurred in defending the patent litigation, reasoning that allocating fees between the company and a jointly represented co-defendant would be burdensome. The court also determined that the indemnification provision did not cover attorneys' fees incurred to enforce the indemnification provision. These decisions left both sides dissatisfied. The founder appealed, and the owners cross-appealed.

On appeal, the founder argues that the Superior Court erred by: (1) holding that the indemnification provision covered damages arising from post-transaction conduct; (2) concluding that public policy did not bar indemnity when the company willfully infringed patents; (3) rejecting the implied covenant defense; and (4) awarding the company prejudgment interest on the loan-interest expense.

In its cross-appeal, the new owners contend that the trial court erred by (1) holding that the indemnification provision does not cover attorneys' fees incurred to enforce that provision, (2) excluding the license cost from the indemnification award, and (3) reducing the award of patent litigation attorneys' fees.

For the reasons explained below, we hold that the Superior Court correctly concluded that the indemnification provision covers post-transaction product sales and does not offend public policy and that the implied covenant did not apply. We find, however, that the trial court's prejudgment interest award on the loan-interest expense erroneously allowed a double recovery.

Turning to the cross-appeal, we hold that the Superior Court correctly concluded that the indemnification provision does not cover the new owner's attorneys' fees incurred to enforce its indemnification rights. But the new owners were entitled to the license cost and the full amount of the attorneys' fees incurred in the patent litigation. Thus, we affirm in part, reverse in part, and remand.

BACKGROUND

A. Claude and Veterinary Orthopedic Implants, LLC

Dr. Claude Gendreau started practicing veterinary medicine in 1967. Later, he founded the Veterinary Specialty Center, an animal surgical practice. During his time there, Claude identified a demand for low-cost fracture-repair implants for animals. To pursue the opportunity, Claude formed Veterinary Orthopedic Implants, LLC ("VOI") in 1992 and, three years later, hired his nephew, Patrick Gendreau, as

VOI's Chief Executive Officer.[1] Brian Beale and Timothy Van Horssen later joined Claude, Patrick, and the Claude Gendreau Investment Trust U/A/D March 16, 2013 (the "Trust")[2] as VOI owners.

In time, VOI became a global leader in veterinary surgical products. Its offerings included implant bone plates for tibial plateau leveling osteotomy ("TPLO") procedures, a common operation for dogs with cranial cruciate ligament injuries—the canine equivalent of an anterior cruciate ligament (ACL) tear. In October 2013, however, DePuy Synthes Products, Inc. ("DePuy") notified VOI that VOI's "Swiss Style" TPLO plates infringed DePuy's U.S. Patent No. 8,523,921 (the "'921 Patent"). VOI continued to sell the Swiss Style TPLO plates.

B. Claude Decides to Sell and DePuy Initiates Litigation

In early 2015, Claude decided to sell VOI and asked Patrick to find a buyer. Around the same time, VOI began marketing plates for CORA-based tibial leveling osteotomy ("CBLO") procedures,[3] which are also used to treat cranial cruciate ligament injuries.

---

[1] Because Claude and Patrick share the same last name, we will refer to them by their first names to avoid confusion.

[2] Claude owned a percentage of VOI through Appellant Claude Gendreau Investment Trust U/A/D March 16, 2013. Because Claude's interest and the Trust's interest align in this case, references in this Opinion to "Claude" will also refer to the Trust, unless otherwise indicated.

[3] "CORA" stands for the center of rotation of angulation.

In 2018, Patrick secured an offer from DW Healthcare Partners ("DWHP") to acquire VOI for $100 million. That same year, VOI introduced "New Elite TPLO" plates to replace its Swiss Style TPLO plates. While negotiations with DWHP were underway, DePuy sued VOI in the United States District Court for the Middle District of Florida, alleging that VOI's Swiss Style TPLO plates infringed the '921 Patent (the "Patent Litigation").[4] Seven days after the suit was filed, Patrick directed VOI employees to transition customers from the Swiss Style plates to the New Elite TPLO plates. VOI continued to sell Swiss Style plates into 2019.

In July 2019, DePuy amended its complaint to add infringement claims based on VOI's Elite and CBLO plates. Around the same time, VOI launched its "NXT" plate, which it designed to avoid infringing the '921 Patent. The Patent Litigation caused DWHP to abandon its plan to acquire VOI.

C. A New Buyer Emerges and Acquires VOI

In October 2019, Fidelio Capital II AB ("Fidelio"), a Swedish private equity firm focused on the veterinary supply chain, approached Patrick about acquiring VOI. Fidelio valued VOI at $100 million but was concerned about the Patent Litigation. It viewed it as an unquantifiable risk. Fidelio therefore offered to

[4] App. to Claude & the Trust's Opening Br. at A938–54 [hereinafter A__] (JX08 – Compl. in *DePuy Synthes Prods., Inc., et al. v. VOI*, 3:18-cv-01242-HES-PDB, Dkt. No. 1, dated Nov. 12, 2018) [hereinafter M.D. Fla. Compl.].

purchase VOI for about $100 million but conditioned the transaction on VOI's owners indemnifying it for any losses tied to that litigation. The parties signed a letter of intent reflecting the basic terms of the sale.

Fidelio formed two Delaware limited liability companies for the acquisition: Ossium BidCo, LLC ("Ossium") and Ossium NewCo, LLC, later renamed Movora, LLC ("Movora," together with Ossium, the "Buyers"). In June 2020, the Buyers and VOI owners—Claude, Patrick, Brian, and Van Horssen (collectively, the "Sellers")—executed an Amended and Restated Membership Interest Purchase and Exchange Agreement (the "MIPA"). Under the MIPA, the Sellers agreed to indemnify the Buyers for the Patent Litigation.

Section 8.2(a) of the MIPA set forth the "Indemnification Provision." It required the Sellers to, severally and in proportion to their ownership percentages, "indemnify, defend and hold harmless" the Buyers from "any Damages suffered by the Company as a result of, or in connection with, the Patent Litigation[.]"[5] The MIPA defined "Patent Litigation" as the DePuy action pending in the United States District Court for the Middle District of Florida, "together with any appeals

[5] A1013 (JX32 – Am. & Restated Membership Interest Purchase & Exchange Agreement dated June 11, 2020, at 54) [hereinafter MIPA].

therefrom and any related or derivative [a]ctions."[6] The MIPA further defined "Damages" as

> any losses, liabilities, damages, awards, . . . payments (including amounts paid in settlement), costs and expenses (including costs of investigation, preparation and defense, and the fees and disbursements of counsel), whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, together with interest with respect to any of the foregoing . . . .[7]

The Sellers' indemnity obligation was capped at $100 million, subject to specific exceptions, including "the expenses of the Indemnified Party in enforcing its rights under this Article 8[.]"[8]

Section 8.4 of the MIPA set forth procedures for seeking indemnification and included a subsection addressing "Inter-Party Claims."[9] Section 8.4 otherwise addressed indemnification claims generally and, in a few places, specified procedures to deal with Third Party Claims.[10] Section 8.5 of the MIPA described the rights of the Indemnified and Indemnifying Parties in connection with any Third

---

[6] A968 (MIPA at 9).

[7] A963 (MIPA at 4).

[8] A1014 (MIPA at 55).

[9] A1015–16 (MIPA at 56–57). The term "Inter-Party Claims" is used as a header in MIPA § 8.4(a). A1015 (MIPA at 56).

[10] *See, e.g.*, A1015 (MIPA at 56) (stating that a party must deliver written notice "no later than twenty (20) Business Days after the Indemnified Party acquires knowledge of such claim (or potential claim, in the case of a Third Party Claim)"); *id.* (stating that the indemnitor can dispute "all or any portion of the claim (including any Third Party Claim)"). The MIPA defined "Third Party Claim" as "any actual or potential Action or claim made by another Person against the Indemnified Party that, if successful, would be indemnifiable hereunder[.]" *Id.*

Party Claims. For example, the Indemnifying Party could elect to assume the defense of any Third Party Claim with counsel of its choice, and if this election was made, the Indemnified Party could participate in the defense of the claim.[11]

The parties agreed that $20 million of the $100 million acquisition price would be paid under a contingent closing note (the "Note").[12] Under the Note, the Buyers withheld $20 million from the Sellers until the Patent Litigation concluded, less settlement or damages the Buyers paid in that litigation. Section 5(g) of the Note stated that, "[i]f 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."[13]

The transaction closed in June 2020. After the acquisition, Patrick continued to serve as VOI's CEO.

[11] A1016 (MIPA at 57).

[12] The Note was an Ancillary Agreement under the MIPA. A961 (MIPA at 2 (defining "Ancillary Agreements")). The MIPA and the Ancillary Agreements "constitute the entire agreement, and supersede all prior written agreements, arrangements, communications and understandings and all prior and contemporaneous oral agreements, arrangements, communications and understandings among the Parties with respect to the subject matter hereof and thereof." A1020 (MIPA at 61).

[13] A1042. Section 5(g) only shifts fees incurred in connection with a proceeding to enforce the Note and, consequently, does not apply to the collection of attorneys' fees incurred in a proceeding to enforce the MIPA.

D. Post-Closing Patent Litigation

Six months after the acquisition, DePuy amended its complaint a second time to add Fidelio as a defendant. The amended complaint alleged that Fidelio was jointly and severally liable for VOI's patent infringement. In June 2021, the United States Patent and Trademark Office issued U.S. Patent No. 11,026,728 (the "'728 Patent"), a continuation of DePuy's '921 Patent. DePuy then amended its complaint for a third time to allege that VOI and Fidelio infringed DePuy's '728 Patent by selling NXT plates after the patent issued.

VOI continued selling Elite and NXT plates through October 2022. Later that year, VOI began selling plates marketed as Compresiv and Versiv (the "C/V plates"). VOI developed the C/V plates to fall outside the scope of DePuy's patents and to replace the Elite and NXT plates.[14] Patrick resigned from VOI in November 2022.

E. The Patent Trial and Post-Trial Injunctions

The Patent Litigation proceeded to trial. A jury found VOI and Fidelio jointly and severally liable for willful patent infringement and awarded DePuy more than $59.4 million in damages. Six days after the verdict, DePuy moved to permanently enjoin VOI and Fidelio from infringing the '921 and '728 Patents. It relied on the

[14] VOI's outside counsel conducted a freedom to operate analysis to determine whether the C/V plates would infringe on DePuy patents. B297–98. Outside counsel opined "that there would be no infringement." B298.

jury's finding that VOI willfully infringed the '921 and '728 Patents through sales of Swiss Style, Elite, NXT, and CBLO plates (the "Infringing Plates"). DePuy also sought to include the C/V plates in the injunction by asking the court to enjoin the sale of a specific screw used in those plates.

A few days later, DePuy moved for a temporary restraining order and, in the alternative, requested that the district court enter the permanent injunction on an emergency basis. DePuy sought to enjoin VOI and Fidelio's "fire sale to flood the market" with C/V plates.[15] DePuy supplemented the record with additional facts in support of its stance that VOI "attempt[ed] to evade the impact of the requested permanent injunction" by sending "unsolicited, large quantities of these products . . . to current customers."[16] DePuy also moved for enhanced damages based on the jury's willfulness finding, increasing the potential exposure to nearly $180 million.[17]

The district court rejected DePuy's proposed permanent injunction, concluding that it was overbroad because it would include C/V plates. The court

---

[15] A2014.

[16] A1708–14 (DX503 – Notice of Suppl. Facts in Support of Pls.' Mot. for a Temporary Restraining Order dated Jan. 23, 2023, at 1–5); A1634 (Decl. of Maria Cunningham in Support of Pls' Emergency Mot. for Temporary Restraining Order dated Jan. 18, 2023, ¶¶ 2–3).

[17] *See* 35 U.S.C. § 284 ("[T]he court may increase the damages up to three times the amount found or assessed."); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 110 (2016) ("Section 284 gives district courts the discretion to award enhanced damages against those guilty of patent infringement" for "egregious cases of misconduct beyond typical infringement.").

instead entered a permanent injunction against the Sellers' manufacturer limited to the Infringing Plates.

DePuy then sought a permanent injunction against VOI and Fidelio as designers and sellers of the Infringing Plates. In its motion, DePuy again asked the court to include the C/V plates in the injunction. Ultimately, the district court permanently enjoined VOI and Fidelio from marketing or selling the Infringing Plates. The injunction did not address the C/V plates.

About a week later, DePuy moved for an order that would require VOI to show cause why VOI's sales of the C/V plates did not violate the court's permanent injunction. DePuy claimed that the C/V plates were "not colorably different" from the Infringing Plates.[18] The district court scheduled a two-day rule to show cause hearing for early April 2023.

F. The Patent Litigation Settlement

Before the second day of the rule to show cause hearing, the parties settled. Patrick, who acted as the Seller's Representative and controlled VOI's patent litigation defense, approved the settlement. The settling parties executed a settlement and license agreement under which VOI and Fidelio agreed to pay DePuy $70 million in exchange for a release of all claims and a license covering the C/V

---

[18] A2033–34 (DX610 – Pls.' Mot. for Order to Show Cause & to Find Defs. in Contempt of the Ct.'s Permanent Inj., M.D. Fla. Dkt. No. 594 dated Mar. 2, 2023, at 1–2).

plates (the "C/V License").[19] The parties also stipulated to a consent judgment stating that VOI and Fidelio willfully infringed the '921 and '728 Patents. As part of the settlement, DePuy agreed "not to enforce any aspect of the Permanent Injunctions as to VOI/Fidelio's manufacture, sale, offer for sale, use or importation of [the C/V plates]" (the "C/V Release").[20] VOI financed the $70 million settlement with a bank loan.

G. The Owners Refuse to Indemnify and the Buyers Sue in Delaware

With the Patent Litigation resolved, the Buyers—Ossium and Movora—asserted their rights under the Indemnification Provision against the Sellers—former VOI owners Claude, Patrick, Brian and Van Horssen—for the $70 million, plus attorneys' fees and costs. The Sellers refused to pay, causing the Buyers to file suit in the Delaware Superior Court. Patrick, Beale, and Van Horssen settled with the Buyers, leaving Claude to defend the action. The Buyers' complaint asserted a single count for contractual indemnification under the MIPA and sought damages, including pre- and post-judgment interest and attorneys' fees and costs.

Claude answered, asserting six counterclaims and eight affirmative defenses. In his sixth affirmative defense, Claude claimed that the Buyers breached the implied covenant of good faith and fair dealing (the "implied covenant"), which, in his view,

---

[19] A1116–18 (JX62 – Settlement & License Agreement dated Apr. 3, 2023, at 1–3) [hereinafter Settlement Agreement].

[20] A1126–27 (JX62 – Ex. A to Settlement Agreement).

excused his performance under the MIPA. He alleged that the Buyers breached the implied covenant by willfully infringing DePuy's patents and, after the verdict, shipping unsolicited quantities of the Infringing Plates and C/V plates to customers. Claude alleged that the Buyers' misconduct increased the indemnifiable settlement amount. He also argued that indemnifying willful patent infringement violated public policy because it encouraged intentional infringement. The parties filed cross-motions for summary judgment.

In December 2024, the Superior Court addressed the parties' cross-motions for summary judgment. The court rejected Claude's defense that the Buyers breached the implied covenant.[21] It explained that the implied covenant is a "gap-filling mechanism" that addresses issues "neither party anticipated," and Claude "[did] not identify any contractual gap[.]"[22] The court also concluded that the implied covenant cannot "impose a general obligation to avoid misconduct."[23] The court left two issues for trial: whether the Buyers breached the MIPA, and therefore, excused Claude's performance under it; and whether the Buyers could prove damages.

---

[21] *Movora LLC v. Claude*, 2024 WL 5389423, at *10–11 (Del. Super. Dec. 2, 2024), *as revised* (Jan. 23, 2025) [hereinafter Summ. J. Op.].

[22] *Id.* at *10 (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010)).

[23] *Id*. (citation modified).

H. The Superior Court Post-Trial Decisions

The court held a five-day bench trial and heard two days of post-trial argument. Claude conceded at post-trial argument that he breached the MIPA by failing to indemnify the Buyers for DePuy's '921 Patent infringement claims against VOI's Swiss Style, Elite, and CBLO plates. He still contended, however, that the Indemnification Provision did not cover the full settlement amount because it included amounts attributable to the Buyers' post-closing plate sales, including damages tied to the sale of C/V plates. In Claude's view, the MIPA limited indemnification to damages attributable to pre-closing conduct.

The Superior Court rejected Claude's interpretation of the MIPA. It held that "[t]he plain text of [the Indemnification Provision] ties [the Buyers'] recoverable indemnity to the Patent Litigation without referencing any point in time."[24] The court also relied on the MIPA's expansive definition of "Damages," and on expert testimony establishing that the provision "sets forth a broad, forward-looking, indemnification obligation."[25] The court also rejected Claude's public policy argument—that damages stemming from willful infringement are not indemnifiable—because Claude failed to identify any Delaware policy supporting his argument.

---

[24] *Movora LLC v. Claude*, 345 A.3d 997, 1014 (Del. Super. 2025), *as revised* (Oct. 1, 2025) [hereinafter Post-Trial Op.].

[25] *Id.* at 1014–15.

On damages, the Superior Court held that amounts tied to the post-transaction C/V Release were indemnifiable. The court found that VOI had injected the issue into the Patent Litigation as a non-infringing alternative to mitigate damages and to facilitate settlement. The court reasoned that VOI's conduct prompted DePuy, after the jury verdict, to seek an injunction against the C/V plates. The court therefore concluded that the C/V Release caused damages "in connection with[] the Patent Litigation"[26] as the parties could not settle without addressing VOI's sales of the C/V plates.

The Superior Court reached a different conclusion as to the C/V License. It held that the "MIPA's definition of Damages does not include a 'license' or any analogous term."[27] Based on DePuy's valuation of the C/V License, the court set its value at $9.8 million, reducing the damages award from $70 million to $60.2 million.

The Buyers also sought to recover about $8.6 million in attorneys' fees and costs incurred in the Patent Litigation. Claude conceded that the Indemnification Provision required the Sellers to indemnify the Buyers for attorneys' fees and costs, but he argued that the requested amount overstated the recoverable fees because it included work performed for Fidelio, which was jointly represented with VOI in the

[26] *Id.* at 1021.

[27] *Id.*

Patent Litigation. Relying on *Valeant Pharmaceuticals International v. Jerney*,[28] a Court of Chancery decision, the Superior Court cut the requested attorneys' fees in half, holding the Sellers responsible for about $4.3 million because allocating fees attributable to VOI and Fidelio would be unduly burdensome.

The Buyers also sought attorneys' fees for enforcing the Indemnification Provision under the MIPA's "Damages" definition and § 8.3(a), which limited the indemnity obligation to the acquisition price of $100 million. The court denied the request, concluding that the MIPA lacked a "clear statement" that entitled the Buyers to shift their fees to Claude.[29]

The court entered judgment for the Buyers in the amount of $40,172,084.49.[30] In a separate order, the court awarded prejudgment interest on the principal amount owed, calculated from the date Claude wrongfully refused the Buyers' indemnification request.[31] The prejudgment interest totaled $3,583,221.89, which included prejudgment interest on the loan-interest expense.[32] In all, the court

---

[28] 921 A.2d 732 (Del. Ch. 2007).

[29] Post-Trial Op. at 1031–32.

[30] *Id.* at 1037 n.366 ("The total liability figure equals the $70 million Settlement, reduced by $9.8 million, plus the $9,084,348 in loan interest—reduced by $1,271,808.72 to account for interest accruing from the excluded portion of the Settlement attributable to the C/V license ($9,084,348 * ($9,800,000 / $70,000,000))—plus $4,304,444.50, representing half the requested Patent Litigation attorneys' fees.").

[31] *Movora LLC v. Claude,* 2025 WL 2795773, at *2 (Del. Super. Oct. 1, 2025) [hereinafter Order].

[32] *Id.* at *2 & n.22, *3 (calculation based on 10% of the principal damages of $35,832,218.92). The trial court reasoned that, "[w]hile Plaintiffs received interest on the loan principal, that award

awarded the Buyers $43,755,306.38. Claude appealed, and the Buyers cross-appealed.

Claude makes four arguments on appeal: (1) the MIPA did not require him to indemnify the Buyers for post-transaction damages arising from their post-transaction business decisions; (2) even if post-transaction damages are covered under the MIPA, the Buyer's willful infringement rendered the provision unenforceable as against public policy; (3) the Superior Court erred by dismissing his implied covenant claim prior to trial; and (4) the Superior Court awarded plaintiffs a duplicate recovery by awarding prejudgment interest on interest recovered for the settlement loan.

On cross-appeal, the Buyers contend that the Superior Court erred by (1) declining to shift fees for the enforcement action; (2) excluding the C/V License cost from the indemnity amount; and (3) reducing the attorneys' fees and costs award in the Patent Litigation.

STANDARD OF REVIEW

"Our review of a grant of summary judgment is *de novo.* Additionally, this Court reviews both the trial court's interpretation of the contract language and its

---

is unrelated to prejudgment interest, which is 'conceptually separate and distinct' from other types of damages, including interest expenses incurred due to borrowing." *Id.* at *2 (citation omitted).

legal conclusions *de novo*."[33] The trial court's factual findings after trial will not be disturbed unless clearly erroneous.[34] We review a decision to award attorneys' fees to determine whether the trial court abused its discretion; however, "we review the trial court's interpretation of a contractual fee-shifting provision *de novo*."[35]

ANALYSIS

A. Claude's Breach of Contract Appeal

1. The Indemnification Provision covers damages for post-transaction plate sales

As noted earlier, Claude admitted that he breached the MIPA by not indemnifying the Buyers for pre-closing patent infringement damages for devices being sold at closing and the post-closing reasonable and expected continuation of those sales. Thus, the only open issue for the breach of contract claim was whether Claude's indemnity obligation covered devices that Claude attributes to the Buyer's "business decisions"—meaning the sale of NXT and C/V plates post-closing.[36] According to Claude, there must be a "meaningful linkage" between the Seller's pre-

[33] *Seaford Golf & Country Club v. E.I. duPont de Nemours & Co.*, 925 A.2d 1255, 1261 (Del. 2007) (footnote omitted).

[34] *In re Columbia Pipeline Merger Litig.*, 342 A.3d 324, 353 (Del. 2025).

[35] *See Bako Pathology LP v. Bakotic*, 288 A.3d 252, 266–67 (Del. 2022) (citation modified).

[36] Opening Br. at 17–29. As to the NXT plates, Claude contends that he owed no indemnity because DePuy did not assert an infringement claim for those plates until after closing. As for the C/V plates, Claude argues that they did not exist at the time of the transaction and therefore fall outside his indemnity obligation.

and post-closing product sales to justify indemnification.[37] That linkage was broken, Claude argues, when the Buyers decided, based on their own business decision, to sell the NXT and C/V plates post-closing.

Claude's pre- and post-closing product divide is inconsistent with the breadth of the MIPA indemnification provision. "Patent Litigation" is defined broadly as the Florida federal court litigation, not any of its specific claims or defenses. As litigants (and contracting parties) know, it is not uncommon for plaintiffs to amend complaints to raise new claims arising out of post-complaint events. And as patent litigants know, it is not uncommon for multiple patents to issue at different times that cover the same subject matter and then be incorporated in pending litigation.

The post-closing sales were meaningfully linked to the pre-closing infringement claims.[38] As the Superior Court found, the Sellers developed and sold the NXT plate prior to the transaction. It was identified as an expected target for DePuy's infringement claims. For the C/V plate, the court found that it was used strategically in the patent litigation—"VOI injected C/V into the Patent Litigation both to facilitate settlement and as non-infringing alternatives to mitigate damages."[39] The court also held that the Sellers' Representative, Patrick, approved

[37] *Id.* at 19.

[38] B151(Trial Tr. Excerpts dated Feb. 10, 2025, at 154:3–8) (Theodor Bonnier); B324–26 (Trial Tr. Excerpts dated Feb. 13, 2025, at 66:2–68:7) (Colleen Flesher).

[39] Post-Trial Op. at 1021 (footnote omitted).

these actions and "directed the post-Patent Litigation verdict C/V shipments under VOI's annual ordering program."[40] It was all part of the push and pull of the patent litigation—the patent owner raises the stakes by adding new patents and infringement allegations against new products, and the target stands on a non-infringement defense or designs around the patents with non-infringing products to minimize liability.

The cases Claude relies on are inapt. In those cases, the indemnity language differs in material ways from the provision here.[41] And enforcing the indemnity would not be commercially unreasonable or "produce an extreme moral-hazard concern" by incentivizing buyers to sell infringing products with impunity.[42] As the

---

[40] *Id.*

[41] Opening Br. 20–22 (citing *Alcoa World Alumina LLC v. Glencore Ltd.*, 2016 WL 521193, at *7–8 (Del. Super. Feb. 8, 2016) (stating that a general indemnification provision did not permit fee shifting), *aff'd sub nom.*, *Glencore Ltd. v. St. Croix Alumina, LLC*, 150 A.3d 1209, 2016 WL 6575167, at *1 (Del. 2016) (TABLE); *State v. Interstate Amiesite Corp.*, 297 A.2d 41, 43–44 (Del. 1972) (holding that a provision that stated a contractor would indemnify costs "on account of the operations of the said contractor" did not cover liabilities arising out of the other party's negligence); *Rizzo v. John E. Healy & Sons, Inc.*, 1990 WL 18378, at *1–2 (Del. Super. Feb. 16, 1990) (stating that an indemnification provision that carved out costs arising out of "the sole negligence of Sky Climber, Inc." permitted indemnification for certain things "not arising from the sole negligence of Sky Climber, Inc."), *aff'd sub nom. Joseph Rizzo & Sons Constr. Co. v. Sky Climber, Inc.*, 633 A.2d 370 (Del. 1993) (TABLE); *RSUI Idem. Co. v. Sempris, LLC*, 2014 WL 4407717, at *7 (Del. Super. Sept. 3, 2014) (determining that an insurance agreement covered claims made during a "Policy Period"); *In re Fuqua Indus. Inc. S'holder Litig.*, 1997 WL 257460, at *5–7 (Del. Ch. May 13, 1997) (stating that a release covering claims arising out of "the acquisition of Georgia Federal" did not cover a claim asserting that defendants wrongfully refused to sell Georgia Federal)). Unlike the agreements in those cases, the MIPA indemnifies fees and expenses incurred "as a result of, or in connection with, the Patent Litigation[.]" A1013 (MIPA at 54). This language does not carveout post-closing sales; rather, this language broadly covers the fees and expenses incurred arising out of the defense of the Patent Litigation.

[42] Opening Br. 23–25.

Buyers' expert testified at trial, transactional planners have a way of dealing with this hazard, called "my watch, your watch" language, where the "seller is on the hook for preclosing liabilities, buyers[] [are] on the hook for post[-]closing liabilities[.]"[43] That approach normally appears in "standard language," which was not present in the MIPA.[44] Instead, the MIPA allocated all of the post-closing liability risk to the Sellers. Claude "cannot now obtain from the courts a right that [he] failed to achieve at the bargaining table."[45] The indemnity covered the sale of pre- and post-transaction devices.

2. <u>The Indemnification Provision does not violate public policy</u>

Claude argues in the alternative that, even if the Indemnification Provision covers post-transaction sales of all products alleged to infringe, it is unenforceable on public policy grounds because it would encourage what happened here—willful patent infringement. Claude characterizes *James v. Getty Oil Co.*, a Superior Court decision, as the "leading Delaware case" supporting his argument.[46] In *James*, the

---

[43] B368 (Trial Tr. Excerpts dated Feb. 14, 2025, at 25:15–20) (Guhan Subramanian, Ph.D.).

[44] B368–71 (Trial Tr. Excerpts dated Feb. 14, 2025, at 25:15–28:4) (Guhan Subramanian, Ph.D.) (defining the "classic temporal allocation" language as the "buyer assumes all liabilities . . . occurring after the closing, and then the seller retains all liabilities . . . based upon underlying facts and circumstances occurring prior to the closing").

[45] *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 391 (Del. 2012).

[46] Opening Br. 31 (citing *James v. Getty Oil Co. (E. Operations)*, 472 A.2d 33, 38 (Del. Super. 1983)).

court stated that a "contract to relieve a party from its intentional or willful acts is invariably held to be unenforceable as being against clear public policy."[47]

The trial court appropriately rejected Claude's reliance on *James*, observing that its public policy statement "has not gained traction in the Delaware courts since [the case] was decided."[48] Our post-*James* decisions have not, in any specific context, barred risk-shifting for willful conduct. In *RSUI Indemnity Company v. Murdock*, for example, we declined to hold that insurance is unavailable as a matter of public policy for losses tied to willful acts.[49] We found support for this conclusion in the Delaware General Assembly's authorization for corporations to obtain broad D&O policies under 8 *Del. C.* § 145(g).[50] We held that two public policies reinforced our conclusion that public policy does not bar coverage for losses arising from fraudulent conduct: Delaware's policy of compensating innocent victims and its policy for enforcing freedom of contract.[51] Moreover, we emphasized that

---

[47] *James*, 472 A.2d at 38 (citing 15 Williston on Contracts § 1750A (3d ed.)).

[48] Post-Trial Op. at 1025 (quoting *CNX Res. Corp. v. CONSOL Energy Inc.*, 2024 WL 4929171, at *6 (Del. Super. Nov. 8, 2024)).

[49] *RSUI Indemnity Co. v. Murdock*, 248 A.3d 887, 904–05 (Del. 2021); *see also Whalen v. On-Deck, Inc.*, 514 A.2d 1072, 1073–74 (Del. 1986) ("The Superior Court found that the public policy of Delaware prohibits the issuance of insurance covering punitive damages ["for wanton conduct"]. In this Court's view, however, there is no evidence of public policy in this State against such insurance.").

[50] *RSUI*, 248 A.3d at 903–04.

[51] *Id.* at 904–05.

"deferring to the parties' contractual choices and to the legislature's prerogative in matters of public policy" was a "wise" approach.[52]

In the absence of a clear statement of public policy from the General Assembly related to willful conduct, we defer to Delaware's public policy favoring freedom to contract.[53] Accordingly, enforcing the Indemnification Provision in this situation does not violate public policy.

3. The implied covenant did not apply

The Superior Court granted the Buyers' summary judgment motion dismissing Claude's implied covenant claim. It reasoned that Claude had not identified a contractual gap that the implied covenant needed to fill, or that the Buyer had improperly exercised its discretion to deprive Claude of the benefits of the MIPA.

In *Johnson & Johnson v. Fortis Advisors LLC*, we recently summarized the application and limitations of the implied covenant:

> The implied covenant of good faith and fair dealing inheres in every contract and ensures that neither party acts arbitrarily or unreasonably to frustrate the fruits of their bargain. It authorizes a court to imply terms only where obligations can be understood from the text of a written agreement but have nevertheless been omitted in the literal sense, and only to protect the reasonable expectations that the parties shared at signing. The implied covenant is not, however, a license for the court to rewrite the contract to appease a party who later wishes to rewrite a contract [it] now believes to have been a bad deal. Rather, the

[52] *Id.* at 904 (citing *Whalen*, 514 A.2d at 1074).

[53] *Id.* at 904–05; *Whalen*, 514 A.2d at 1074.

> covenant is a narrow gap-filling tool of last resort. Used properly, the implied covenant functions like a scalpel, not a brush. A court should apply the implied covenant surgically to vindicate the parties' shared expectations at the time of contracting and not to paint over contractual provisions that one side later regrets.[54]

As we held in *Johnson & Johnson*, the implied covenant operates in two primary ways: "when a contract allocates discretionary authority to one party over a central aspect of the contract" and "to address unforeseen developments—contingencies neither anticipated nor resolved by the contract—that threaten the parties' bargained-for economic expectations."[55] The second application recognizes the reality that "'[n]o contract, regardless of how tightly or precisely drafted it may be, can wholly account for every possible contingency.'"[56]

On appeal, Claude does not identify any contractual gap that needed filling. And he cannot point to any specific grant of discretionary authority that might be subject to the implied covenant. Instead, he relies on *Dieckman v. Regency GP LP*, where we held that the general partner could not invoke a conflicted-transaction safe harbor through misleading actions because it was too obvious to require a contracting party to state that the general partner cannot secure the safe harbor

---

[54] 352 A.3d 229, 253 (Del. 2026) (citations omitted); *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) ("Parties have a right to enter into good and bad contracts, the law enforces both.").

[55] *Johnson & Johnson*, 352 A.3d at 253–54.

[56] *Id.* at 254 (quoting *Glaxo Gp. Ltd. v. DRIT LP*, 248 A.3d 911, 919 (Del. 2021)).

through deceit.[57] *Dieckman*, however, is a far cry from this case. The MIPA contained a broad indemnity provision that defined Patent Litigation liberally. As noted earlier, it was not unexpected that scope of the litigation would expand to include new products and patents. And importantly, the parties gave the Seller's Representative, Patrick, a seat at the table for controlling the litigation and approving the settlement.

Claude relies on *Baldwin v. New Wood Resources LLC* for the proposition that an indemnitor must act in good faith when an indemnification provision confers broad discretion.[58] But *Baldwin* involved an LLC agreement that conditioned indemnification on two requirements as determined by the indemnitor: that the covered person "acted in good faith" and in the company's "best interests."[59] We held that the implied covenant required the indemnitor to make these determinations in good faith; otherwise, the agreement's express good faith condition "would be rendered meaningless."[60] Here, the MIPA contains no such provision conditioning indemnity on the Buyers' subjective determinations. Nor does it confer post-closing discretion in a way that would nullify any other MIPA provision. Under these

---

[57] 155 A.3d 358, 368 (Del. 2017).

[58] Opening Br. 38–39 (citing *Baldwin v. New Wood Resources LLC*, 283 A.3d 1099, 1118 (Del. 2022)).

[59] *Baldwin*, 283 A.3d at 1118 (citation omitted).

[60] *Id.* at 1120.

circumstances, the parties got what they bargained for in the MIPA. This Court will not rewrite the MIPA, which sophisticated parties negotiated with the assistance of counsel, because Claude now regrets the bargain that he struck.[61] The Superior Court did not err in dismissing Claude's implied-covenant defense.

4. The Buyers were not entitled to an award of prejudgment interest

Finally, Claude contends that the trial court erred in awarding the Buyers prejudgment interest. Claude highlights that the Buyers paid the settlement with borrowed money and that, by including the interest the Buyers incurred on the loan used to pay the settlement as a component of its damages award, the court effectively compensated the Buyers for the lost use of their funds.

The Buyers disagree. They first contend that they lost access to the funds used to pay the loan interest and thus were entitled to prejudgment interest as compensation for this loss. And second, the Buyers assert that they can recover both the loan-interest expense and prejudgment interest under our decision in *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*.[62]

As a general rule, "[i]n Delaware, prejudgment interest is awarded as a matter of right, not by judicial discretion."[63] Awarding prejudgment interest serves two

---

[61] *Nemec*, 991 A.2d at 1126.

[62] Answering Br. 57 (citing *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482, 486 (Del. 2011)).

[63] *LG Elecs. Inc. v. Invention Inv. Fund I, L.P.*, — A.3d —, 2026 WL 935618, at *16 (Del. Apr. 7, 2026) (citation omitted).

salutary purposes: "First, it compensates the plaintiff for the loss of the use of his or her money; and, second, it forces the defendant to relinquish any benefit that it has received by retaining the plaintiff's money in the interim."[64]

Here, because the Buyers borrowed the $70 million required to fund the settlement, they did not lose the use of their money to that extent. Of course, that came at a cost—interest payments at 7-8%, over $9 million, accruing from April 2023 through December 2024 when the Superior Court issued its memorandum opinion in the Buyers' favor. To be sure, the Buyers are entitled to be compensated for that loss. And they were: in accordance with the Buyers' request,[65] the trial court treated the loan interest as damages and included it in its award. That award, in our view, achieved both purposes that would otherwise be served by an award of prejudgment interest. By borrowing the $70 million required to fund the settlement, the Buyers did not lose the time value of their own money and were compensated for the cost—the loan interest—of preserving their own capital. And the court's award of loan interest as damages forces Claude to relinquish any benefit—that is, the time value of the settlement amount—he may have received by retaining the Buyers' money in the interim.

---

[64] *Brandywine Smyrna*, 34 A.3d at 486.

[65] *See* A698–702.

Viewed from a slightly different angle, the award of loan interest plus prejudgment interest on the loan interest appears to compensate the buyers twice for the time value of the settlement amount. Had the Buyers paid the settlement from their own funds, they would not have incurred the loan-interest expense and would have then been entitled to prejudgment interest on the loan-interest-free damages award. Assuming—perhaps counterfactually[66]—that the loan-interest rate is similar to the prejudgment-interest rate, the amount of prejudgment interest would be equal to the amount of loan interest the Buyers, having borrowed to pay the settlement, actually paid.

Brandywine Smyrna, the case upon which the Buyers principally rely, does not present this interest overlap. In that case, a car dealer sued a roofing contractor in tort and contract claiming that the contractor's faulty work caused the dealership to suffer significant rain damage resulting in a months-long closure of the dealership. In addition to seeking a damages award for property damage and lost revenues during the closure, the dealer claimed as damages the additional interest expenses it had incurred because of the water damage. Unlike the loan interest in this case, the interest expenses claimed by the dealer—floor plan interest because of the loss of a

[66] According to Claude's opening brief, the loan interest rate was "7-8%," while the Superior Court set the prejudgment interest rate at 10%. Opening Br. 15. If Claude's brief is accurate, it would appear that the Buyers, by pressing the court to award the loan interest as damages, settled for the lower interest rate. *Id.*

favorable borrowing rate and interest on a loan to restore capital that was impaired by construction costs—was not tied directly to the other components of the dealer's damages. In upholding the trial court's inclusion of the dealer's interest expenses in its damages award, this Court observed that the dealer's interest expenses were "conceptually separate and distinct from" prejudgment interest.[67] The same cannot be said here where the loan interest awarded to the Buyers corresponds with the time value of the settlement amount had the Buyers paid it from their funds. *Brandywine Smyrna*, therefore, does not control the result here.

Likewise, our decision in *LG Electronics Inc. v. Invention Investment Fund I, L.P.*,[68] issued after the completion of briefing in this case, is inapposite to the situation presented here. LG, from which two of its customers had demanded indemnification to recover litigation expenses, sought to recover the amount of those expenses from the defendants under a breach-of-contract theory. LG prevailed at trial, but the trial court denied its request for prejudgment interest because it had not established that it had actually paid its customer the demanded indemnification amounts. As we put it in our opinion, "the Superior Court, however, 'decline[d] to exercise its discretion to award LG prejudgment interest,' reasoning that, because

---

[67] *Brandywine Smyrna*, 34 A.3d at 486.

[68] — A.3d —, 2026 WL 935618, at *16.

LG 'functioned like a pass-through entity' and was not deprived of any funds, an award of prejudgment interest would inappropriately grant LG a windfall."[69]

We reversed on this point and explained our reasons as follows:

> IV cites no Delaware authority—and we are aware of none—that prejudgment interest is contingent upon the prevailing party's incurring out-of-pocket losses. The judgment reflects LG's damages as a result of IV's breach and those damages were suffered when IV's breach caused GM and Toyota to incur indemnifiable litigation expenses.[70]

The point was that LG's indemnification obligation had been triggered and, presumably, because that obligation had not been discharged, interest would have accrued on the outstanding obligation. Thus, an award of prejudgment interest was required to make LG whole. Like *Brandywine Smyrna*, *LG* did not address the issue we decide here.

In this case, the Buyers had two paths to recovery of the time-value of the amount they paid to settle the Patent Litigation—recover the loan interest as a component of damages or seek an award of prejudgment interest on the amount paid in settlement; it was error for the trial court to award both.

---

[69] *Id.* (citations omitted)

[70] *Id.*

B. Ossium & Movora's Cross-Appeal

1. The MIPA does not contain a clear statement shifting attorneys' fees

On cross-appeal, the Buyers first contend that the Superior Court erred in declining to shift attorneys' fees in this enforcement action. They assert that the MIPA, when read as a whole, authorizes fee shifting in actions to enforce the Indemnification Provision.

"[C]ontractual fee shifting provisions are an exception to the American Rule that litigants are responsible for their own fees and expenses[.]"[71] "The fee-shifting provision must be a clear and unequivocal agreement in connection with a dispute between parties involving a failure to fulfill obligations under the contract."[72] "There is no specific language that must be used in order for an indemnity provision to provide for recovery in first-party actions."[73] But the parties must point to contractual language that shifts fees; they cannot rely on a general indemnification provision.[74] When the parties use specific fee-shifting language elsewhere in the agreement, the parties' failure to include this language in the indemnification

---

[71] *Leistner v. Red Mud Enters. LLC*, 2023 WL 11196881, at *1 (Del. Ch. Apr. 26, 2024).

[72] *Deere & Co. v. Exelon Generation Acqs., LLC*, 2016 WL 6879525, at *1–2 (Del. Super. Nov. 22, 2016).

[73] *Id.* at *2.

[74] *Id.* at *1.

provision "indicates a lack of intent to create a clear and unequivocal agreement to shift fees in first-party actions."[75]

Here, the MIPA does not establish a clear intent to shift fees for three reasons: (1) the parties drafted a fee-shifting provision in the Note, and they deviated from that approach when drafting Article 8 of the MIPA; (2) the references to "expenses of the Indemnified Party from enforcing its rights" and "expenses (including … the fees and disbursements of counsel)" do not constitute clear and unequivocal language to shift fees; and (3) §§ 8.4 and 8.5 of the MIPA do not create a distinct procedure for indemnifying first- and third-party claims. We address each reason in turn below.

i. <u>The Indemnification Provision lacks the specific fee-shifting language used in the Note</u>

The Buyers contend that the Superior Court erred in concluding that the MIPA does not shift fees because it uses different language than the Note's fee-shifting provision. Claude asserts that the MIPA lacks clear and unequivocal fee-shifting language and that § 5(g) of the Note supports his interpretation. We agree with Claude.

Section 5(g) of the Note, a form of which is attached to the MIPA as an exhibit, provides that: "[i]f the Seller commences a proceeding to enforce and collect upon

[75] *Deere*, 2016 WL 6879525, at *1–2.

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."[76] There is no such provision in the MIPA. The Note's express fee-shifting provision, coupled with the MIPA's lack of clear and unequivocal fee-shifting language, is evidence that the parties did not intend to shift fees in an action to enforce the MIPA.[77]

Nor does our analysis change simply because § 5(g) appears in the Note—an ancillary agreement to the MIPA. The MIPA and the Note form a single contractual scheme, and thus the trial court properly considered the Note's fee-shifting provision.[78] The Superior Court correctly held that § 5(g) showed that the parties knew how to draft an express fee-shifting provision, and that the MIPA's omission of a comparable language demonstrates that they did not intend to shift fees incurred to enforce the Indemnification Provision.

---

[76] A1042; *see also Nasdi Hldgs., LLC v. N.A. Leasing, Inc.*, 2020 WL 1865747, at *6 (Del. Ch. Apr. 13, 2020) (stating that a reference to prevailing parties is "a hallmark term of fee-shifting provisions." (citation omitted)).

[77] *See, e.g.*, *Deere*, 2016 WL 6879525, at *2 (stating that the failure to use fee shifting language, which was used elsewhere in the agreement, in the indemnification provision indicates an intent not to shift fees); *Four Cents Hldgs., LLC v. M&E Printing, Inc.*, 2025 WL 2366460, at *8–9 (Del. Super. Aug. 12, 2025) (same).

[78] *Thompson Street Cap. P'rs IV, L.P. v. Sonova United States Hearing Instruments*, 340 A.3d 1151, 1167 (Del. 2025).

ii. <u>The definition of Damages and § 8.3 do not demonstrate a clear and unequivocal intent to shift fees</u>

The Buyers primarily rely on two provisions in the MIPA to support their argument that the MIPA supports fee shifting in enforcement actions. The first is the expansive "Damages" definition, which includes the "costs of investigation, preparation and defense, and the fees and disbursements of counsel."[79] The second is the MIPA's $100-million indemnification cap in § 8.3(a), which excludes from the cap "claim[s] for indemnification based on . . . the expenses of the Indemnified Party in enforcing its rights under . . . Article 8."[80] Claude counters that neither of those provisions contains language creating a right to shift attorneys' fees in enforcement actions. We agree with Claude.

Neither provision demonstrates a clear and unequivocal intent to shift fees. First, the definition of "Damages" does not create a substantive right or obligation;[81] rather, the definition describes how damages will be calculated.[82] And § 8.3 neither uses the term "Damages" nor creates a substantive right or obligation; instead, it

---

[79] Answering Br. 62–63; A963 (MIPA at 4).

[80] Answering Br. 62; A1014 (MIPA at 55).

[81] *Fortis Advisors LLC v. Boston Dynamics Inc.*, 2025 WL 1356521, at *6 (Del. Super. Apr. 29, 2025) ("the definition of 'Losses' in Schedule III 'does not imply clearly and unequivocally that first-party claims are included' because it 'lacks explicit language applying to first-party claims.'" (citation omitted)).

[82] *See generally AB Stable VIII LLC v. Maps Hotel and Resorts One LLC*, 2020 WL 7024929, at *20 n.200 (Del. Ch. Nov. 30, 2020) ("In a contract, a defined term simply serves as a convenient substitute for the definition, and only for that contract." (citation omitted)).

caps the parties' obligation to indemnify. These provisions do not show a clear intent to shift fees. Second, Delaware courts have rejected arguments based on an indemnification provision that, as here, refers only generally to enforcement expenses.[83] Accordingly, the MIPA's mere reference to enforcement expenses in § 8.3 is not a clear and unequivocal statement that demonstrates an intent to shift fees.

iii. The Buyers misinterpret §§ 8.4 and 8.5

The Buyers also cite to "other indications" in §§ 8.4 and 8.5 to argue that the MIPA permits fee shifting.[84] They contend that those sections created separate procedures for indemnifying Damages resulting from "Inter-Party Claims" and "Third Party Claims" and therefore allow recovery of "the fees and disbursements of counsel" for "Inter-Party Claims."[85] Claude counters that § 8.4 sets out the procedure for bringing indemnification claims and resolving related disputes, while

---

[83] *Four Cents*, 2025 WL 2366460, at *7 (stating that the plaintiff was not entitled to shift fees where the definition of "Losses" included "reasonable attorneys' fees and the cost of enforcing any right to indemnification hereunder[.]"); *see also S'holder Rep. Servs. LLC v. Sphera Solutions, Inc.*, 2026 WL 880894, at *12 (Del. Ch. Mar. 31, 2026).

[84] Answering Br. 63–65.

[85] A1015–16 (MIPA at 56–58). In support of this argument, the Buyers rely on *Schneider Nat'l Carriers, Inc. v. Kuntz*, 2022 WL 1222738, at *30 (Del. Super. Apr. 25, 2022). But the Buyers' reliance on *Schneider* is misplaced. The *Schneider* court made it clear that the absence of a "fee-shifting clause elsewhere in the contract . . . distinguishes the SPA from several of the precedents[.]" *Id.* at *31. Those precedents "concluded that the existence of a fee-shifting clause elsewhere in the contract, 'further demonstrate[d] that the parties did not intend for Losses to encompass fee-shifting on first-party claims.'" *Id.* (citing *Ashland LLC v. Samuel J. Heyman 1981 Continuing Tr. for Heyman*, 2020 WL 6582958, at *7 (Del. Super. Nov. 10, 2020)).

§ 8.5 addresses the indemnitor's rights and obligations in Third Party Claims. On this point, we agree with Claude.

Sections 8.4 and 8.5 do not, as the Buyers suggest, create separate procedures for indemnifying Inter-Party Claims and Third Party Claims. Section 8.4 governs the procedure for notice and payment of an indemnification claim, including Third Party Claims, and the process for resolving disputes over those claims. Section 8.5 governs the rights and obligations of the parties regarding Third Party Claims. Accordingly, the Buyers' interpretation of §§ 8.4 and 8.5 does not establish separate notice and payment procedures for Inter-Party Claims and Third Party Claims, and those provisions therefore do not reflect a clear and unequivocal intent to shift fees.

2. <u>The Buyers were entitled to indemnity for damages related to the C/V License</u>

Next, the Buyers claim that the trial court erred in excluding the cost of the C/V License from the total indemnity award. Although they concede that the term "license" is not included in the definition of "Damages," the Buyers contend that the definition of "Damages" includes "'any … payments' related to the Patent Litigation, 'including amounts paid in settlement[,]'" and that the $9.8 million paid for the license is both a "payment" and an "amount paid in settlement," so the cost of the license should be included.[86] We agree with the Buyers.[87]

As explained above, the Indemnification Provision requires that the Sellers indemnify the Buyers for damages suffered "as a result of, or in connection with, the Patent Litigation."[88] The definition of "Patent Litigation" includes "any related or derivative Actions,"[89] and "Action" includes a "hearing" and "injunction."[90] Damages stemming from the C/V License were "in connection with" the Patent Litigation because the Patent Litigation settled during a two-day hearing on DePuy's motion to show cause.[91] In the motion, DePuy requested an order requiring VOI, and the other defendants, to show cause why it should not be held in contempt of the permanent injunction.

As we read the Indemnification Provision, the C/V License payment qualifies as "Damages" under the Indemnification Provision. VOI paid for the license as part of the settlement resolving the Patent Litigation and to avoid the risk that the district

---

[86] Answering Br. 66–69.

[87] The trial court did not address this argument, but it was fairly raised below. *See Kroll v. City of Wilmington*, 276 A.3d 476, 479 (Del. 2022) ("We also recognize that this Court may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court." (citation omitted)).

[88] A1013 (MIPA at 54).

[89] A968 (MIPA at 9).

[90] A961 (MIPA at 2).

[91] A1013 (MIPA at 54).

court would extend injunctive relief to the C/V plates. The Superior Court recognized that the C/V plates were an integral part of the settlement because "settling the Patent Litigation without addressing VOI's prior C/V sales was not realistic."[92] VOI's payment for the C/V License was an "amount[] paid in settlement."[93] We therefore reverse the Superior Court's exclusion of the $9.8 million that VOI paid for the C/V License in calculating the indemnity amount.

3. <u>The Buyers were entitled to Claude's share of the full $8.6 million in attorneys' fees</u>

Finally, the Buyers contend that the Superior Court erred by reducing the Patent Litigation attorneys' fees and costs award from $8.6 million to $4.3 million. The MIPA requires the Sellers to indemnify the Buyers for attorneys' fees and costs that VOI incurred in the Patent Litigation in proportion to the Sellers' individual ownership percentage.[94] VOI proved at trial that $8.6 million in fees were incurred as a result of the Patent Litigation and that these same fees were paid solely by VOI.[95] Because VOI and Fidelio shared counsel in the Patent Litigation, the parties in this

---

[92] Post-Trial Op. at 1021.

[93] A1013 (MIPA at 54).

[94] Post-Trial Op. at 1028 ("Claude concedes Plaintiffs can recover costs and fees for the Patent Litigation, but argues the amount requested includes non-recoverable items."). Under the MIPA, the Sellers "severally" were obligated to indemnify the Buyers. A1013 (MIPA at 54). The Superior Court found that Claude's percentage interest is 55.55%. Post-Trial Op. at 1033 n.333.

[95] Post-Trial Op. at 1029; *see also* B342–45 (stating that the invoices for legal fees were only incurred by VOI in connection with the Patent Litigation and that these invoices were paid for by VOI); B1102–1762 (compiling the invoices that VOI's counsel sent for work conducted in connection with the Patent Litigation).

matter dispute whether VOI should receive the full $8.6 million incurred in connection with VOI and Fidelio's joint representation. The Superior Court resolved the dispute by splitting the fees in half. The court relied on *Valeant Pharms. Intern. v. Jerney*[96] for the proposition that it may divide an attorneys' fees award evenly when properly allocating the fees and costs would be "unduly burdensome."[97]

In *Valeant*, the Court of Chancery held that a supplemental fee-allocation proceeding would be unhelpful given the large scale of joint defense.[98] This case, however, does not present the same issue. The Superior Court recognized that it could determine the fees incurred by VOI in connection with the Patent Litigation. Specifically, the Superior Court found that "Claude did not rebut . . . testimony that Plaintiffs' request excludes defense costs solely tied to Fidelio" with the exception of "one or two items which *may* be attributable to Fidelio[.]"[99] Thus, *Valeant*'s rationale does not apply here, and the Superior Court should have awarded VOI the full fees that it requested consistent with the MIPA.[100]

---

[96] 921 A.2d 732 (Del. Ch. 2007).

[97] Post-Trial Op. at 1029 ("The court [in *Valeant*] rejected a request for 'a supplemental proceeding to allocate fees and expenses' as unduly burdensome, because 'there is no doubt their defense was, by and large, jointly conducted.'" (quoting *Valeant*, 921 A.2d at 755)).

[98] *Valeant*, 921 A.2d at 755.

[99] Post-Trial Op. at 1029.

[100] *Valeant*, 921 A.2d at 755. The trial court's finding that VOI's request excluded Fidelio's attorneys' fees, except for potentially one or two items, shows that this case and *Valeant* involve two different sets of facts. In *Valeant*, the Court of Chancery found that, "[w]hile it might be possible to identify small items that related to discovery directed to one or the other of these two men, there is no doubt that their defense was, by and large, jointly conducted." *Id.* The Court of

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court is **AFFIRMED in part and REVERSED in part**, and the case is **REMANDED** for further proceedings consistent with this opinion. Jurisdiction is not retained.

Chancery, for these reasons, "reject[ed] the idea of a supplemental proceeding to allocate fees and expenses[.]" *Id.*; *see also Levy v. Hli Operating Co., Inc.*, 2007 WL 2801383, at *11 n.62 (Del. Ch. May 16, 2007) (stating that this approach "prevents the court from having to engage in a time-consuming supplemental hearing to precisely allocate expenses amongst the individuals by examining attorneys' time sheets."). The reasons underlying the *Valeant* and *Levy* decisions are not present in this case, and the trial court erred in relying on this decision.

In the alternative, Buyers and VOI argue that even if half of the fees were Fidelio's fees, Fidelio was entitled to indemnification as Buyer Movora's "Affiliate" under the indemnification provision. Answering Br. 72–73. Based on our holding above that VOI is entitled to the Patent Litigation costs that it paid, we need not, and do not, reach this alternative argument.