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Case Number 253,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHARTER COMMUNICATIONS HOLDING COMPANY, LLC, CHARTER COMMUNICATIONS OPERATING, LLC, and BRIGHT HOUSE NETWORKS, LLC,	)	
Plaintiffs Below, Appellants,	)	No. 253, 2025
v.	)	Court Below:
SONUS NETWORKS, INC. and RIBBON COMMUNICATIONS OPERATING COMPANY, INC.,	)	Superior Court of the State of Delaware C.A. No. N22C-09-529 EMD [CCLD]
Defendants Below, Appellee.	)	**REDACTED PUBLIC VERISON FILED: AUGUST 15, 2025**

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

The Superior Court erroneously dismissed Plaintiffs' $150 million indemnity action on summary judgment by disregarding hotly-disputed issues of material fact, ignoring governing law, and fundamentally misconstruing the contracts at issue.

The case involves the indemnification provisions of three purchase contracts ("Indemnification Agreements" or "Agreements") under which Defendants ("Ribbon") promised to indemnify Plaintiffs ("Charter") for claims made against Ribbon products. The Agreements, in turn, provide that Charter will give Ribbon prompt notice of an indemnifiable action. None of the Agreements require that the notice contain any specific information or language, and none mandate a specific time by which the notice must be provided. Moreover, two of the Agreements expressly state that failure to provide notice does not relieve Ribbon of its indemnification obligations unless that failure "prejudiced" Ribbon's ability to defend the action. The third Agreement contains a similar prejudice exception by operation of law.

In December 2017, Sprint Communications sued Charter for infringement of fifteen patents directed to the Voice over Internet Protocol ("VoIP") equipment that Ribbon sold to Charter pursuant to the Indemnification Agreements. The Charter suit was but one in a highly-publicized, long-running patent litigation campaign that Sprint initiated in 2005 against virtually all providers of VoIP telephone services, a

campaign in which Sprint asserted that it held a large portfolio of seminal VoIP patents. In 2018, 2019, and 2020, Charter provided Ribbon with separate notices of the Sprint action. Nevertheless, Ribbon refused to indemnify Charter, forcing Charter to bring this lawsuit to enforce its indemnification rights.

Ribbon moved for summary judgment, alleging that while Charter's 2018 and 2019 notices did identify Sprint's action against Charter, they were insufficiently formal to constitute proper notice under the Indemnification Agreements. And while Ribbon conceded that Charter's 2020 notice was sufficiently formal, it alleged this notice was sent too late to be considered "prompt." Ribbon also alleged that a provision in the Agreements requiring that Charter allow Ribbon to control the defense was, in effect, a separate, independent notice requirement that obligated Charter to formally offer Ribbon control of the Sprint action, and that Charter failed to make that offer of control.

The Superior Court agreed with Ribbon on all counts and granted summary judgment against Charter three weeks before trial. In so doing, it improperly decided disputed issues of fact regarding notice and prejudice. Along the way, the court misconstrued the Indemnification Agreements and ignored the Delaware and New York law which govern them. This Court should reverse.

SUMMARY OF ARGUMENT

1. The Superior Court's analysis of Charter's 2018 and 2019 notices to Ribbon contains many reversible errors.

a. Relying on a dictionary definition, the Superior Court held that the word "notice" in the Agreements means "formal notice." The court then held that while Charter's 2018 and 2019 notices did notify Ribbon of the Sprint action against Charter (the "Sprint/Charter Action"), the notices were not "formal" and therefore did not trigger Ribbon's indemnification obligations. That was a threshold legal error because the Indemnification Agreements do not require any specific form of notice and, under both Delaware and New York law, "formal" notice is *not* necessary unless expressly required by the contract. And the Superior Court further erroneously found that "formal" notices must convey specific information, such as "the nature of the Litigation" and "whether the Defendants' products are accused products in the Litigation." Neither the Agreements nor the dictionary impose these notice requirements.

b. But even if the Agreements did require this, questions of fact would remain as to whether Charter's 2018 and 2019 notices were understood by Ribbon to convey such information. For example, Charter's 2018 notice informed Ribbon that Sprint had sued Charter, and it identified the case name, the district court in which the action was filed, and the civil action number. In the context of Sprint's

long-running, well-publicized VoIP patent litigation campaign—context the Superior Court ignored—the information that Sprint had now sued Charter would alone tell Ribbon everything it needed to know about Sprint's then-fledgling lawsuit. Moreover, the publicly filed amended complaint in the Sprint/Charter Action ("Amended Complaint")—available on PACER using the district court and civil action number information contained in Charter's 2018 notice—describes the nature of that action in detail, including the fact that it was Ribbon's VoIP equipment that was accused of patent infringement. The Superior Court ignored the fact that a reasonably sophisticated company such as Ribbon could and would have used the information in Charter's 2018 notice to obtain all this information.

c. Compounding this error, the Superior Court also ignored all the evidence demonstrating that Ribbon *did* obtain all this information and *was* on notice. Just a few months after Charter's 2018 notice, in response to an indemnification demand Ribbon received in early 2019 from WideOpenWest ("WOW," another of Ribbon's customers sued by Sprint), Ribbon's *own in-house counsel* sent an email to WOW stating that Ribbon was "aware of" the Sprint/Charter Action, that it was aware of the patents that were asserted in that action, and that it was aware that the Sprint/Charter Action involved the same accused (Ribbon) technologies as the WOW case. The court further ignored evidence that Ribbon was actively monitoring the Sprint/Charter Action and had in its files the scheduling

order and an order specifically relating to Sprint's claims against Charter. And it disregarded the fact that Charter's 2019 notice (a subpoena) specifically identified the Sprint/Charter Action as a patent infringement suit, and specifically identified the Ribbon VoIP products as the "Accused Products." This was all reversible error.

d. The Superior Court also erroneously concluded that "formal" notices must mention indemnification. Again, the Agreements contain no such requirement. Moreover, Ribbon is charged as a matter of law with knowledge of its indemnification obligations, and its public filings demonstrate that most of its customer contracts contain indemnification clauses. Any communication from a customer (like Charter) regarding a lawsuit would therefore implicate indemnification.

e. But perhaps the biggest error the Superior Court made concerning Charter's 2018 and 2019 notices was its refusal to even consider whether Ribbon was prejudiced by Charter's supposed failure to provide "formal" notice. The Agreements expressly, or by operation of law, state that lack of notice does not relieve Ribbon of its indemnification obligations unless it is prejudiced thereby. Nonetheless, solely because the Superior Court found that the 2018 and 2019 notices were inadequate, it concluded it did not even have to consider the prejudice issue: "Because the October 2018 Letter and the [2019] Subpoena do not constitute written notice under the Agreements …. the Court does not need to address the issue of

prejudice as it relates to the two documents." The court's fundamental error in deeming Ribbon's lack of prejudice to be irrelevant independently requires reversal.

2. The Superior Court committed many additional errors concerning Charter's 2020 notice.

a. While the Superior Court acknowledged that the 2020 notice satisfied its erroneous "formal notice" test, it held that it was not "prompt" based on month counting, including the 31 months that had passed since the Sprint/Charter Action was filed. This was error because "promptness" cannot be determined by mere month-counting, but must instead be evaluated by what is reasonable under the circumstances—a question of fact for the jury.

b. And the Superior Court concluded that Ribbon was prejudiced by this purportedly belated notice based on the pretrial activities that had occurred as of the date the notice was sent in July of 2020. In so holding, the Superior Court erroneously disregarded as "not relevant" all Charter's evidence that Ribbon knew about the Sprint/Charter Action years prior to July 2020, well before anything of substance had happened in the case, but made the deliberate decision to stay on the sidelines and have Charter perform those pretrial activities. Thus, even if Charter had not sent any notices until 2020, that could not possibly have prejudiced Ribbon. Charter's 2020 notice letter simply told Ribbon what it already knew.

c. In addition, even if Ribbon had had no knowledge of the Sprint/Charter Action before July 2020, disputed material facts still would have rendered summary judgment improper. In order to grant Ribbon's motion, the Superior Court had to improperly "discount[]" Charter's evidence that Ribbon was not prejudiced because, even after July 2020, it still had sufficient opportunity to participate in the defense or settlement. For instance, the Superior Court acknowledged that at the time of Charter's 2020 notice, discovery in the Sprint litigation was ongoing and "trial had not happened." By "discount[ing]" those facts, the Superior Court failed to draw reasonable inferences in Charter's favor, as required on summary judgment.

d. Finally, the Superior Court erroneously held that prejudice is irrelevant to the one Agreement that does not contain an express prejudice provision. That Agreement is governed by New York law, pursuant to which a party must establish prejudice from lack of notice even in the absence of an express prejudice provision.

3. As a fallback to its notice and prejudice findings, the Superior Court, in four conclusory paragraphs, held that Charter failed to allow Ribbon to control the defense or settlement. According to the court, the contractual control provisions—which merely require Charter to allow Ribbon to control the action—effectively constitute separate, independent notice requirements that obligated Charter to

provide Ribbon with a formal offer of control. Charter's purported failure to make that offer, the court concluded, was an independent ground for granting summary judgment. That entire analysis is erroneous.

a. The Agreements plainly do not require Charter to provide Ribbon with a formal offer of control, but rather require only that Charter "allow" Ribbon to control the action if it wanted control—which it indisputably never did.

b. Even if the control provisions could be read as separate notice requirements, they would have to be read concomitant with the notice requirements expressly contained in the Agreements, which contain a prejudice exception. The Superior Court never considered prejudice.

c. The Superior Court ignored record evidence that Charter *did* expressly offer Ribbon control of the Sprint/Charter Action.

d. The Superior Court ignored the fact that any failure by Charter to comply with the control provisions was excused as futile.

STATEMENT OF FACTS

A. The Parties

Plaintiffs are subsidiaries of Charter Communications, Inc. (A4546; A4549-A4550.) Charter is a cable company that offers television, internet, and telephone services. (A4546.) Cable telephone service is offered using VoIP equipment. (A3470-A3489.)

Defendants are subsidiaries of Ribbon Communications, Inc., which "was created by the merger of" Sonus and GENBAND in 2017 "with both companies specializing in secure high-performance [VoIP] technology and solutions." (A4555; A4558-A4559.) Ribbon sold its VoIP products to cable companies, including Charter and many others who were sued by Sprint for infringing its VoIP patents.

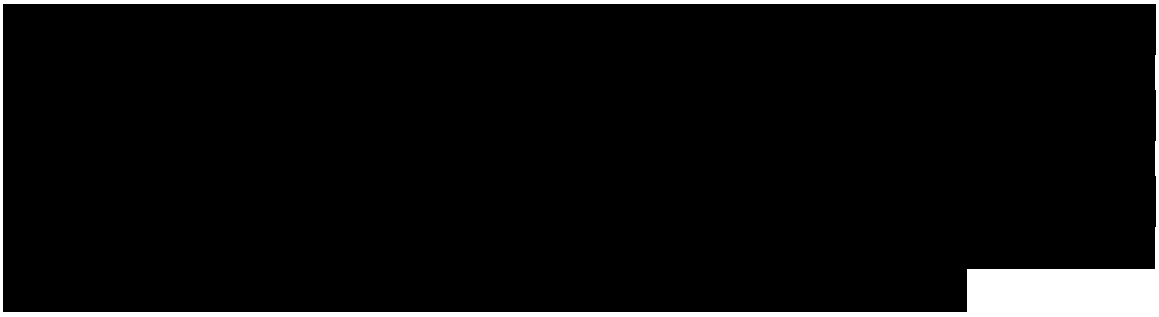
B. Charter's Indemnification Agreements With Ribbon

Charter sought indemnification from Ribbon to cover the costs of Sprint's patent lawsuit pursuant to three purchase Agreements for Ribbon's VoIP equipment.[1]

The Cedar Point Agreement, governed by Delaware law, provides that Ribbon will indemnify covered legal actions if Charter (a) gives Ribbon prompt

[1] These contracts were executed by Cedar Point Communications, Inc., Sonus Networks, Inc., and Nortel Networks Inc. Ribbon acknowledges that it "became the successor-in-interest to" these entities. (A0246-A0247.) For convenience, "Ribbon" refers to these entities as applicable.

notice of the action, *provided that Charter's failure to give notice does not relieve Ribbon of its indemnification obligations unless Ribbon's ability to defend the action was "actually prejudiced" thereby*; and (b) gives Ribbon control of the defense and related settlement negotiations:



(A3283 § 6.1; A3287 § 14.5.)

The Sonus Agreement, governed by New York law, provides that Ribbon will indemnify covered claims if Charter (a) gives Ribbon prompt notice of the claim, *provided that Chater's failure to give notice does not relieve Ribbon of its indemnification obligations unless its ability to defend the claim is "prejudiced thereby"*; and (b) tenders authority to defend or settle the claim:

(A3299-A3301 §§ 7(a), 14.)

The Nortel Agreement, governed by New York law, provides that Ribbon will indemnify covered claims if Charter (a) gives Ribbon prompt notice of the claim; and (b) "allows" Ribbon to control the defense and related settlement negotiations:

(A3323-A3324 §§ 10, 12(c).) As discussed *infra* Argument § II(C)(3), the Nortel Agreement, by operation of law, also contains a prejudice exception to the notice requirement.[2]

C. Sprint's Well-Publicized 2005-2016 VoIP Patent Litigations Against the Cable Industry

In 2005, Sprint began a highly-publicized patent litigation campaign against virtually the entire cable industry alleging that the VoIP equipment it used infringed Sprint's patents. (A3588-A3589 ¶¶ 19-22; A4644-A4676.) Between 2005 and 2016, Sprint won or settled lawsuits against Vonage, VoiceGlo, Paetec, Broadvox,

[2] Charter has separate indemnification claims against Ribbon under each Agreement. If this Court finds that summary judgment was incorrectly granted with respect to any Agreement, the Superior Court's order should be reversed and the case remanded.

Big River, Nuvox, Cox, Comcast, Cable One, and Time Warner Cable. (A4644-A4676; A3495-A3533 § III.) Several of those companies, including Comcast and Cable One, bought their VoIP equipment from Ribbon, and Ribbon learned all about Sprint's patent portfolio and the types of Ribbon products accused of infringement from its involvement in those lawsuits. For example, Ribbon received a subpoena from Sprint in 2014 that (i) identified the Sprint VoIP patents that were being infringed (A4775-A4829 at A4786); (ii) identified the specific types of Ribbon equipment that infringed those patents—Ribbon's "softswitches" and "media gateways" (A4792); and (iii) requested information about the operation of the softswitches and media gateways that Ribbon sold to Comcast and Cable One (*id.*; A4794). Between Ribbon's involvement in these lawsuits and the vast amount of media coverage Sprint's patent enforcement campaign generated, Ribbon learned everything it needed to know about the Sprint VoIP patents—and how those patents implicated its own products—long before Sprint ever sued Charter. (*E.g.*, A644-4645 (Erik Larson, *Sprint's VoIP Battle Earns Two Settlements*, Law360 (Aug. 31, 2006)); A4649 (*Sprint and Vonage Settle Patent Dispute*, Reuters (Oct. 8, 2007)); A4669-A4670 (Kat Greene, *Sprint Nabs $140M Jury Win In Patent Fight With TWC*, Law360 (Mar. 3, 2017)).)[3]

[3] (A4644-A4697 (collection of articles about Sprint's VoIP litigations).)

D. Sprint's Well-Publicized 2017-2018 Suits Against Additional Ribbon Cable Customers

In December 2017, Sprint sued Charter in Delaware federal court. (A3582-A3971.) In 2018, Sprint sued WOW, Grande Communications, RCN Telecom, Frontier Communications, and Altice—all Ribbon customers—also in Delaware federal court. Dkts. 18-cv-361, 18-cv-363, 18-cv-536, 18-cv-1752. The Amended Complaint filed against Charter, like the subpoena Ribbon received from Sprint in the Comcast case in 2014, identified the Sprint VoIP patents being infringed and specifically identified Ribbon's "softswitch" and "media gateway" products as the basis for infringement. (A4731-A4774; A4746-A4747 ¶¶ 52-53.) Because all of these cases involved the same patents and the same technologies, the Delaware federal court consolidated them for pretrial purposes.

The Delaware court issued the first scheduling order in the consolidated action in August 2018. (*E.g.*, A3973-A3986.) Under that order, Sprint had until December 2018 to serve its initial "infringement contentions"—the document in which a patent plaintiff provides support for its infringement allegations. (A3979.) Fact depositions did not begin until November 2019, and expert discovery did not begin until March 2020. (A3543-A3546; A0423 (Dkts. 394, 397).)

This new wave of Sprint lawsuits, like all prior phases of its litigation campaign, was well-publicized. (*E.g.*, A4677-A4697; A4677-A4678 (Ryan Boysen,

Sprint Accuses Charter of Infringing Internet Call IP, Law360 (Dec. 1, 2017)); A4683-A4684 (Jeff Baumgartner, *Sprint Puts Three More in Its Legal Crosshairs*, NextTV.com (Mar. 13, 2018)).)

E. Charter's Notices to Ribbon About the Sprint Lawsuit

From 2018 until Charter settled the Sprint/Charter Action in 2022, Charter repeatedly notified Ribbon of the Action.

1. Charter's 2018 Notice to Ribbon

Shortly after the Delaware federal court consolidated the Sprint VoIP lawsuits and entered the first scheduling order in August 2018, Charter sent Ribbon the first in a series of notices of the Sprint/Charter Action. On October 31, 2018, Charter sent Ribbon a letter stating that [redacted]

(A3331-A3332.) In view of Ribbon's history with Sprint's suits against its other cable customers and the widespread media attention these suits received, the 2018 letter's communication to Ribbon that Charter was Sprint's latest target was all Ribbon needed in order to understand that its products were implicated and that it should assume Charter's defense. Moreover, the letter's reference to the court in which the case was filed and the civil action number allowed Ribbon to access the Amended Complaint on the PACER docket and learn that the products it sold to

Charter were singled out as the basis for Sprint's infringement allegation. The evidence demonstrates that Ribbon *did* access the docket and *did* have these details about the Sprint/Charter Action shortly after receiving Charter's 2018 notice.

In February 2019—when fact discovery in the Delaware consolidated actions (including the Sprint/Charter Action) was just beginning and before anything substantive had occurred[4]—[redacted] notified Ribbon that it had been sued by Sprint. The WOW letter [redacted]. (A4225-A4226.) In its March 2019 response to [redacted] Ribbon admitted that it already knew about the Sprint/Charter Action, and that it knew the Action involved the same patents and the same Ribbon technologies that [redacted] identified in its letter:

[redacted]

(A4360 (emphases added).) Ribbon's email to [redacted] demonstrates that, thanks to Charter's October 2018 notice letter to Ribbon, Ribbon knew which patents Sprint

[4] Charter had made only a partial motion to dismiss Sprint's willful infringement allegations for failure to sufficiently plead. (A0386 (Dkt. 19); A3174-A3199.)

had asserted against Charter and what the accused technologies were—*Ribbon's* technologies, just as Sprint's Amended Complaint says.

Even though nothing of substance had happened in the case as of October 2018, Ribbon did not seek to participate in or control the defense or settlement of Sprint's claims against Charter after receiving Charter's 2018 notice.

2. Charter's 2019 Notice to Ribbon

Throughout 2018 and 2019, other defendants in the Delaware consolidated actions gave Ribbon notice of Sprint's VoIP patent infringement claims. [redacted] gave Ribbon notice in July 2018. (A4222-A4223.) [redacted] notified Ribbon in November 2018. (A4224.) [redacted] notified Ribbon in February 2019. (A4225-A4226.) And both [redacted] notified Ribbon in July 2019. (A4227-A4358.)

On October 18, 2019, before fact depositions and expert discovery had even begun in the Delaware actions, Charter provided a second notice by way of a third-party subpoena to Ribbon for documents and testimony. (A3333-A3417.) The subpoena defined "the lawsuit" as the Sprint/Charter Action. (A3340.) It identified the nature of the lawsuit as a patent infringement lawsuit, and it specifically identified the Sprint patents that were asserted. (A3341.) And it identified the "Accused Products" as Ribbon's VoIP products. (*Id.*)

In response to Charter's subpoena—and separate subpoenas from Sprint—Ribbon produced more than 14,000 pages of documents as well as employee declarations in lieu of depositions. (A4003-A4017.) Still, Ribbon did not seek to participate in or control the defense or settlement of Sprint's claims against Charter.

3. Charter's 2020 Notice to Ribbon

By mid-2020, the Delaware court had set a trial date of October 2020 (later continued until July 2022). (A0390-A0391 (Dkt. 50); A0440.) On July 20, 2020 Charter sent Ribbon another notice about the Sprint/Charter Action. (A3418-A3419.) Charter stated that [redacted] (*Id.*)

F. Ribbon's Refusal to Control the Defense or Settlement

Ribbon finally engaged with Charter following receipt of Charter's July 2020 notice. For the next two years, Charter repeatedly asked Ribbon to take over or participate in the defense and settlement negotiations. In each instance, Ribbon refused.

1. Ribbon's Refusal to Take Control Throughout 2020

Notwithstanding its years of knowledge regarding the details of the Sprint/Charter Action, Ribbon responded to Charter's 2020 notice in August 2020 with feigned surprise, stating that it [redacted] (A3420; *but see* A4360.) Ribbon then claimed it needed additional information, including the infringement contentions served by Sprint in December 2018, to [redacted] (A3420.) Charter provided that information in September 2020. (A3421.)

On September 25, 2020, Ribbon responded that it was reviewing the received information and also raised [redacted] about the timing of Charter's 2020 notice, stating that [redacted]." (*Id.*)

Given the surging COVID pandemic, in September 2020, the Delaware federal court continued the trial date indefinitely. (A4220-A4221.) In December 2020, Charter wrote to Ribbon again, addressing Ribbon's purported concerns about the timing of Charter's 2020 notice and reminding Ribbon that it had also sent Ribbon notices in 2018 and 2019. (A3422-A3425.) Charter also advised that [redacted] (A3423 (emphasis added).) Charter noted that it [redacted]

[redacted] (*Id.*) By the end of 2020, however, Ribbon had not sought to assume control of the Sprint/Charter Action or to participate in any way.

For its part, on December 31, 2020, Sprint sent a [redacted] to Charter, following up on [redacted] it had floated in September earlier that year. (A4186-A4187.)

2. Ribbon's Refusal to Take Control Throughout 2021

On January 15, 2021, Ribbon contended that Charter's 2018 and 2019 notices did not constitute proper notice and that Charter's delay in sending a proper notice [redacted] (A3426-A3428.) Ribbon argued that Charter's [redacted] (A3428.) Ribbon never mentioned that it had known all about the Sprint/Charter Action for years, much less explain why it didn't offer to "render a defense" when it first obtained that knowledge over two years earlier.

In February 2021, Charter wrote to Ribbon explaining that it understood Ribbon's previous letters to mean that Ribbon refused to participate in Charter's defense. (A2706-A2709.) Charter also noted the implausibility that Ribbon, whose business was selling VoIP technology to cable companies, lacked notice of the well-known Sprint claims against Charter and others:

[redacted]

(A2708.)

Ribbon did not deny that it had known about Sprint's claims against Charter all along. Instead, in March 2021, Ribbon responded that [redacted] (A3429-A3430.) [redacted] (A3430.)

Meanwhile, with Ribbon having refused to indemnify Charter or participate in the defense in any way, Charter began [redacted] with Sprint. Months after Charter's 2020 notice, between [redacted], Charter and Sprint [redacted]. (A4190-A4196.) On April 20, 2021, Sprint and Charter tentatively agreed to a settlement. (A4197.) Because the settlement was only tentative, however, there was still much for the parties to resolve. And without a final settlement agreement, Charter continued to defend Sprint's patent lawsuit.

On April 28, 2021, Charter wrote to Ribbon asking whether it would reconsider its refusal to participate in the Sprint/Charter Action, and advised that it was close to a settlement with Sprint. (A3456-A3458.) In May 2021, Ribbon responded, stating [redacted] (A3437.)

From June through September 2021, Charter continued defending the case while at the same time negotiating settlement with Sprint. At one point the settlement negotiations almost broke down, and the parties employed a mediator. (*E.g.*, A4199-A4216.) All the while, Charter kept updating Ribbon on the litigation and settlement. In September 2021, Charter requested a meeting with Ribbon so Charter could [redacted] (A3442.)

After the September meeting, Charter sent Ribbon a follow-up letter recapping the information provided to Ribbon in the meeting, and again [redacted]" (A4830-A4831.) Charter also offered to provide Ribbon with whatever materials and information it needed to fully participate in the defense, noting the court's entry

of a new trial date of July 11, 2022, which at that time was still seven months away. (*Id.*)

In December 2021, Ribbon responded that it had not changed its mind and would not participate in Charter's defense in any way. (A3451-A3452.) [redacted] (*Id.*)

3. Ribbon's Refusal to Take Control Throughout 2022

In January 2022, Charter replied to Ribbon and reiterated that [redacted] (A4832-A4833.) Charter noted that [redacted] (A4833.)

After months of additional similar communications (A3453-A3455), Charter advised Ribbon in April 2022 that it had reached a final settlement with Sprint. (A3459-A3460.) Ribbon responded, again denying any indemnification obligation. (A3461-A3462.)

G. Ribbon Would Not Have Indemnified or Defended Charter Irrespective of When or How It Received Notice

It is undisputed that Ribbon would never have defended Charter irrespective of when or how it received notice of the Sprint/Charter Action. Ribbon has always maintained, and continues to maintain, that the Sprint/Charter Action is not indemnifiable under the Agreements because, Ribbon says, its equipment was not accused of infringement in the Sprint/Charter Action. (A0163-A0233; A0265 n.3; A3429-A3430; A3437; A3440-A3455.) And it contended that it could not [redacted] in Charter's defense because it was [redacted] in the Sprint/Charter Action, something it never would have been, irrespective of when it received notice.[5] (A3451-A3452.)

Moreover, Ribbon's consistent practice has been to shirk its indemnification obligations and to never defend its customers, which is why it never agreed to defend *any* of its customers sued by Sprint. (A3547-A3562, 176:11-21, 191:2-13, 226:8-24.) For example, when [redacted] sought indemnification, Ribbon refused [redacted] and therefore [redacted] to even address indemnification. (A4387.)

[5] Of course, the notion that Ribbon was unable to assume Charter's defense because it was "not a party" is plainly false and antithetical to the whole concept of indemnification.

Ultimately, like Charter, [redacted] had to sue Ribbon for failing to honor its contractual indemnification obligations. (A4405-A4543.)

Thus, Charter's purported failure to provide proper notice has nothing to do with Ribbon's ability to defend Charter. Ribbon was never going to defend Charter under any circumstances.

H. The Superior Court's Summary Judgment Ruling

On May 14, 2025, less than three weeks before trial, the Superior Court granted Ribbon summary judgment and dismissed this case on the improper grounds set forth in the Argument section below. (Ex. A.)

ARGUMENT

I. Summary Judgment Was Improper With Respect to Charter's 2018 and 2019 Notices

A. Questions Presented

1. Whether the Superior Court misconstrued New York and Delaware law by holding that "notice" in the Indemnification Agreements means strict "formal notice." (A3239-A3247.)

2. Whether the Superior Court erred in finding no disputed issues of material fact existed on whether Ribbon received sufficient notice from Charter's 2018 and 2019 notices. (A3242-A3247.)

3. Whether the Superior Court erred in failing to consider whether Ribbon was prejudiced by any lack of notice from Charter in 2018 and 2019. (A3239-A3241; A3251-A3254.)

B. Scope of Review

"In an appeal from a trial court's decision to grant summary judgment, this Court's scope of review is *de novo*, not deferential, as to both the facts and the law." *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009). "[T]he facts of record, including any reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party." *Id.*

C. Merits of Argument

The Superior Court held that Charter's 2018 and 2019 notices did not constitute proper notice under the Indemnification Agreements. It then concluded that it did not need to address any prejudice to Ribbon. (Ex. A, 12-15.) Both conclusions were erroneous.

1. The Superior Court Erroneously Required "Formal Notice"

The Agreements require only that Charter "notify" Ribbon of the action in which an indemnifiable claim is made. The Superior Court acknowledged that Charter's 2018 letter *does* "specifically reference[] the case name and number" of the Sprint/Charter Action. (*Id.*, 9.) Nonetheless, relying on a dictionary definition of "notify," the court committed a threshold legal error by holding that notice under the Agreements means "formal notice." (*Id.*, 13-14.) Charter's 2018 letter was not "formal notice," the court continued, because it "does not discuss the nature of the Litigation, any mention of indemnification or whether the Defendants' products are accused products in the Litigation." (*Id.*, 15.) As for Charter's 2019 subpoena, the court acknowledged that it "defines 'Accused Products' to be certain products sold by Ribbon," but found that notice insufficient because it did "not mention indemnification." (*Id.*, 9.)

As an initial matter, the dictionary on which the court relied contains two definitions of "notify." The other, which the court never mentions—"to give notice

of or report the occurrence of"—does not require "formal" notice.[6] The Superior Court provided no explanation for why it selected the definition that contains the word "formal" rather than the one that does not. Nor did the court explain why it ignored the definition of the word "notice" from the same dictionary—"to give notice of"—which similarly contains no formality requirements.[7]

In any event, rather than rely on a dictionary definition, the court should have applied the governing law. Under both New York and Delaware law, unless a contract expressly specifies the details of what a notice must contain, "[n]o particular form of notice and *no formal notice is necessary*." *Deutsche Bank Tr. Co. of Am. v. Tri-Links Inv. Tr.*, 74 A.D.3d 32, 41 (N.Y. App. Div. 2010) (emphasis added; citation omitted); *accord Thule AB v. Advanced Accessory Holdings Corp.*, 2010 WL 1838894, at *8 (S.D.N.Y. May 4, 2010) ("It is well established that unless otherwise specified by contract, no particular form of notice is required under New York law for an indemnitee's notice of claim to his indemnitor." (citation omitted)); *Portfolio BI, Inc. v. Djukic*, 2024 WL 887047, at *5 (Del. Ch. Feb. 29, 2024) ("[T]he term 'notice' does not definitively set the high bar proposed by the Sellers of a 'formal

[6] *Notify*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/notify (visited July 29, 2025).

[7] *Notice*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/notice (visited July 29, 2025).

statement'…."). Thus, the Superior Court's entire analysis rested on a threshold legal error that by itself requires reversal.

2. Disputed Issues of Material Fact Existed Over Whether Charter's 2018 Letter and 2019 Subpoena Placed Ribbon on Adequate Notice of Sprint's Patent Action

Even if the Indemnification Agreements did require Charter to convey the detailed information identified by the Superior Court, Charter's compliance would still be a disputed fact question for the jury. "[O]n the limited question of the specificity or detail in a claim…the reasonable quantum of detail 'depends on the circumstances and the allegations; in other words, it involves questions of fact.'" *Hill v. LW Buyer, LLC*, 2019 WL 3492165, at *8 (Del. Ch. July 31, 2019) (citation omitted); *Am. Auto. Ass'n of N. Cal. v. Barnes Assoc.*, 2020 WL 4729063, at *6 (Del. Ch. Aug. 13, 2020) ("The sufficiency of [an indemnity] notice presents a mixed question of law and fact that typically cannot be decided as a matter of law." (collecting cases)).

Here, a key fact question was how Ribbon would have understood Charter's 2018 letter in the context of the overarching Sprint patent litigation campaign against the cable industry and against Ribbon customers in particular, as well as Ribbon's actual knowledge of Sprint's claims against Charter. In other words, what should Ribbon "have understood from the information it was given?" *United Ass'n Local 38 Pension Tr. Fund v. Aetna Cas. & Sur. Co*., 790 F.2d 1428, 1430-31 (9th Cir.

1986) (reversing dismissal of indemnity claim for lack of notice because "the statements contained in the furnished material at the very least raise a genuine issue of material fact as to whether they constitute the notice that the contract requires").

The evidence demonstrates not just that material facts exist regarding what Ribbon "understood from the information it was given" in Charter's 2018 notice, but that Ribbon *did* understand from that information that its products were accused of patent infringement in the Sprint/Charter Action. A few months after Charter sent the October 2018 notice, Ribbon's in-house counsel wrote to [redacted] acknowledging that Ribbon knew about the Sprint/Charter Action, knew which patents were asserted in that Action, and knew that Action involved Ribbon technologies. *Supra* Statement of Facts ("SOF") § (E)(1). Ribbon's email to [redacted] is the smoking gun demonstrating that Charter's 2018 notice *did* convey "the nature of the Litigation" and the fact that "Defendants' products are accused products in the Litigation," two of the three things the Superior Court held a "formal notice" must convey. And while the 2018 letter does not expressly mention indemnification (the third requirement of a "formal notice" according to the Superior Court), Ribbon is charged as a matter of law with knowledge of its indemnification obligations. *Horton v. Organogenesis Inc.*, 2019 WL 3284737, at *3 & n.33 (Del. Ch. July 22, 2019) (notice was sufficient "particularly given that the sellers are charged with knowledge of their representations and warranties in the" agreement). Imputed knowledge

aside, a letter from a customer would necessarily put Ribbon on notice of patent indemnification obligations because most of its customer contracts contain such obligations.[8]

Even without Ribbon's smoking gun email that it was "aware of" Sprint's claims against Charter, it would defy credulity to believe that Ribbon didn't understand Charter's 2018 notice to mean that Charter was the latest target in Sprint's highly publicized patent campaign against users of the types of VoIP equipment that Ribbon sold to Charter. Anyone in the VoIP business would know this. In addition, three years before Sprint sued Charter, Ribbon received a subpoena from Sprint in its cases against Ribbon customers Comcast and Cable One that identified the Sprint VoIP patents and the targeted Ribbon softswitches and media gateways—the very same equipment targeted in the Sprint/Charter Action. *See supra* SOF § (C). At the very least, a question of fact would exist as to whether a "sophisticated" party like Ribbon would understand "the significance of the" Sprint/Charter Action "to its own interests," including an understanding that the lawsuit implicated its indemnification obligations to Charter. *Deutsche*, 74 A.D.3d

[8] "From time to time, we are subject to litigation regarding intellectual property rights or other claims *and have indemnification clauses in most of our customer contracts that may require us to indemnify customers against similar claims*." *Ribbon's 2020 10-k*, 28 (emphasis added), SEC.GOV, https://www.sec.gov/Archives/edgar/data/1708055/000170805521000014/rbbn-20201231.htm (visited July 29, 2025).

at 41. All the record evidence demonstrates that Ribbon understood from the 2018 notice exactly what the significance of the Sprint/Charter Action was to its own interests.

As for Charter's October 2019 notice, it explicitly identified the "nature of the Litigation" as a patent infringement action and that Ribbon's products were the "Accused Products" *See supra* SOF § (E)(2). Moreover, this notice must be considered in the context of all the additional information Ribbon received from third parties after Charter sent its 2018 notice. Ribbon received notice of the Sprint/Charter Action from Sprint by way of a letter dated August 7, 2018, and subpoenas Sprint issued to Ribbon on September 10, 2019 and October 3, 2019. (A4032-A4170.) When discussing the scope of the subpoenas, Sprint specified that it was seeking documents regarding Ribbon's sale of equipment to its customers, including Charter (A4171), and [redacted] (A4175-A4176.) In response to the Sprint subpoena, Ribbon produced over 66,000 pages of documents, as well as employee declarations in lieu of depositions. (A4018-A4031.)

And while Ribbon was receiving all these notices from Charter and Sprint, it was also receiving an avalanche of indemnification notices from its other customers whose cases had been consolidated with the Sprint/Charter Action. *See supra* SOF § (E)(2). Ribbon was monitoring the Sprint/Chater Action, and had the scheduling order and an order specifically relating to Sprint's claims against Charter in its files. (A3988-A4001; A4360; A4404; A4611-A4622.)

In sum, the record evidence demonstrates that, from a time before anything substantive had happened in the Sprint/Charter Action, Ribbon knew everything the Superior Court said a "formal notice" must convey. Yet the court refused to consider any of it. Instead, the court granted Ribbon summary judgment based on the lack of specific words in the notices themselves, thereby "mak[ing] the notice requirement nothing more tha[n] a formal, procedural impediment to suit, of little purpose other than to void an otherwise valid claim." *Hines v. New Castle Cnty.*, 640 A.2d 1026, 1030 (Del. 1994) (citation omitted). This is an independent basis for reversal.

3. The Superior Court Improperly Refused to Consider Whether Ribbon Was Prejudiced by Any Lack of Proper Notice From Charter in 2018 and 2019

Even if Charter had never provided any notice to Ribbon whatsoever, that alone would not excuse Ribbon from its indemnification obligations under the Agreements. Rather, the Cedar Point Agreement provides that [redacted]

[redacted] (A3283 § 6.1.) The Sonus Agreement similarly provides that [redacted] (A3299-A3300 § 7(a).) And while the Nortel Agreement does not contain an express prejudice exception, New York law imposes a prejudice exception as a matter of law. *See infra* Argument § II(C)(3). Under no circumstances, then, is Ribbon relieved of its indemnification obligations unless it was prejudiced by any failure to receive prompt notice.

Yet, the Superior Court refused to even consider whether the supposed lack of adequate notice in 2018 and 2019 prejudiced Ribbon. To the contrary, it concluded that it did not need to assess prejudice *because* Charter's notices supposedly were inadequate: "Because the October 2018 Letter and the [2019] Subpoena do not constitute written notice under the Agreements …. the Court does not need to address the issue of prejudice as it relates to the two documents." (Ex. A, 15.) The court thus disregarded the prejudice requirement entirely.

The record evidence demonstrates that Ribbon had all the information it needed to take over Charter's defense shortly after it received Charter's 2018 notice. Consequently, it cannot have been prejudiced by any formality deficiencies in

Charter's 2018 and 2019 notices. The Superior Court's refusal to even consider whether Ribbon was prejudiced is an independent ground to reverse.

II. Summary Judgment Was Improper Because Disputed Issues of Material Fact Exist Concerning Charter's 2020 Notice

A. Questions Presented

1. Whether the Superior Court erred in finding no disputed issues of material fact existed regarding whether Charter's 2020 notice was "prompt." (A3248-A3251.)

2. Whether the Superior Court erred in finding no disputed issues of material fact existed regarding whether Ribbon was prejudiced from any lack of prompt notice. (A3239-A3241; A3251-A3254.)

3. Whether the Superior Court misconstrued New York law in determining that prejudice need not be considered with respect to the Nortel Agreement. (A3251-A3252.)

B. Scope of Review

"[T]his Court's scope of review is *de novo*[.]" *LaPoint*, 970 A.2d at 191.

C. Merits of Argument

The Superior Court erred in concluding that Charter's 2020 notice—despite being sufficiently formal—was not prompt and prejudiced Ribbon's ability to participate in the defense of the Sprint/Charter Action. (Ex. A, 15-19.)

1. Disputed Material Issues of Fact Exist On Whether Charter's 2020 Notice Was "Prompt"

"Under a 'prompt' notice provision, 'an insured must provide such notice within a reasonable period of time under the circumstances…Whether an 'insured's failure to provide timely notice to an insurer is reasonable under the circumstances is ordinarily a question of fact precluding summary judgment.'" *Sunrise One LLC v. Harleysville Ins. Co. of N.Y.*, 293 F. Supp. 3d 317, 330 (E.D.N.Y. 2018) (New York law; internal quotation marks and citations omitted).

The Superior Court recognized that "whether notice is prompt is determined 'in view of the facts and circumstances of the particular case, and the mere lapse of time is not necessarily the determining factor.'" (Ex. A, 17 (citation omitted).) The court even acknowledged that this "test seems to invite the response that when notice is at issue, the matter cannot be handled through summary judgment." (*Id.*) Nevertheless, the Superior Court then went ahead and deemed Charter's 2020 notice to be late based solely on month-counting. (*Id.*) In so doing, it improperly ignored all the "facts and circumstances" which make the timing of Charter's 2020 notice reasonable.

For example, Ribbon told Charter that to evaluate its indemnification obligations, it needed to review the infringement contentions, the expert reports and other information from the Sprint/Charter Action. (*E.g.*, A3420; A3432.) Sprint's

first set of infringement contentions was not served until December 2018, a year after the case started, and expert discovery did not close until June 2020, only a month before Charter's 2020 notice. (*E.g.*, A0395 (Dkt. 88); A0428 (Dkt. 444.) If Ribbon needed this information to decide whether to defend Charter, it cannot legitimately contend it was prejudiced by failure to receive notice before that information even existed. Moreover, fact depositions did not even start until November 2019, and Charter's 2020 notice came before its discussions with Sprint that led to settlement had even commenced. (A3237; A4186-A4187.) And of course, the delay in sending "formal notice" must be evaluated in the content of the prior notices Charter had sent, whether they were "formal notices" or not.

It was for the jury to evaluate these facts and determine whether the timing of Charter's July 2020 notice was reasonable under the circumstances. The Superior Court improperly deprived it that opportunity.

2. Disputed Material Issues of Fact Existed On Whether Ribbon Was Prejudiced By The Timing of The 2020 Notice

The Superior Court also found that Ribbon was prejudiced as a matter of law by not receiving "formal" notice until July 2020. In so doing, it made a number of reversible errors.

For one, the Superior Court identified various pretrial activities that occurred before July 2020 and simply assumed that Ribbon was deprived of the opportunity

to participate. (Ex. A, 18.) The court disregarded the evidence that Ribbon knew everything it needed to know about the Sprint/Charter Action long before July 2020, before anything substantive had happened in the case, and that Ribbon could have participated in *all* those activities. It therefore was not prejudiced by any failure to receive notice. The Superior Court acknowledged Charter's evidence that "Defendants [had] notice of the [Sprint/Charter] litigation from outside sources," but deemed Ribbon's actual notice "not relevant" to the prejudice inquiry. (*Id.*) That was error.

Under New York law, "[s]trict compliance with a contract's notice provision is generally not required where the adverse party received actual notice and suffered no prejudice." *Thor 680 Madison Ave. LLC v. Qatar Luxury Grp. S.P.C.*, 2020 WL 2748496, at *12 (S.D.N.Y. May 27, 2020); *Dellicarri v. Hirschfeld*, 210 A.D.2d 584, 585 (N.Y. App. Div. 1994) (similar). Delaware law likewise considers actual notice relevant in any prejudice inquiry. In *Hines v. New Castle County*, for instance, the Superior Court granted summary judgment against a plaintiff who had failed to comply with a statutory notice requirement for claims against a county. 640 A.2d at 1027-28. This Court reversed, holding that "in the absence of a showing of prejudice, actual notice on the part of the County or its responsible officials of sufficient facts to place the governing body of the County on notice of a possible claim constitutes substantial compliance with the notice ordinance here under

review." *Id.* at 1030; *see Trustwave Holdings, Inc. v. Beazley Ins. Co.*, 2024 WL 1112925, at *13 (Del. Super. Mar. 14, 2024) (same in indemnity context). The Superior Court thus erred in disregarding Ribbon's actual knowledge as "not relevant" to the prejudice question.

Next, although the Superior Court acknowledged Charter's evidence "that Defendants were never going to defend the Litigation, so late notice did not prejudice them," it held that this too was "irrelevant" to the prejudice inquiry. (Ex. A, 19.) This too was error. If an indemnitor or insurer never intended to provide coverage or take control of the defense, a supposed failure to notify the indemnitor of its opportunity to defend cannot possibly have been prejudicial; the indemnitor would have acted the same with *or without* notice. *See Auster Oil & Gas, Inc. v. Aetna Cas. & Sur. Co.*, 891 F.2d 570, 579 (5th Cir. 1990) ("Aetna would have denied coverage and would not have defended Carmouche even if it had been timely notified….These unchallenged facts, taken together, raise a genuine factual issue as to whether Aetna suffered prejudice from the delay in notice.").

Here, like *Auster Oil*, Ribbon denies that the Sprint/Charter Action is indemnifiable, and it is undisputed that Ribbon would not have defended Charter irrespective of when or whether it received notice. *See supra* SOF § G. The Superior Court was wrong to disregard those facts in determining that Ribbon was prejudiced by Charter's purported late notice.

Finally, even if Charter's conduct had deprived Ribbon of the ability to participate in the pretrial activities that had been completed by July 2020, that *still* would not constitute prejudice as a matter of law. The Superior Court analogized this case to *Conergics Corp. v. Dearborn Mid-West Conveyor Co.*, 144 A.D.3d 516 (N.Y. App. Div. 2016), which found prejudice in view of a 21-month delay in providing notice. (Ex. A, 16-17.) The critical difference between this case and *Conergics*, however, is that in *Conergics*, the indemnitee failed to give *any* notice of the claim during "*the entire pendency*" of the case. 144 A.D.3d at 523-24 (emphasis added). But where, as here, the underlying suit was still pending at the time of the notice, the issue of prejudice is one of fact, not suitable for summary judgment.

Indeed, the same court that issued *Conergics* later held that a *four-year* delay in notice was not dispositive of prejudice on summary judgment. *Salvo v. Greater New York Mut. Ins. Co.*, 213 A.D.3d 587, 587-88 (N.Y. App. Div. 2023). Citing *Conergics*, *Salvo* recognized that, when a suit is pending at the time of notice, the prejudice inquiry depends on the factual circumstances. *Id.* at 588. There, "[a]lthough the late notice deprived [the] defendant of the ability to participate in the initial investigation and litigation of the claim, [the] defendant ha[d] not explained how [the indemnitee's] defense of the matter materially prejudiced it." *Id.* "Moreover, the delay did not affect defendant's access to relevant evidence since discovery was still open at the time defendant received notice of the claim." *Id.*

Here, the facts militating against prejudice are even stronger than those in *Salvo*. Unlike *Salvo*, the purported late notice here did not "deprive [Ribbon] of the ability to participate" in the case—Ribbon knew about the case all along and choose not to participate. But like *Salvo*, Ribbon produced no evidence that Charter's "defense of the matter materially prejudiced it." *Id.* at 588. And like *Salvo*, as the Superior Court acknowledged, at the time of Charter's 2020 notice, discovery in the Sprint litigation was ongoing and "trial had not happened." (Ex. A, 18.) Yet rather than properly letting the jury evaluate those facts, the Superior Court "discounted" them, which is the opposite of viewing the facts, "including any reasonable inferences to be drawn therefrom…in the light most favorable to the nonmoving party." *LaPoint*, 970 A.2d at 191.

Moreover, throughout Sprint's entire patent litigation campaign starting in 2005, Sprint won at trial or favorably settled with every single company it sued. *See supra* SOF §§ C-D. No one had successfully challenged its patents. Thus, the likelihood that Charter would ultimately have to pay Sprint, through settlement or a verdict, was incredibly high. The most important role Ribbon could possibly have had in the Action, then, was participation in the settlement discussions, to determine how much that payment would be. Ribbon indisputably had every opportunity to control settlement discussions, as Charter's July 2020 notice was sent seven months before Charter's discussions with Sprint that led to settlement had even begun. And

Ribbon offered no evidence that Charter's settlement strategy and the resulting settlement were deficient or "materially prejudiced" Ribbon. *Salvo*, 213 A.D.3d at 588.

The Superior Court acknowledged that "the discussions that led to the Settlement Agreement had not yet begun when the Plaintiffs sent the July 2020" notice.[9] (Ex. A, 18.) But rather than draw inferences in Charter's favor, the court again "discount[ed]" this evidence, finding that it was "undercut" because Plaintiffs purportedly "never notified Defendants that they began settlement discussions" and only notified Ribbon of a non-final, tentative settlement after-the-fact. (*Id.*) But "the relevant inquiry in determining whether an indemnitor had sufficient notice of a settlement is not whether the indemnitor had specific notice of the indemnitee's settlement negotiations, but whether the indemnitor had notice of the underlying claim such that it had an ample opportunity to defend its interests." *Tokio Marine v. Macready*, 803 F. Supp. 2d 193, 202 (E.D.N.Y. 2011). And the Superior Court ignored the fact that, even after Charter explicitly notified Ribbon of the settlement

[9] The Superior Court stated in passing that "substantial settlement discussions" occurred prior to 2020. (Ex. A, 18.) This statement is based on two unsolicited offers by Sprint in 2018 to settle *for far more money than the case ultimately settled for*, as well as a 2018 mediation in an *entirely different case*. (*Id.*, 8) This cannot possibly have prejudiced Ribbon.

discussions, it still took Charter and Sprint another year of negotiations, and a mediation, to complete the settlement.

It was for the jury to decide whether to "discount" Plaintiffs' evidence or whether the circumstances "undercut" Plaintiffs' claims; not the court. In *DLO Enterprises, Inc. v. Innovative Chemical Products Group*, for instance, the defendant argued that a late notice of a claim "materially prejudiced them because by th[e] time [of the notice], [the plaintiff] had already agreed to settle [the] underlying claim on unfavorable terms." 2021 WL 1943348, *2 (Del. Ch. May 13, 2021). The defendant argued that the settlement was so far along that even if it had sought to take over the defense "doing so would have been futile in the face of the settlement deal." *Id.* The court rejected this argument, holding that "[w]hether and to what extent [the settling parties] struck such a deal during this time [was] genuinely in dispute, material to prejudice from the notice's timing, and cannot be resolved at this stage." *Id.*

The Superior Court's myriad errors concerning Charter's 2020 notice require reversal.

3. Under New York Law an Indemnitor Must Show Prejudice From Any Lack of Notice Even if the Contract Does Not Include an Express Prejudice Provision

The Superior Court erred in holding that the "Nortel Agreement does not contain a 'prejudice' clause," and thus did not require Ribbon to show prejudice from any lack of notice. (Ex. A, 17.)

Under New York law, even where a contract does not include an express prejudice provision, a party must establish prejudice from a lack of notice. *See Thor*, 2020 WL 2748496, at *12 ("Strict compliance with a contract's notice provision is generally not required where the adverse party...suffered no prejudice" (collecting cases)).

Applying New York law, the Seventh Circuit reversed a lower court for making precisely this error. In *Smurfit Newsprint Corporation v. Southeast Paper Manufacturing Company*, the trial court held that an indemnitor asserting a lack of notice did not need to show prejudice to avoid its indemnification obligations where the agreement contained no express prejudice provision. 368 F.3d 944, 946-48, 952-54 (7th Cir. 2004). The Seventh Circuit reversed, holding that "[u]nder general New York contract law, 'one seeking to escape the obligation to perform under a contract must demonstrate material breach or prejudice'….This rule applies to prompt-notice provisions….Thus, as a general matter, [defendant] would have to demonstrate that it was prejudiced by [plaintiff's] failure to provide prompt written notice before it could rightfully refuse to indemnify [plaintiff]." *Id.* at 952. That was the proper course here.

III. Summary Judgment Was Improper Because Disputed Issues of Material Fact Existed Concerning Whether Charter Allowed Ribbon to Control the Sprint/Charter Action

A. Question Presented

Whether the Superior Court erred in finding no disputed issues of material facts existed on whether Charter allowed Ribbon to control the Sprint/Charter Action. (A3254-A3259.)

B. Scope of Review

"[T]his Court's scope of review is *de novo*[.]" *LaPoint*, 970 A.2d at 191.

C. Merits of Argument

As a fallback to its principal holding concerning notice, the Superior Court in four summary paragraphs concluded "that the factual record in this civil action demonstrates that Plaintiffs did not allow Defendants to control the litigation." (Ex. A, 20.) That conclusion cannot be correct.

As a threshold matter, the Superior Court incorrectly found that the Agreements required Charter to take "some action…to turn over control of the Litigation or settlement discussions." (*Id.*) The Agreements contain no such requirement, but instead require only that Charter allow Ribbon to control the action if Ribbon wanted control—which, as the evidence plainly demonstrates, it never did. *Deutsche*, 74 A.D.3d at 41 (where formal tender is not required, a failure to "specifically tender the defense" is irrelevant where indemnitee "could have offered

to take over [indemnitor's] defense at any time"); *Koch Indus., Inc. v. Aktiengesellschaft*, 727 F. Supp. 2d 199, 222-23 (S.D.N.Y. 2010) (similar); *Time Warner Cable Enters. LLC v. Nokia of Am. Corp.*, 228 A.D.3d 523, 525 (N.Y. App. Div. 2024) ("formal tender of the defense to defendant was unnecessary" where indemnitor/defendant had "sufficient notice" of "its duty to defend" and indemnify).

The Superior Court did not identify the type of affirmative, unilateral "action" Charter was required to take "to turn over control" to Ribbon. (Ex. A, 20.) Because Charter could never force control onto Ribbon, the court presumably meant that Charter was required to notify Ribbon that Charter expected Ribbon to take control ("Control Notice"). But even if this separate notice requirement could be read into the Agreements, it would have to be read concomitantly with the notice provisions expressly contained in these Agreements, *i.e.*, like the prompt notice requirement, there would have to be a prejudice exception to the Control Notice requirement. But the Superior Court never considered whether Ribbon was prejudiced by Charter's failure to expressly notify Ribbon that it should assume control of the Sprint/Charter Action.

And if a Control Notice is required *and* that is an entirely separate notice requirement than the "prompt" notice actually contained in the Agreements, then there is nothing in the Agreements that say this separate Control Notice has to be prompt. As explained *supra* SOF § F, the correspondence between the parties shows

that Charter repeatedly and expressly offered Ribbon control throughout 2020 and 2021, offers which would indisputably satisfy such a separate Control Notice requirement.

Finally, the Superior Court never addressed the fact that Charter was excused from sending any required Control Notice because doing so would have been futile—Ribbon always disclaimed responsibility for indemnification. (A3258-A3259 (collecting cases).)

Ribbon knew all about the Sprint/Charter Action since 2018, before anything of substance had happened in the case. Where, as here, an indemnitor made "a deliberate choice to stay on the sidelines and to allow [an indemnitee] to defend the suit on its own" it cannot "avoid its obligation to indemnify [the indemnitee] for settling the matter reasonably and in good faith." *Deutsche*, 74 A.D.3d at 41-42.

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Notice provisions in indemnity contracts are meant to provide "sufficient time to participate in the defense." *Am. Transtech Inc. v. U.S. Tr. Corp.*, 933 F. Supp. 1193, 1200 (S.D.N.Y. 1996) (New York law). They are not mere "formal, procedural impediment[s] to suit, of little purpose other than to void an otherwise valid claim." *Hines*, 640 A.2d at 1030 (citation omitted). The Superior Court's rigid approach—which disregarded the key question of whether Ribbon knew what it needed to know to meaningfully participate in the defense—turned the notice

provisions here into an empty ritual, allowing Ribbon to abdicate its contractual promises to defend against patent infringement claims relating to its products. At the very least, the jury should have been permitted to consider these disputed facts.

CONCLUSION

The judgment of the Superior Court should be reversed.

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CERTIFICATE OF SERVICE

I, hereby certify that, on July 29, 2025, a true and correct copy of Appellants' Opening Brief was caused to be served on the following counsel of record for Defendants via File & Serve*Xpress*:

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