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IN THE SUPREME COURT OF THE STATE OF DELAWARE

E.I. DUPONT DE NEMOURS AND COMPANY, Plaintiff-Below, Appellant, v. MEDTRONIC VASCULAR, INC. Defendant-Below, Appellee.	No. 280, 2013 On appeal from the Superior Court of the State of Delaware in and for New Castle County C.A. No. N10C-09-058-MMJ CCLD **REDACTED PUBLIC VERSION**

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NATURE OF PROCEEDINGS

Plaintiff E.I. duPont de Nemours and Company ("DuPont") waited a decade before pursuing a wide array of breach of contract and related tort claims against defendant Medtronic Vascular, Inc. ("Medtronic") arising out of a 1989 Patent Assignment and Cooperative Research Agreement ("PACRA"). On cross-motions for summary judgment, the Superior Court decided five statute of limitations issues in favor of Medtronic. The Superior Court also considered, expressly in the alternative, six substantive issues, ruling against DuPont on three of those. DuPont has appealed only two of the Superior Court's statute of limitations rulings and one of its substantive rulings, along with a separate evidentiary ruling.

This dispute relates to stent systems, which are comprised of balloon catheters and stents, two items that were at one time sold separately, and later were packaged and sold for a single price. The PACRA provides DuPont with royalties on sales of products that include DuPont-developed material or technology, like balloon catheters, but not on products that lack DuPont-developed material or technology, like stents. When products that include DuPont material and technology are sold with other products for a single price, the PACRA provides for apportioning the sales price so that DuPont is paid royalties on the portion it helped develop. Medtronic apportioned sales of stent systems (its own and those sold by a

sublicensee, Cordis). DuPont claims Medtronic should have paid royalties on the unapportioned price of stent systems.

DuPont and Medtronic signed a tolling agreement effective August 25, 2009. DuPont thus had to establish that the limitations period was tolled until August 25, 2006, for its claims to survive. But before August 25, 2006, (1) DuPont was *twice* told by its own auditors investigating Medtronic's royalty payments that Medtronic was apportioning sales of stent systems, and (2) internal documents show that the parties repeatedly discussed apportionment and that DuPont was aware that Medtronic intended to apportion sales of stent systems.

This is a straightforward case of inquiry notice. DuPont had all the information it needed to file a timely suit, and certainly could have investigated and uncovered the claims it filed well before August 25, 2006. Moreover, DuPont produced no evidence that Medtronic concealed that it was apportioning sales of stent systems, or that its claims were unknowable had DuPont acted diligently.

DuPont raises other issues that were not essential to the judgment, which this Court need not reach. The privileged contents of a draft letter prepared by Medtronic's in-house counsel could not change the outcome of this case, even if they were admissible. Finally, the Superior Court rightly determined that the apportionment of the sales price of stent systems was appropriate under the PACRA.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court properly refused to accept DuPont's invitation to read the PACRA's definition of "Catheter" as if the other provisions of the PACRA do not exist. The Superior Court, as required by Delaware law, properly considered the PACRA as a whole to harmonize the affected contract provisions and effectuate the agreement's purpose of compensating DuPont with royalties for its intellectual property.

2. Denied. The Superior Court thoroughly considered the summary judgment record in light of controlling Delaware law and properly granted Medtronic summary judgment because DuPont's claims are time-barred.

3. Denied. The Superior Court properly found that the two auditors hired by DuPont as its agents to conduct an audit under the PACRA—PricewaterhouseCoopers LLP ("PwC") and Deloitte & Touche LLP ("Deloitte")—both explained to DuPont that Medtronic was apportioning sales of stent systems pursuant to the PACRA. Neither auditor owed Medtronic a duty of confidentiality with respect to explaining how Medtronic was calculating royalties.

4. Denied. DuPont's opening brief fails to argue that a tolling doctrine applies to its claim related to royalties paid on licensed Cordis sales. As a result, DuPont has waived any argument that its Cordis claim is timely. Even absent waiver, an audit report prepared by PwC and provided to DuPont shows that PwC

received from Medtronic all of the information necessary to determine how royalties were calculated and paid on Cordis sales. Moreover, DuPont cannot carve its breach of contract claim into pieces for limitations purposes. The fact that it had been put on inquiry notice regarding apportionment of stent sales bars its claim for Cordis sales just as it bars its claim for Medtronic sales. Indeed, the fact that DuPont has conceded that it did not timely assert its (now abandoned) breach of contract claim for Medtronic ceasing royalty payments on sales of its own stent systems in July 2003 bars its claim for Cordis sales as well.

5. Denied. The Superior Court properly ruled that DuPont produced no evidence that Medtronic fraudulently concealed that it was apportioning royalties on stent systems. Moreover, the Superior Court properly held that DuPont repeatedly was on inquiry notice of its potential claims prior to August 25, 2006, three years before the tolling agreement was executed.

6. Denied. The Superior Court properly held that a draft letter prepared by Medtronic's former general counsel and sent to his clients for review and comment, but which was never finalized and sent to DuPont, was privileged. That draft letter does not merely recite "facts," but reflects factual communications made by a client to counsel for the purpose of facilitating legal advice.

STATEMENT OF FACTS

I. Technology Background

A balloon catheter is a narrow tube with a balloon at the end used to open constricted blood vessels. During a balloon angioplasty, the balloon catheter is guided to the site in the blood vessel requiring treatment, and inflated to open the vessel. B403. The balloon is then deflated and removed. *Id.*

In the early 1980s, DuPont and C.R. Bard, Inc. ("Bard") worked together to develop material for angioplasty balloons. B2; *see also* B206. In 1984, DuPont was issued a patent (the Levy Patent) that covered a balloon with improved physical properties for use as a balloon catheter. A100-05.

In 1993, the Food and Drug Administration approved the use of coronary stents in angioplasties. B404. Stents are small expandable metal tubes that are implanted against an artery wall. B403. Unlike balloons, stents remain in the body to help keep opened arteries from narrowing. B404-05; *see also* B260-61. A physician delivers the stent with a balloon catheter, expands the balloon to place the stent, and then withdraws the balloon. B404; B260-61. DuPont contributed nothing to the development of stents for permanent implantation.

Though stents and balloon catheters are often used together, they were originally sold separately. B404. Physicians would buy both and then hand crimp the stent over the balloon catheter. *Id.* Later, balloon catheters were sold with

stents as part of "stent systems," with the manufacturer mounting stents on balloon catheters. *Id.* The stent, manufactured separately from the balloon catheter, is not permanently affixed, *e.g.*, glued, bonded, or fused, to the balloon. B406. Stent systems are sold for a single price. B404.

II. Bard and DuPont Enter Into, Amend, and Carry Out the PACRA

DuPont negotiated the primary agreement at issue in this case—the PACRA—with Bard, its collaborator in developing material for balloon catheters. The PACRA was executed in December 1989. A106.

A. The Provisions of the PACRA Agreed to by DuPont and Bard

Under the PACRA, DuPont assigned to Bard its rights to the Levy Patents. A117-120. DuPont and Bard further agreed to work on new projects, with Bard receiving exclusive licenses on resulting technologies. A111-15. Bard agreed to pay DuPont royalties on the "Selling Price" (which was defined as invoice price minus certain deductions) of "Products." A108; A123-24. "Product" was defined, with immaterial exceptions, as "(i) any Catheter which utilizes a Material or Technology; (ii) any medical device or system, other than a Catheter, which is sold for application within the Field of Use and which utilizes a Material or Technology." A110. Bard did not pay royalties on sales of other items.

The PACRA anticipated that Bard might combine in a single sale what the PACRA defined as Products (royalty-bearing for DuPont) and other items (for

which no royalties were owed). When a non royalty-bearing item was sold in conjunction with a royalty-bearing Product for a single price, the PACRA referred to the other item as a "Related Product." A108-09. For sales of such combinations of Products and Related Products ("conjoined products"), the PACRA did not require payment of royalties based on the selling price of the entire conjoined product. Instead, it provided a formula (reproduced below) to determine what percentage of the manufacturing cost of the conjoined product was attributable to the royalty-bearing "Product." That percentage was then multiplied by the conjoined product's invoice price to get the royalty-bearing "Selling Price." A108-09.

$$\text{Invoice Price of Entire Unit} \left(\frac{\text{Product's Factory Cost}}{(\text{Product's Factory Cost}) + (\text{Related Product's Factory Cost})} \right) = \text{Selling Price}$$

This formula mitigates against the potential for DuPont to receive a royalty windfall from the portion of a conjoined product sale attributable to a Related Product, *i.e.*, an item that does not utilize DuPont Material or Technology.

The PACRA required Bard to submit written royalty reports to DuPont on a quarterly basis providing the cumulative Selling Price of all Products sold during the quarter. A125-26. The PACRA further required Bard to maintain records of the Selling Price of all Products for two years and provided DuPont the right to audit "such records." A126-27.

B. Bard's Royalty Payments on the Sale of Stent Systems

Bard started selling stents systems in late 1996 or early 1997, *see* B49, and understood that the balloon catheter portion of the stent system was a royalty-bearing Product under the PACRA, but that the stent was a non royalty-bearing Related Product. Less than a year after Bard entered the coronary stent market, Bard's assistant general counsel advised Bard personnel that,

> [U]nder the terms of the [PACRA] Bard is not required to pay a royalty on the entire invoice price of a Samba Rely catheter that has a premounted stent. ... When reading Article II(D) [of the PACRA], the Samba Rely catheter would be the "Product" and the premounted stent would be the "Related Product".

B414; *see also* B411-12.

C. Bard Sublicenses to and Resolves a Dispute with Cordis

In December 1993, Bard licensed Cordis Corporation ("Cordis") to make, use, and sell products under the Levy Patent ("Levy License Agreement"). B32; B46. Pursuant to the Levy License Agreement, Cordis paid royalties to Bard, B46-48, which then paid a portion to DuPont.

Cordis and Bard later became engaged in a dispute over the Levy License Agreement, which they ultimately settled with an Addendum to the Levy License Agreement ("Levy Addendum"). A188. The Levy Addendum provides that if "Licensed Products are bundled with other goods, such as stents, or provided in kits," Cordis will pay royalties on a percentage of the sales price of the bundle attributable to the Licensed Product. A191. This apportionment formula differs

from the PACRA's. As noted above, the PACRA apportions based on a percentage of manufacturing cost, not selling price.

III. Medtronic Becomes a Party to the PACRA and, Like Bard, Pays Royalties Only on the Balloon Catheter Portion of Stent Systems

In July, 1998, Bard sold its coronary catheter business to Arterial Vascular Engineering, Inc. ("AVE"), B66, and assigned to AVE its rights and obligations under the PACRA and the Cordis agreements, B214. Medtronic acquired AVE on January 28, 1999, B234, and inherited these agreements. So when Medtronic acquired AVE, there were two categories of sales for which royalties were owed to DuPont: direct sales by Medtronic, and the sales by Cordis as a sublicensee of the Levy Patent. DuPont claims that paying royalties based on an apportioned price of stent systems for both categories breaches the PACRA.

Shortly after Medtronic's acquisition of AVE, DuPont and Medtronic discussed how royalties would be calculated on stent system sales. The apportionment issue was openly discussed between the parties and internally at DuPont. Later, Medtronic's royalty payments for both its own sales and Cordis sales were audited.

A. 1999: DuPont and Medtronic Discuss How to Calculate Royalties, Excluding the Stent Portion from Stent Systems

On March 25, 1999, just a few months after Medtronic inherited the PACRA, DuPont's Kitty Knox sent an email to Medtronic's Mark Brister that

raised for discussion, among other things, the "[c]alculation of royalty for balloons sold as part of a stent delivery package." B236. During a March 31, 1999 conference call, as the handwritten notes of DuPont's Charles Molnar show, Medtronic and DuPont discussed "[h]ow to calculate royalty" when a balloon catheter is sold with a stent. B240; *see also* B389. The notes sketch out an example of the apportionment formula of the PACRA—a percentage of that selling price determined by figuring the percentage of the manufacturing cost of the whole system attributable to the balloon catheter. B240. In the example, Molnar assumes that the manufacturing cost of the balloon catheter and stent are equal, and that the stent system costs $1500. He thus applies the agreed royalty rate to $750, not the full $1500 price of the stent system. *Id.*

In April 1999, Medtronic and DuPont continued to discuss how Medtronic would apportion the price of a stent system to calculate its royalty-bearing Selling Price. Medtronic observed [redacted]. A237. On April 13, 1999, Medtronic's Mark Brister sent DuPont's Kitty Knox a letter attaching "a two page spreadsheet which projects DuPont royalties for the next five years." A239. Consistent with what Brister had told Knox, B374-76, that spreadsheet projected royalties based on a portion of the sales price of the

stent system, A244-45. Brister's projection apportioned using Medtronic's preferred selling price ratio. *Id.* The spreadsheet nowhere calculates royalties on the sales price of the entire stent system. *Id.*

Shortly after receiving Brister's projections, on April 16, 1999, Knox calculated whether it would be more advantageous for DuPont to use the apportionment calculation described in the PACRA (as Knox wrote, "if calc acc to agreement portion att to balloon") or the sales price ratio proposed by Brister. B245. Knox's effort to calculate what was best for DuPont under the PACRA did not include a calculation of how much royalties would be owed based on the selling price of the stent system as a whole.

Medtronic sought two changes in the PACRA in 1999. First, as discussed above, it tried to persuade DuPont that the apportionment formula should be based upon average selling price rather than manufacturing cost. Second, it tried to persuade DuPont that certain of its products were not covered by the Levy Patents. The negotiations were never about whether there would be an apportionment between balloons and stents; they were about how apportionment would work. Ultimately, DuPont refused to change the apportionment formula. The parties did agree to resolve the issue relating to which balloon products were subject to the Levy Patent by amending the PACRA in 1999 to provide that Medtronic's royalty obligations would terminate on July 5, 2003. B248.

B. 2000: PricewaterhouseCoopers Audits Medtronic Royalty Payments and Reports that Medtronic Apportions the Sales Price of Stent Systems

A little over a year later, Dr. Blake Bichlmeir, who replaced Kitty Knox as DuPont's manager of the PACRA relationship with Medtronic, began suspecting that DuPont wasn't "[redacted]" in its quarterly royalty reports. B361-62. DuPont engaged PwC to audit Medtronic's royalty payments under the PACRA "on [DuPont's] behalf." A360; *see also* A352.

PwC sent a letter to Medtronic requesting that Medtronic provide certain documents and information necessary for PwC to complete its royalty audit. B279-82. Among other things, PwC requested that Medtronic provide a "detailed description of the sales and royalty calculation systems," a "detailed description of methodology used to identify all royalty-bearing sales, as well as the procedures for calculating the relevant royalties under the [PACRA]," and a list of all products offered by Medtronic, including products that used a Material or Technology and products that did not use a Material or Technology and "thus, are excluded from the royalty calculation." B281. PwC also requested "access to [Medtronic's] sales journals for each month/quarter under examination, which should include the net sales amount and quantity sold relative to each royalty bearing catheter and medical device Product, as well as non-royalty bearing products." *Id.*

From October 15 to October 19, PwC was on-site at Medtronic's offices meeting with Medtronic employees and reviewing Medtronic records. A521; B284-86. PwC auditor Michael Swan recalled nothing that raised questions about Medtronic's honesty or candor during the audit, and he did not believe that anyone at Medtronic was hiding anything or being dishonest. A546-47.

On December 12, 2000, PwC issued its final report to DuPont. A379. PwC informed DuPont that Medtronic was using the PACRA formula for apportioning stent system sales because stents are Related Products:

> Pursuant to Article II(D)(i) of the Bard Agreement [i.e., the PACRA], 'If any such Product is sold with any Related Product, Selling Price [i.e., the royalty base] means the amount obtained by multiplying the invoice price for such sale by a fraction, the numerator of which is the Factory Cost of such Product to Bard ... and the denominator of which is the Factory Cost of such Product plus the Related Product sold in conjunction therewith ....' *In connection with this engagement, we noted that Medtronic AVE applies this provision to the Selling Price of stent products. This appears reasonable given that stents include Related Products.*

A380 (emphasis added). Separately, PwC reported to DuPont that Medtronic was a party to a sublicense agreement with Cordis and that PwC's testing included reviewing "the relevant sublicense agreements and correspondence" with Cordis, as well as the reports of payments coming in to Medtronic from Cordis and payments going out from Medtronic to DuPont. *Id.*

C. 2000 – 2001: DuPont Internal Correspondence Confirms the Information Available to DuPont about Apportionment

Internally, DuPont communicated that its royalties for stent system sales were based on an apportioned price. On multiple occasions throughout 2000, Bichlmeir emailed his colleagues about Medtronic's royalty reports, each time noting that DuPont benefits from Medtronic's success in penetrating the stent market because the "nylon balloons, part of the S670 [stent] system, generate royalties to DuPont." B270; B273; B276.

In June 2001, Bichlmeir sent another email to colleagues at DuPont with a draft term sheet for a new licensing and development agreement. Bichlmeir contrasts his proposal with Medtronic's current practice of calculating royalties:

> We [DuPont] propose to change payments significantly from current practice. Under the old Bard angioplasty balloon agreement, compensation to DuPont depended solely on royalties on patents. Payments were based on a percentage of the cost of manufacture for the product sub-unit in question, in that case the balloon structure itself. The calculation was based on the manufacturing cost of the balloon as a percent of the manufacturing cost of the total catheter system times a stepped set of royalty rates.

B290. That is, Bichlmeir acknowledged to his colleagues in 2001 that the then "current practice" was for Medtronic to pay royalties on an apportioned sales price of stent systems.

D. 2003 – 2006: Medtronic's Termination of Royalties and the Deloitte & Touche Audit

Consistent with the provisions of the 1999 PACRA amendment, in early 2003, Medtronic [redacted]

[redacted]. B384. DuPont first acknowledged that Medtronic was no longer paying royalties on its stent system sales in December 2003. B296. Later, in December 2005, DuPont requested and Medtronic provided express written confirmation that it had ceased paying royalties on its sales of stent systems. B304; B306. DuPont asserted in this case that Medtronic breached the PACRA when it terminated royalty payments in July 2003, B346-48, but the Superior Court found that this claim was time-barred and, in the alternative, that it failed on the merits. Add. 33-36, 70-71. DuPont has not appealed those rulings, and has stated that it here seeks only "royalties owed by Medtronic for the period of 1999 to 2003."[1] Br. 4.

In 2003, shortly after Medtronic's royalty payments ceased, DuPont retained Deloitte to conduct a "Royalty Investigation" of Medtronic's royalty payments under the PACRA. A425. On December 24, 2003, Medtronic's Marlon Housman sent Don Loveday and others at DuPont an email expressing surprise at the scope of the information Deloitte was seeking as part of its testing, stating "Medtronic's relationship with DuPont (through AVE and Bard) has a long history and non-balloon products have never been subject to a royalty to our knowledge, and by their nature are unlikely to utilize any covered technology...." B301.

[1] DuPont has not identified the specific end date of its claim in 2003, but the only logical conclusion is that it is July 5, 2003.

Prior to Deloitte's fieldwork at Medtronic, Medtronic [redacted] A461. Deloitte audited Medtronic from 2003 until 2006. DuPont had significant input into Deloitte's procedures, was aware of what Deloitte was doing, and had sole responsibility for the sufficiency of the procedures. B335-36; B398. During the audit, Deloitte—like PwC before it—learned that Medtronic was paying royalties on apportioned stent system sales. B326-28; B396-97.

Deloitte prepared a draft of its audit report dated August 4, 2006. B335. That draft notes that Deloitte had already informed DuPont that Medtronic "calculates royalties on 44% of the stent sales to quantify balloon portion of the stent sales," and that DuPont "disagreed" with Medtronic. B337. Further, DuPont had, by no later than August 4, 2006, "directed" Deloitte to recalculate royalties on stent systems without apportionment. *Id.*

IV. The Superior Court's Rulings

After extensive discovery and substantial briefing the Superior Court issued a detailed opinion granting summary judgment against DuPont on all claims. DuPont appeals only two of the Superior Court's five statute of limitations rulings: (1) that DuPont's claim that Medtronic improperly paid royalties on an apportioned price of stent systems sales was time-barred, Add. 36-46; and (2) that DuPont's

claim that Medtronic improperly calculated royalties on Cordis sales was time-barred, Add. 46-49.

Delaware's limitation period for breach of contract is three years, but the parties had entered into a tolling agreement effective August 25, 2009, making August 25, 2006 the relevant date. DuPont bore the burden of proving both that a tolling doctrine applies and that DuPont was not on inquiry notice of its claims by that date. Add. 31. Relying on the evidence above, the Superior Court concluded that, prior to the critical date, DuPont was on inquiry notice regarding the apportionment claim for Medtronic's sales, and that DuPont had failed to produce any evidence that Medtronic fraudulently concealed how it was calculating royalties. Add. 36-46. It also concluded that DuPont's claims based on Cordis sales were untimely because they were not inherently unknowable. Add. 46-49.

Though unnecessary to its judgment, the Superior Court also ruled that, on the merits, Medtronic was correct to pay royalties on a portion of the selling price of stent systems because the stents sold in stent systems are Related Products under the PACRA. Add. 60-70. The Superior Court had also previously ruled (twice) that the contents of a draft letter prepared by Medtronic's in-house counsel was privileged, Add. 78-79, 81-91, yet DuPont continues to use it, Br. 8, citing A235.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT TO MEDTRONIC BECAUSE DUPONT'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

A. Questions Presented

Was DuPont on "inquiry notice" of its breach of contract claims for Medtronic and Cordis sales of stent systems before August 25, 2006? Did Medtronic fraudulently conceal that it was not paying royalties on the stent portion of its stent systems? If the issue is not waived, was the manner in which royalties were calculated and paid on Cordis sales inherently unknowable? Is a letter drafted by Medtronic's former general counsel in response to a request for legal advice protected by the attorney-client privilege?

B. Scope of Review

This Court's review is *de novo*. *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 833 (Del. 1992) (summary judgment); *SmithKline Beecham Pharm. Co. v. Merck & Co.*, 766 A.2d 442, 450 (Del. 2000) (legal standard for statute of limitations); *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 371 (Del. 2011) (application of attorney-client privilege).

C. Merits of DuPont's Argument

A party asserting a claim for breach of contract generally has three years from the date the cause of action accrued to file suit. 10 *Del. C.* § 8106. DuPont's cause of action accrued in 1999, when Medtronic first allegedly breached the

PACRA by crediting royalties on a portion of the price of stent system sales. *See In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998) ("the cause of action accrues, at the time of the alleged wrongful act"), *aff'd*, 725 A.2d 441 (Del. 1999) (Table). On August 25, 2009, a decade after its cause of action accrued, DuPont executed a tolling agreement with Medtronic. A503. So DuPont bears the burden of demonstrating that (1) some tolling doctrine stretches its right to sue all the way to August 25, 2006 (three years prior to the tolling agreement), and (2) DuPont was not placed on inquiry notice of its claims prior to August 25, 2006. *CertainTeed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6-7 (Del. Ch. Jan. 24, 2005) (citing *Wal–Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312 (Del. 2004)); *U.S. Cellular v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 504 (Del. 1996) (burden is on the plaintiff to establish tolling).

DuPont failed to produce evidence that could lead a reasonable jury to conclude that the limitations period was tolled until August 25, 2006. *See Smith v. Del. State Univ.*, 47 A.3d 472, 477 (Del. 2012) (reciting reasonableness standard for summary judgment). For its claims concerning both Medtronic and Cordis sales, the evidence establishes that DuPont was put on inquiry notice of its claims numerous times over the 7 year period from 1999 to 2006. Indeed, Medtronic produced evidence of DuPont's actual notice, which exceeds the inquiry notice standard that applies. The undisputed evidence of inquiry notice alone supports

affirming the judgment. In addition, DuPont failed to produce evidence that could support a jury's finding that a tolling doctrine ever applied. There is no evidence that could support a reasonable judgment that Medtronic either fraudulently concealed that it was paying royalties based on an apportionment of stent system sales, or that DuPont's breach of contract claims were inherently unknowable.

1. Prior to August 25, 2006, DuPont was on Inquiry Notice of Both the Medtronic and Cordis Claims

The limitations period runs no later than whenever DuPont had enough information to put it on "inquiry notice" of its claims. That is, even if DuPont could create a fact issue over whether a tolling doctrine (like fraudulent concealment or an inherently unknowable injury) applied, such tolling ceases once DuPont is put on "inquiry notice." *Dean Witter*, 1998 WL 442456, at *6.

"Inquiry notice does not require full knowledge of the material facts; rather, plaintiffs are on inquiry notice when they have sufficient knowledge to raise their suspicions to the point where persons of ordinary intelligence and prudence would commence an investigation that, if pursued would lead to the discovery of the injury." *Pomeranz v. Museum Partners, L.P.*, 2005 WL 217039, at *3 (Del. Ch. Jan. 24, 2005). The inquiry notice standard is objective. *Dean Witter*, 1998 WL 442456, at *6. What matters is what a reasonable person, exercising reasonable diligence, in light of the information in his or her possession, would have inquired

about and discovered. *Pomeranz*, 2005 WL 217039, at *3; *see also Coleman v. PricewaterhouseCoopers, LLC*, 854 A.2d 838, 842 (Del. 2004).

a. Apportionment of Stent System Sales

DuPont claims Medtronic breached the PACRA by paying royalties based on an apportioned price of both Medtronic's and Cordis's stent systems. DuPont was repeatedly given information from 1999 to August 2006 that Medtronic was apportioning stent system sales. DuPont ignores some of the evidence, offers only distractions from the rest, and has failed to create a genuine issue of fact.

***The Royalty Audits*:** DuPont twice had Medtronic's royalty payments audited. On both occasions, its auditor expressly informed DuPont that Medtronic was paying royalties on only a portion of the price of stent systems. This evidence *alone* fully supports the judgment.

In December 2000, PwC reported to DuPont that Medtronic was applying "Article II(D)(i) of the [PACRA]" to "the Selling Price of stent products." A380. That is the provision of the PACRA that sets forth the formula for apportioning royalties when a Related Product is sold with a Product for a single price. A108-09. The report even endorses the decision to apply this provision of the PACRA to "stent products" because "stents include Related Products." A380. PwC was unambiguous: items that Medtronic is selling for a single price that include stents are generating royalties to DuPont on only a portion of the full invoice price.

DuPont claims PwC was reporting that Medtronic was applying the apportionment formula found in Article II(D)(i) of the PACRA to "stent system kits … sold in conjunction with items … such as pumps, guidewires, or introducers." Br. 37. But this *cannot* be what PwC was referring to because the apportionment formula of Article II(D)(i) of the PACRA applies only to items sold for a single invoice price; there is no price to apportion if the non royalty-bearing item is separately priced. A108-09. DuPont asserts that "introducers and pumps" were sold "in conjunction with stent systems," Br. 37, but, as the evidence DuPont cites shows, stent systems were never sold *for a single price* with introducers and pumps. A927-28. [redacted], *see* B311-23, so they could not have been the basis for any apportionment.

A reasonably prudent person could not have read the PwC report the way DuPont now claims. DuPont points to a declaration it submitted in opposition to summary judgment that reflects the misreading of the PwC report its lawyers have concocted. A1221. But neither DuPont nor the accountant who submitted the declaration ever explained how a separately priced, non royalty-bearing item could play any role in the apportionment formula of the PACRA. A reasonably prudent person who looked at what PwC said and paid attention to the PACRA's apportionment formula would have looked only at the components of items sold for a single price. At a minimum, such a prudent person would have investigated

whether PwC was referring to the components of stent systems, which are sold for a single price. *See Pomeranz*, 2005 WL 217039, at *15 (a plaintiff must "act with reasonable alacrity once [it has] reason to suspect that [its] rights were injured").

Deloitte, too, clearly informed DuPont about apportionment of stent system sales under the PACRA. The August 4, 2006 draft report Deloitte had prepared is explicit that (1) Medtronic "calculates royalties on 44% of the stent sales to quantify balloon portion of the stent sales" and (2) the auditors "discussed this matter with DuPont and DuPont disagreed" with Medtronic on the issue. B337; *see also* B308; B326-28; B396-97; B399.

DuPont has nothing to say about the fact that Deloitte identified the issue and discussed it with DuPont. Instead, it quibbles over whether any *written* report was received prior to August 25, 2006. Br. 33-34. Receipt of the written report is superfluous; what matters is that the draft report leaves no doubt that Deloitte had delivered the information to DuPont. The fact that Deloitte "discussed" how Medtronic was calculating royalties on stent products is no less dispositive than evidence that Deloitte wrote it down and handed it to DuPont.

In addition, Deloitte performed the audit as DuPont's agent because DuPont expressly retained Deloitte to conduct the royalty inspection on its behalf. B293-94; B298-99; B335-36. *See, e.g., Cox v. Dean*, 1994 WL 466312, at *3 (Del. Super. July 29, 1994). Deloitte's notice and knowledge are therefore imputed to

DuPont. *See, e.g., Lawhon v. Winding Ridge Homeowners Ass'n, Inc.*, 2008 WL 5459246, at *11 n.76 (Del. Ch. Dec. 31, 2008); *J.I. Kislak Mortg. Corp. v. William Matthews Builder, Inc.*, 287 A.2d 686, 689 (Del. Super. 1972), *aff'd*, 303 A.2d 648 (Del. 1972). Imputation is particularly appropriate here because an agreement expressly permitted Deloitte to "[redacted]." A461.

Internal DuPont Documents and Communications from Medtronic about Royalty Calculations for Stent Systems: The audit evidence alone suffices to affirm the judgment. But other unrefuted evidence provides independent confirmation of the Superior Court's ruling.

In 2001, Bichlmeir explained to his colleagues that a new agreement he wanted to propose would "change payments significantly from current practice." B290. He further explained what the "current practice" (under the PACRA) was: "[C]ompensation to DuPont depended solely on royalties on patents. Payments were based on a percentage of the cost of manufacture for the product sub-unit in question, in that case the balloon structure itself. The calculation was based on the manufacturing cost of the balloon as a percent of the manufacturing cost of the total catheter system times a stepped set of royalty rates." *Id.*

According to DuPont, the Superior Court should have ignored what Bichlmeir wrote because in a deposition he denied meaning what he wrote. Br. 31.

But Bichlmeir merely testified that he thinks he was mistaken about what the PACRA required. A802-04. Whether Bichlmeir *agreed* with Medtronic's decision to apportion is not the issue. The issue is whether Bichlmeir had enough information to cause a reasonably prudent person to inquire whether Medtronic was paying royalties only on a portion of stent system sales. *Coleman*, 854 A.2d at 842. Someone who had enough information to describe Medtronic's royalty payments as Bichlmeir did, even if, as he asserted during his deposition, the description was "[redacted]," A802, certainly had enough information to inquire further about what Medtronic was, in fact, doing.

That by 2001 Bichlmeir had enough information to inquire further about Medtronic's royalty calculation is confirmed by his repeated emails to others at DuPont reporting on Medtronic's royalty payments. Bichlmeir repeatedly touted to his colleagues the royalties flowing to DuPont from Medtronic's successful stent systems, explaining that the "nylon balloons, part of the S670 [stent] system, generate royalties to DuPont." B270; B273; B276. What he supposedly wrote down off the top of his head was the same thing he had told others at DuPont for a year: DuPont receives royalties only on a portion of Medtronic's stent systems.

Bichlmeir was not the only DuPont employee with enough information to trigger a reasonably prudent person to at least inquire further. From the outset of the Medtronic and DuPont relationship, Medtronic told DuPont that it was

planning to pay royalties on only a portion of the sales price of stent systems, and DuPont's contemporaneous documents provide undisputed evidence that DuPont understood that negotiations in the spring of 1999 were about *how*, not *whether*, the sales price for stent systems would be apportioned. DuPont has produced no documents reflecting a different understanding at the time.

On April 13, 1999, Medtronic sent DuPont a letter attaching a spreadsheet that projected DuPont royalties based on only a portion of the stent system. A244-45. DuPont's Kitty Knox used Medtronic's projections as the basis for her own calculations to determine the most advantageous way for DuPont to calculate royalties. B245 ("Coronary stents: if calc acc to agreement portion att to balloon"). Knox, like Medtronic, did not calculate royalties on the price of whole stent systems. *Id.* DuPont contends that these projections should be ignored because they were sent in response to a request for "a sales forecast for nylon products." Br. 36, citing A234. But it does not matter *why* they were sent. What matters is what information they convey to DuPont. The cover letter states unequivocally that the spreadsheet "projects DuPont royalties for the next five years," A239, and the spreadsheet itself identifies royalties on only a portion of the sales of "Coronary Stents" attributable to "balloon[s]," A244-45. Charles Molnar's notes, which DuPont does not even acknowledge exist, also calculate royalties on only a portion of stent system sales. B240.

DuPont tries to sweep away all of the evidence of the discussions between DuPont and Medtronic in Spring of 1999, arguing that royalty payments had not yet been made so this evidence is irrelevant. Br. 34-35. That is wrong. By no later than March 1999, Medtronic was calculating royalties by apportioning stent systems and drawing down a royalty credit based on that apportionment. B243. DuPont does not and cannot explain why the calculation of royalties to draw down a credit is any different from writing a check. For limitations purposes, they are the same. *See Dean Witter*, 1998 WL 442456, at *4 ("the cause of action accrues, at the time of the alleged wrongful act"). In any event, what Medtronic told DuPont it was going to do when calculating royalties is part of the mix of information that establishes inquiry notice, even if the precise "harm" that Medtronic said was coming did not materialize until later. *See* Add. 40 n.113.

DuPont shifts from distraction to distortion in its effort to escape the import of its own internal documents. DuPont claims that in April 1999 Medtronic proposed to change the definition of "Product" to permit Medtronic to avoid paying royalties on stents, and that since DuPont rejected the proposal it was "left to believe Medtronic would not be withholding royalties on stents." Br. 35, citing A247; A251; A343. But neither the 1999 amendment, nor Medtronic's prior proposals, had anything to do with stents. Medtronic's proposal was about whether Medtronic would pay royalties on *balloons* that it had developed

independently of DuPont before inheriting the PACRA. This is clear from the fact that the products it discusses are expressly thought to be potentially subject to coverage under a Levy patent. *See* A248-49.

Finally, in December 2003, Medtronic's Marlon Housman sent Don Loveday and others at DuPont an email stating that "non-balloon products have never been subject to a royalty to our knowledge, and by their nature are unlikely to utilize any covered technology ...." B301.

In sum, the documents provide unrefuted evidence that DuPont repeatedly received and knew all the information a reasonably prudent person would need to inquire into whether Medtronic was paying royalties on only a portion of stent systems sales, its own and Cordis's. DuPont cannot explain that evidence away, any more than it can explain away the fact that its auditors twice specifically told DuPont how Medtronic was calculating royalties on sales of its stent systems.

b. The Claim Unique to Cordis Sales

DuPont's claim regarding Cordis sales is that Medtronic "failed to follow the PACRA in computing royalties owed on Cordis sales." Br. 19. To the extent DuPont is asserting that Medtronic should not have apportioned Cordis's stent system sales at all, then all the evidence discussed above establishes inquiry notice. Because DuPont was on inquiry notice that Medtronic paid royalties after

apportioning its own stent system sales, it likewise was on inquiry notice that Medtronic would pay royalties after apportioning Cordis's stent system sales.

DuPont may also be arguing that even if Medtronic could apportion Cordis's stent system sales, it applied the wrong apportionment formula. The evidence establishes inquiry notice time-barring this claim as well. Simply asserting a different version of its breach claim as to Cordis sales does not change the result. Having been put on inquiry notice of the (supposed) breach by apportioning at all, the law treats DuPont as on notice for all versions of the breach with respect to those sales. *Dean Witter*, 1998 WL 442456, at *7 ("Inquiry notice does *not* require ... plaintiffs' awareness of all of the aspects of the alleged wrongful conduct.") (emphasis in original); *U.S. Cellular*, 677 A.2d at 504 n.7; *CertainTeed*, 2005 WL 217032, at *11 (where plaintiff had reason to suspect breaches of representations relating to two facilities, plaintiff "could not fail to act with diligence as to other possible instances of non-compliance" with respect to a third facility). DuPont knew enough to spur a reasonable person to conduct a prudent investigation into how royalties were being calculated and paid for Cordis sales, just as it knew enough to spur such an investigation for Medtronic sales. *See* Add. 49 ("PwC's Final Report's finding that Medtronic was apportioning Medtronic's stent products in some capacity, should have raised DuPont's suspicions that Medtronic also may have been apportioning Cordis sales.").

c. Notice of Termination of Royalty Payments for Medtronic Sales in 2003 Bars DuPont's Claims

There is yet another independent reason why DuPont's beach of contract claim for miscalculation of royalty payments on stent systems is time barred. The 1999 PACRA Amendment provided that all royalty obligations for sales of Medtronic's Products would cease on July 5, 2003. Medtronic did not pay royalties on any of its sales after that date. In late 2003 and certainly no later than 2005, DuPont knew that Medtronic had stopped paying royalties entirely on its own sales of stent systems. B304; B306. DuPont believed that was a breach of the PACRA and asserted that breach in this case. B346-48. The Superior Court ruled that this claim was time-barred, and in the alternative ruled that Medtronic had not breached the PACRA by terminating royalty payments on sales after July 5, 2003. DuPont has abandoned that breach of contract claim on appeal, but it remains relevant to the timeliness of the claims it continues to pursue.

As noted above, Delaware law does not require that DuPont know *every way* in which Medtronic allegedly was breaching the PACRA for DuPont to be put on inquiry notice of all of its PACRA royalty claims. *Dean Witter*, 1998 WL 442456, at *7. Rather, "whatever is notice calling for inquiry is notice of everything to which such inquiry might have led." *Pomeranz*, 2005 WL 217039, at *14 (quoting *U.S. Cellular*, 677 A.2d at 504 n.7). Notice of its breach for failure to continue

paying royalties on Medtronic sales after July 2003 therefore bars the claims DuPont has pursued on appeal.

The evidence that DuPont knew before 2006 that Medtronic had stopped paying royalties on its sales in 2003 is irrefutable. DuPont acknowledged that Medtronic was no longer paying royalties on its stent system sales in December 2003. B296. By December 2005, DuPont requested and Medtronic provided express written confirmation that payments had ceased. B304; B306. Not only is the evidence unrefuted, but, at this point, DuPont may not even try to refute it.

DuPont's decision to not appeal this issue means that the Superior Court's ruling that DuPont was on notice of this claim prior to 2006, Add. 34-36, has not been and cannot be challenged. The failure to appeal means that the ruling on this breach of contract issue is final, even as DuPont seeks a different disposition as to other issues. "Common issues that have been resolved in the first disposition are precluded in reaching the second disposition." 18 Wright, Miller & Cooper, *Federal Practice & Procedure* § 4418 (2d ed. 2002) (discussing direct estoppel).

When DuPont was put on notice of a supposed breach for *ceasing* payments under the PACRA on stent systems (no later than 2005), its obligation to diligently pursue information regarding its claims based on failing to pay the proper *amount* under the PACRA was triggered. Inquiry notice bars DuPont's claims for this additional independent reason.

2. Medtronic did not Fraudulently Conceal DuPont's Claims nor were They Inherently Unknowable

All the evidence establishing inquiry notice suffices, without more, to end the case. *See Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 363845, at *7 (Del. Ch. Jan. 27, 2010). But even if DuPont had created an issue of fact about its inquiry notice, it still would have to have produced evidence that some tolling doctrine applied prior to August 25, 2006 that prevented the statute of limitations from running on its claims. DuPont failed to do so.

a. The Claim Based on Medtronic Sales

DuPont asserts that Medtronic fraudulently concealed that it was paying royalties based on a portion of its stent system sales. Br. 27-30. Fraudulent concealment "requires the twin showing of (a) the defendant's knowledge of the alleged wrong, and (b) an affirmative act of concealment by the defendant." *Lecates v. Hertrich Pontiac Buick Co.*, 515 A.2d 163, 176 (Del. Super. 1986). DuPont failed to produce evidence of either.

There is no evidence that Medtronic believed that the PACRA required it to pay royalties on the sales price of stent systems as a whole, and thus no showing that Medtronic possessed "knowledge of the alleged wrong," which it then concealed. *See SmithKline*, 766 A.2d at 450 (concealment must be fraudulent). The evidence shows that Medtronic consistently understood that it should pay royalties on only a portion of stent systems sales. A239-45; B301; B374-76; B406.

In fact, there is evidence that Medtronic had objective reason to believe that it was proper to apportion the sales price of stent systems. Before Medtronic had stepped into the PACRA, Bard had decided to pay royalties on only a portion of stent systems. B414. When Bard sold its stent business to AVE, it warranted that it was not in breach of its agreements, including the PACRA. B102-03; B199-200. So when Medtronic purchased AVE, and conducted appropriate diligence, it would have seen that Bard vouched for the interpretation of the PACRA that Medtronic ultimately adopted.

There is also no evidence that Medtronic engaged in any "affirmative act of concealment." The only supposed acts of concealment asserted on appeal are Medtronic's quarterly royalty reports, which were in the same form that Bard had used. *Compare* A317 *with* B53. The royalty reports, unlike Medtronic's internal sales records, did not explain that Medtronic was treating stents as Related Products, upon which no royalties were owed. Br. 28-29 (accusing Medtronic of keeping "two books," with the one shared with DuPont "scrubbed of information" that would have alerted DuPont to apportionment). But as the Superior Court recognized, Add. 37-38, and as DuPont acknowledges, Br. 29-30, the PACRA required Medtronic to report the "cumulative Selling Price of all Products" sold. *See* A125-26. As the capitalization makes clear, "Selling Price" is a defined term, and it allows for the report of the *apportioned* price of items, like stent systems.

A108-09. The PACRA did not require disclosure of the underlying apportionment calculation. The PACRA did require Medtronic to maintain its internal records (the "second set of books"), which DuPont could audit. A126-127. There is no evidence DuPont's auditors were prevented from reviewing and reporting on Medtronic's records. To the contrary, as noted above, *supra*, pp. 21-24, the auditors accurately reported that Medtronic was apportioning the sales price of stent systems. Since Medtronic followed the PACRA in disclosing only the apportioned "Selling Price" of stent systems, it did not act fraudulently. *Lecates*, 515 A.2d at 176 (silence does not toll limitations period).

b. The Claim Based on Cordis Sales

DuPont has failed to identify in its brief any tolling doctrine that it believes applies to its claim based on Cordis sales. DuPont discusses inquiry notice with respect to this claim. Br. 20-26. But, as noted above, the absence of inquiry notice is helpful to DuPont *only if* a tolling doctrine applies. Having failed to argue in its brief that any tolling doctrine applies to its Cordis claim, DuPont has waived the issue. Del. Supr. Ct. R. 14(b)(vi)(A)(3); *Roca v. E.I. du Pont de Nemours and Co.*, 842 A.2d 1238, 1242-43 (Del. 2004).

The Superior Court discussed whether DuPont had produced evidence that the Cordis claim was "inherently unknowable." Add. 48-49. Even if DuPont has preserved the issue, the claim still fails on the merits.

To establish tolling based on inherently unknowable injuries, DuPont had to produce evidence that it was a "practical impossibility" to discover the manner in which royalties were calculated on Cordis sales, *Dean Witter*, 1998 WL 442456, at *5, and that DuPont was "blamelessly ignorant" of the wrongful act and the injury, *Burrell v. AstraZeneca LP*, 2010 WL 3706584, at *5 (Del. Super. Sept. 20, 2010).

The 2000 PwC report makes clear that DuPont could have learned through diligent inquiry how royalties were calculated and paid on Cordis sales. In that report, PwC states that it reviewed "the sublicense net revenue included on the Royalty Reports submitted by Medtronic" and "agree[d] said amounts to the reports submitted by the Sublicensees to Medtronics AVE [sic]." A380. In other words, PwC looked into whether the payments that Medtronic provided to DuPont for Cordis sales "agree[d]" with what the PACRA required given the money that was coming into Medtronic from Cordis. PwC's review also included, as PwC's report makes clear, "the relevant sublicense agreements and correspondence" with Cordis. *Id.* One of those agreements was the Levy Addendum, which provided a different formula for apportioning the sales price of stent systems than the formula in the PACRA. Add. 12-13.

DuPont argues that PwC did not know that Medtronic was paying royalties based on the Levy Addendum apportionment formula rather than the PACRA's formula. Br. 23-24. But it does not matter whether PwC figured that out; to

establish that the claim was inherently unknowable, DuPont has to produce evidence that PwC *could not have* figured it out. *Dean Witter*, 1998 WL 442456, at *5. The evidence flatly refutes that suggestion, as PwC stated that Medtronic did not [redacted]. A546-47. PwC had access to all the information needed to uncover this claim, including the Levy Addendum, the royalty reports from Cordis to Medtronic, the PACRA, and the reports from Medtronic to DuPont. The claim was not "inherently unknowable."

For the same reason, DuPont's denial of any agency relationship with the auditor it hired to conduct the royalty audit is also beside the point. Whether DuPont is deemed to know everything PwC knows does not make DuPont's claim any more or less knowable. DuPont insinuates that PwC would have refused to disclose any discrepancy in payments for Cordis sales "because of PwC's confidentiality concerns and practice." Br. 26. But the evidence shows only that PwC's auditor would not share his "underlying work" with his client in his report and that he would ask for permission to share confidential material with his client. Br. 26, citing A513-15; A527-28. There is simply no evidence that supports the assertion that PwC would have thought itself constrained to keep from DuPont any conclusion that Medtronic had been improperly paying royalties. Indeed, PwC's auditor expressly said he would have [redacted]. A544.

3. The Superior Court Properly Ruled that a Draft Letter Sent from Medtronic's Former General Counsel to Medtronic Employees was Privileged

The Superior Court properly ruled that a letter drafted by Medtronic's former general counsel, Lawrence Fassler, and never sent to DuPont, was privileged. A235. Fassler received the information at issue from Medtronic employees in connection with a request for his legal advice about "[redacted]," B355, which advice Fassler provided, B356. *See also* B358 (privilege log entry for email attaching draft letter). "[A] party cannot be compelled to disclose the facts he communicated to his attorney to enable the attorney meaningfully to dispense legal advice." Add. 86; *Cincinnati Bell Cellular v. Ameritech Mobile Phone Servs.*, 1995 WL 347799, at *2 (Del. Ch. May 17, 1995). Medtronic's disclosure of other facts related to the same subject does not waive the privilege, because those facts were not privileged. Add. 88-90.

In any event, the contents of the letter are immaterial here, as the Superior Court later observed. Add. 38, n.105. The record refutes DuPont's assertion that because this draft letter was excluded, DuPont never learned that Medtronic believed that royalties were going to be paid on only a portion of sales of stent systems. *See* Br. 38. DuPont learned just that less than two weeks later, when Medtronic's Brister sent the spreadsheet projecting royalty payments on only a portion of stent systems sales. A239; A244-45.

II. A STENT SOLD IN A STENT SYSTEM IS A "RELATED PRODUCT" UPON WHICH NO ROYALTIES ARE OWED

A. Question Presented

Is a stent sold in a stent system a "Related Product" under the PACRA?

B. Scope of Review

This Court reviews contract interpretation and summary judgment *de novo*. *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012).

C. Merits of DuPont's Argument

The Court should ascertain the parties' intent from the PACRA's language in light of their reasonable expectations. *See Comet Sys., Inc. S'holders' Agent v. MIVA, Inc.*, 980 A.2d 1024, 1030 (Del. Ch. 2008). The Court must "construe the agreement as a whole, giving effect to all provisions therein." *Riverbend*, 55 A.3d at 334. Courts "harmonize[]" a contract's provisions, avoiding "unreasonable results." *Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1063 (Del. 2010).

The PACRA defines a "Product," in relevant part, as a "Catheter" that utilizes a Material or Technology developed by DuPont. A110-11. A Product sold on its own generates royalties to DuPont on its entire Selling Price. A108.

In contrast, when a Product is sold in conjunction with "products or materials" that do not contain Material or Technology developed by DuPont—defined as a "Related Product"—the invoice price of the entire unit is apportioned. A108-09. This provision rewards DuPont for its contributions, but mitigates

against DuPont receiving a windfall in the event Bard (or later Medtronic) were to package and sell a royalty-bearing Product, like a balloon catheter, "in conjunction" with a non royalty-bearing item, like a stent, for a single price.

DuPont proposes to read the definition of "Catheter" in the PACRA to frustrate the purpose of the PACRA's provisions for apportioning the selling price of items sold with both Products (including "Catheters") and non royalty-bearing "Related Products." In an effort to recover royalties for the sales of stents that DuPont had nothing to do with developing, DuPont proposes to treat stents as merely a "part" of a "Catheter." Br. 14-15. If, as DuPont proposes, separately developed and at one time separately sold items become "part" of a "Catheter" merely because Medtronic (or Bard) decides to sell those items together for a single price, it is hard to see what purpose the PACRA's definition of Related Products and its apportionment formula serves. As the Superior Court recognized, DuPont's reading fails when the PACRA is "view[ed] ... in its entirety." Add. 68. *See Riverbend*, 55 A.3d at 334-35 ("The meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement's overall scheme or plan."). The definitions of "Related Product," "Product," and "Selling Price" simply fail to function if DuPont can treat items packaged with a Product that is a Catheter as simply a "part" of the Catheter. *See* Add. 69-70.

When the Superior Court noted that stents are "not glued, bonded, [or] fused" to balloon catheters, Add. 68, it was not adding "requirements" to PACRA definitions, as DuPont asserts, Br. 16. It was appropriately considering all the facts about the items in question in light of all the terms of the PACRA and their evident purpose. Determining how to *apply* the terms of the PACRA to stent systems required considering how stents and balloon catheters are put together in the single unit. DuPont apparently believes that a contract is best interpreted without consideration of all the facts germane to the subject of the contract and the contract as a whole. Delaware law is to the contrary.

CONCLUSION

For all of the foregoing reasons, the Superior Court's judgment in favor of Medtronic should be affirmed.

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