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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, Appellees.	)	**CORRECTED PUBLIC VERSION FILED:** October 16, 2025

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Plaintiffs ("Charter") and Defendants ("Ribbon") entered into three separate agreements under which Ribbon provided Charter with certain equipment that Charter used in its networks offering various internet-based telephone services. In each agreement, Ribbon agreed to indemnify Charter against claims that Ribbon's equipment infringed a third party's patent. Charter is free to defend and control such third-party infringement claims itself, but if it wants indemnification, the agreements obligate Charter to take two actions. First, Charter must provide Ribbon prompt written notice of an indemnifiable third-party infringement claim. Second, Charter must hand over control of the defense and any settlement negotiations to Ribbon.

Sprint sued Charter for patent infringement in 2017. This action was one piece of a multi-front intellectual-property war between Sprint and Charter that spanned lawsuits across several states. From the beginning, Charter sought global peace with Sprint and controlled the litigation's defense and settlement negotiations accordingly. Years later, on the eve of trial, Charter notified Ribbon of a potential indemnification obligation. Even after doing so, Charter continued to control the defense and exclude Ribbon from settlement negotiations.

Because Charter failed to give prompt written notice and turn over control, the Superior Court denied Charter's request for indemnification and granted summary judgment to Ribbon. It correctly held that notice was not given until 2020

because prior communications from Charter—a discovery letter and subpoena—did not inform Ribbon of an indemnification obligation. That long-delayed notice was not prompt, and it prejudiced Ribbon's ability to defend the suit. The Superior Court also held that Charter was obligated to affirmatively cede control of the litigation to Ribbon but did not do so.

The parties' bargain placed a light burden on Charter if it wished to obtain indemnification. For whatever reason—perhaps a desire to control all pieces of its litigation with Sprint or a doubt that Sprint's claims were indemnifiable—Charter chose not to take the steps required. This Court should affirm.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly held that the 2018 letter and 2019 subpoena were not notices, and notice was not given until the 2020 letter.

a. Denied. The Superior Court held that Charter must give notice to Ribbon of an indemnification obligation (*i.e.*, a third-party claim that Ribbon's products infringe the third party's patents). It did not require that the notice take any particular form.

b. Denied. The 2018 letter only notified Ribbon that Charter may have to disclose Ribbon's confidential information in the Sprint Litigation. The 2019 subpoena only requested Ribbon's documents and testimony. Neither informed Ribbon that any third party alleged Ribbon's products infringed that third party's patents. When Charter wanted to provide notice of an (allegedly) indemnifiable claim, it knew how to do so, as the July 2020 letter shows.

c. Denied. The Superior Court correctly held that additional information Ribbon may have known is irrelevant to whether Charter provided notice. Because Charter was free to defend itself under the Agreements, Ribbon had no reason to think it had an indemnification obligation unless and until Charter took action to invoke its contractual indemnification rights. Indeed, for two Agreements, notice was a condition precedent to Ribbon's indemnification, meaning Ribbon had no

obligation unless Charter strictly complied. In any event, Charter overstates what Ribbon knew or could have known about the Sprint Litigation.

d. Denied. The Superior Court held that a notice must inform Ribbon of an indemnification obligation. Neither the 2018 letter nor the 2019 subpoena did so. Nor could Ribbon have discerned that information by simply being informed of the case. Sprint's complaint accused Charter's phone services (not Ribbon's specific equipment) of infringement. Even Charter needed Sprint's non-public infringement contentions to understand whether Sprint claimed that Ribbon's products infringed, which Charter did not send Ribbon until after its July 2020 notice.

e. Denied. The Superior Court correctly held that prejudice from delayed notice is assessed when Ribbon finally received notice, not when Ribbon received a non-notice document. And it soundly held that awareness of the Sprint Litigation from other sources, such as the 2018 letter and 2019 subpoena, could not mitigate prejudice resulting from the 2020 notice. Ribbon's receipt of these documents, if anything, would have indicated that Charter was *not* seeking Ribbon's indemnification, as Charter was communicating with Ribbon yet not giving notice.

2. Denied. The Superior Court correctly held that the 2020 letter was not prompt, and that delay prejudiced Ribbon's ability to defend.

a. Denied. Under Delaware and New York law, a notice can be not prompt as a matter of law, and courts in those states routinely grant summary

judgment for delays far shorter than Charter's delay. The Superior Court applied that framework here and did not engage in mere month counting.

b. Denied. Sent on the eve of trial, Charter's late notice precluded Ribbon's involvement in virtually all pretrial activities and the substantial settlement discussions that had occurred. Charter offers no explanation for its delay, and the Superior Court correctly held the delay was prejudicial to Ribbon's ability to defend. And, again, awareness of the Sprint Litigation before receiving the notice was irrelevant.

c. Denied. Charter cites no authority disputing that losing participation in virtually all pretrial activities is prejudicial as a matter of law. Charter ignores that the question under the Agreements' terms is whether Ribbon's ability to defend the suit is prejudiced, not whether the suit's outcome is prejudiced.

d. Denied. Only two Agreements contain a prejudice provision. For the one that does not, late notice is dispositive. Charter offers no basis to add a prejudice requirement to that contract.

3. Denied. Each Agreement makes turning over control a condition precedent. The Superior Court correctly held that these Agreements require Charter to affirmatively give control of the defense and settlement negotiations to Ribbon, and Charter did not do so.

a. Denied. The Agreements' terms—give, tender, and allow—require some action of turning over control to Ribbon. Charter proffers no textual basis to argue that it had no obligation to hand over control until Ribbon asked. The opposite is true: Ribbon could have no indemnity obligation until Charter complied with the control condition precedent.

b. Denied. Ribbon does not argue, nor did the Superior Court hold, that the control provisions create separate notice requirements. Charter's argument obfuscates the dispositive point: Charter did nothing to cede control.

c. Denied. The undisputed factual record shows that Charter controlled all phases of the Sprint Litigation and did not allow Ribbon to control settlement discussions. Charter identifies no evidence that it took the affirmative step of ceding control and instead points only to vague statements made in 2020 and 2021.

d. Denied. Charter's futility argument is waived. In any event, Charter should have handed over control long before Ribbon informed Charter it would not indemnify.

STATEMENT OF FACTS

I. Under three Agreements, Ribbon agreed to indemnify Charter for certain claims brought against products Ribbon provided to Charter.

Charter and Ribbon are parties to three separate agreements under which Ribbon agreed to provide Charter various products that would assist Charter in providing telephone services over internet-based networks: the "Nortel Agreement," A296, the "Cedar Point Agreement," A306, and the "Sonus Agreement," A325 (collectively, the "Agreements").[1] Each Agreement contains an indemnification provision. Charter claims Ribbon owes it indemnity for a lawsuit filed by Sprint Communications L.P. on December 1, 2017, against Charter and related entities (the "Sprint Litigation"). The suit accused Charter's phone services—provided on five distinct networks, each including equipment from many suppliers—of patent infringement. A373; A1119-A1121; *see also* A1122; A1481. The Sprint Litigation was part of a multi-front intellectual-property-litigation war between Charter and Sprint, spanning lawsuits in Delaware, Kansas, and Texas. A2991.

[1] These Agreements were originally executed by Plaintiffs and entities to which Defendant Ribbon Communications Operating Company, Inc. became the successor-in-interest through acquisitions. While Defendant Sonus Networks, Inc. is not a party to any Agreement after those acquisitions, this brief, like Charter's Opening Brief and the Superior Court's order, refers to "Charter"/"Plaintiffs" and "Ribbon"/"Defendants" for simplicity.

A. The Nortel Agreement

The Nortel Agreement provides that "[i]f a third party claims that [Ribbon] Hardware or Software provided to [Charter] under this agreement infringes that party's patent," Ribbon will defend Charter "against that claim … provided that [Charter] a) promptly notifies [Ribbon] in writing of the claim and b) allows [Ribbon] to control, and cooperates with [Ribbon] in, the defense and any related settlement negotiations." A297-A298 § 10. New York law governs this Agreement. A298 § 12(c).

B. The Cedar Point Agreement

The Cedar Point Agreement provides that Ribbon will indemnify and defend Charter "from and against any and all actions[and] claims … connected with or in any manner arising from (a) any allegations by any third party that any Product, and/or Company's use of the Product, infringes upon any" U.S. patent. A310 § 6.1. The Agreement further states:

> The foregoing obligations are conditioned on [Charter] notifying [Ribbon] promptly in writing of such action, provided that any failure to provide such notice shall not relieve [Ribbon] of its indemnification obligations hereunder, except to the extent that [Ribbon's] ability to defend such Claim is actually prejudiced by such failure; giving [Ribbon] sole control of the defense thereof and any related settlement negotiations … ; and cooperating, at [Ribbon's] request and expense, in such defense.

Id. Delaware law governs the Cedar Point Agreement. A314 § 14.5.

C. The Sonus Agreement

The Sonus Agreement provides that Ribbon will indemnify Charter against "any claim alleging that any Product or Deliverable or any Authorized Use thereof infringes any United States patent … of a third party." A327 § 7. Under the Agreement:

> [Charter] will notify [Ribbon] in writing of any such claim reasonably promptly after receipt by [Charter] of notice of such claim, provided that any failure to give such prompt notification will not relieve [Ribbon] of its obligations hereunder except to the extent that [Ribbon's] ability to defend such claim is prejudiced thereby.

Id. The Agreement also states that "[Ribbon's] indemnification obligation is subject to [Charter's] (i) tendering to [Ribbon] (and its insurer) full authority to defend or settle any such claim and (ii) reasonable cooperation in the defense of such claim, at [Ribbon's] sole expense." *Id*. New York law governs the Sonus Agreement. A329 § 14.

II. After Sprint sues Charter, Charter controls the Sprint Litigation defense and settlement negotiations.

After the Sprint Litigation began, Charter selected law firms to defend the Litigation, A993-A996, and its in-house counsel managed the Litigation day-to-day, A1906-A1907 ¶¶ 10-14; A1939; *see also* A1930-A1933. Charter also controlled settlement negotiations with Sprint. A725; A1907 ¶¶ 15-16. The day Sprint filed the Litigation, Charter's and Sprint's CEOs discussed possible settlement. A2407. The next month, Sprint offered a settlement to resolve "all open patent issues." A2410. Charter and Sprint continued negotiations throughout 2018, A2399-A2400; A2413-A2414, in which they contemplated resolving all pending disputes to secure total peace across all litigation fronts. A2258; A2287; *see also* A965-A966.

Charter made no contact with Ribbon until eleven months after Sprint filed suit. On October 31, 2018, Charter's outside counsel emailed a letter to Ribbon's general counsel. A2416; *see also* A877. That letter stated that the attorney represented Charter in a lawsuit brought by Sprint, referenced the case caption, and informed Ribbon that discovery obligations may require Charter to produce documents containing Ribbon's confidential information. A2416. Charter's outside counsel sent dozens of similar letters to other companies. A2419-A2454. A year later on October 18, 2019, Charter issued a third-party subpoena to Ribbon seeking Ribbon's documents and testimony. A2457.

III. Charter demands indemnification from Ribbon on the eve of trial, nearly three years after Sprint filed suit.

A. Charter finally sends a notice in July 2020.

On July 20, 2020, Charter sent Ribbon a letter via overnight courier. A2652. Trial in the Sprint Litigation was set to begin on October 5, 2020. A2681. Deadlines for fact and expert discovery had passed. A2685-A2688; A2690-A2693. Claim construction had been completed, A415 (ECF 304); the parties had served their final infringement and invalidity contentions, A421 (ECF 376-377); and dispositive and *Daubert* motions had been fully briefed, A429 (ECF 455); A431 (ECF 480); A435 (ECF 522, 524-525). Charter had spent $25 million in attorneys' fees and costs for the Sprint Litigation. A2648-A2650; A2743-A2957. And the following day, Charter conducted a mock trial. A2072-A2074; A2695.

Charter's July 2020 letter to Ribbon summarized the claims asserted in the Sprint Litigation and then stated:

> We are providing notice of the above matter to you pursuant to the indemnification provisions of our November 24, 2004 Master Agreement with Cedar Point Communications Inc., June 10, 2011 Master Purchase Agreement with Sonus Networks, Inc., and all applicable amendments and subsequent agreements.

A2652-A2653. It concluded by stating "[p]lease let me know when you are available to discuss how *we* can effectively defend this claim. We appreciate your support in these matters and look forward to a cooperative and successful defense." A2653 (emphasis added). In his deposition, the Charter in-house attorney that sent the letter

characterized it as "a formal legal demand" making "requests … to Ribbon." A878-A879.

On August 7, 2020, Ribbon responded that it would investigate the matter, requested additional information from Charter, and asked how it could assist Charter in its defense. A2697. That same month, Charter and Sprint (now T-Mobile) resumed their "continued [settlement] dialogue." A2404. In September 2020, as part of Charter's "continued [settlement] discussions with T Mobile," T-Mobile made a settlement offer to Charter. A2714.

Meanwhile, Charter responded to Ribbon's August 7 letter, summarizing Sprint's infringement contentions and asking to discuss Ribbon's indemnification obligations, while saying nothing about the just-resumed settlement negotiations. A1119-A1121. Ribbon responded shortly thereafter that it was reviewing the material sent and asked Charter to "provide an explanation as to the reasons for the delay" in notifying Ribbon. A2699.

Charter did not respond until December 24, 2020. A2701. When it did, it claimed the 2018 letter and 2019 subpoena had notified Ribbon of "the existence" of Sprint's claims. A2701-A2702. Charter claimed that "there is currently no trial date" and "therefore Ribbon still has the opportunity to discuss with Charter the option of assuming Charter's defense or to participate in some other manner."

A2702.[2] Charter said nothing about T-Mobile's September 2020 settlement offer. *See* A2701-A2704.

Ribbon's response on January 15, 2021 disputed that the notice requirements were satisfied and detailed how Charter's delay prejudiced Ribbon. A2500-A2502. Charter and Ribbon exchanged additional letters in February and March 2021, wherein Ribbon maintained that Charter's delay "cut off Ribbon's ability to control" the Sprint Litigation defense. A2706; A2711. Specifically, Ribbon had no input on identifying key witnesses or hiring and deposing key experts; lacked familiarity with the case discovery, Charter's networks, and the other suppliers' equipment in those networks; missed the opportunity to file petitions for *inter partes* review; and was deprived of the ability to consult with its own technical employee experts during discovery to develop defenses. A705-A707; A709.

B. Charter keeps Ribbon in the dark while it completes a settlement with Sprint.

As Charter and Ribbon corresponded, Charter, without informing Ribbon, exchanged additional settlement offers (always for a global resolution) with T-Mobile. A2716-A2717; A2719-A2720; A2722-A2726; A2728-A2729. On April 20, 2021, Charter and T-Mobile agreed upon a "tentative settlement" of $220 million

[2] On September 2, 2020, the trial date was continued due to the pandemic. A437 (ECF 545).

with "general agreement on the global peace concepts around the patent issues." A2731.

Eight days later, Charter informed Ribbon that "Charter is actively pursuing settlement opportunities with Sprint and is close to reaching a global settlement of all outstanding litigations." A2740. Ribbon never received drafts of the settlement agreement nor any explanation of the terms. A719-A721; A2572.

After agreeing to $220 million, Charter and T-Mobile spent nearly a year negotiating global-peace terms. A961-A962; A2986-A2989; A3201-A3213. Charter and T-Mobile executed their global settlement in March 2022. A2991-A3012.

IV. The Superior Court grants summary judgment to Ribbon.

Charter sued Ribbon, asserting three breach-of-contract claims alleging that Ribbon failed to perform indemnification obligations under the three Agreements. A114. Ribbon sought summary judgment on two bases: Charter failed to perform the conditions precedent of providing prompt written notice and giving control of the Sprint Litigation to Ribbon. Ex. A at 2, 10-12.[3]

The Superior Court granted summary judgment to Ribbon. *Id.* at 2. It held that the 2018 letter and 2019 subpoena were not notices under the Agreement, meaning Charter did not provide notice until July 20, 2020. *Id*. at 14-16. That July 2020 notice was not prompt, and, where required by the Agreements, Charter's delay prejudiced Ribbon's ability to defend the Sprint Litigation. *Id*. at 16-18.

The Superior Court held that summary judgment was independently warranted because Charter failed to give Ribbon control of the Sprint Litigation and settlement negotiations. *Id*. at 19-20. Each Agreement required some action of turning over control, which Charter never performed. *Id*. at 20. Instead, Charter controlled all phases of the Litigation. *Id*.

[3] Citations to Exhibit A refer to the Superior Court's decision attached as Exhibit A to Charter's Opening Brief.

ARGUMENT

I. The Superior Court correctly granted summary judgment because Charter failed to provide prompt notice, indisputably prejudicing Ribbon.

A. Questions Presented

1. Whether the Superior Court properly held that the 2018 letter and 2019 subpoena were not notices, meaning notice was provided only when Charter sent the 2020 letter. A264-A269; A276-A277; A4714-A4718.

2. Whether the Superior Court correctly held that the 2020 letter did not constitute prompt notice. A264-A266; A274-A277; A4718-A4720.

3. Whether the Superior Court correctly held that, where required, Charter's failure to provide prompt notice prejudiced Ribbon's ability to defend the Sprint Litigation. A274-A278; A4720-A4723.

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).

C. Merits of Argument

Under Delaware and New York law, the plain meaning of a contract's clear and unambiguous provisions controls. *Bathla v. 913 Mkt., LLC*, 200 A.3d 754, 759-60 (Del. 2018); *Greenfield v. Philles Recs., Inc.*, 780 N.E.2d 166, 170-71 (N.Y. 2002). As the Superior Court concluded, the relevant terms are unambiguous and

should be afforded their ordinary meaning. Ex. A at 13. The Superior Court correctly held that Charter failed to comply with each Agreement's notice provision and granted summary judgment. This Court should affirm.[4]

1. Each Agreement requires prompt notice of an indemnification obligation.

"While the specifics of each Agreement vary somewhat," the Agreements obligate Charter to provide prompt written notice of the claim giving rise to a potential indemnification obligation. Ex. A at 6, 15-16. As to their differences, "[t]he Nortel Agreement does not contain a 'prejudice' clause," whereas the Sonus and Cedar Point Agreements "require that any delay in notice prejudice the Defendants." *Id.* at 17. Thus, "[a] delayed notice is dispositive for [the Nortel Agreement]." *Id*.

The three Agreements differ in another respect: Notice is a condition precedent under the Nortel and Cedar Point Agreements. "A condition precedent is an act or event, other than a lapse of time, that must exist or occur *before* a duty to perform something promised arises." *Thompson St. Cap. P'rs IV, L.P. v. Sonova U.S. Hearing Instruments, LLC*, --- A.3d ----, 2025 WL 1213667, at *9 (Del. Apr. 28, 2025) (citation and internal quotation marks omitted); *MHR Cap. P'rs LP v.*

[4] Charter raises three separate indemnification claims, so if the Court determines that summary judgment was improperly granted as to any Agreement, it can still affirm as to the others.

Presstek, Inc., 912 N.E.2d 43, 47 (N.Y. 2009) (similar). "A condition precedent must be expressed clearly and unambiguously, and is typically evidenced by such terms as 'if,' 'provided that,' 'on condition that,' or some other phrase that conditions performance." *Soleimani v. Hakkak*, 2024 WL 1593923, at *5 (Del. Ch. Apr. 12, 2024) (citation and internal quotation marks omitted), *aff'd*, 327 A.3d 1060 (Del. 2024); *MHR*, 912 N.E.2d at 47 (similar).

The party claiming breach must prove that the condition on which the obligation depends has been satisfied. *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *49 (Del. Ch. Nov. 30, 2020), *aff'd*, 268 A.3d 198 (Del. 2021); *Rachmani Corp. v. 9 E. 96th St. Apartment Corp.*, 629 N.Y.S.2d 382, 386 (N.Y. App. Div. 1995). Strict compliance with conditions precedent is required, and substantial performance will not support a breach claim. *City of Pittsburgh Comprehensive Mun. Pension Tr. Fund v. Conway*, 2024 WL 1752419, at *18 (Del. Ch. Apr. 24, 2024); *MHR*, 912 N.E.2d at 47.

While the Superior Court did not expressly state that notice is a condition precedent, *compare* Ex. A at 14-18, *with id.* at 19, 21, the existence of one is a legal question. *Thompson St.*, 2025 WL 1213667, at *7; *Granger Constr. Co. v. TJ, LLC*, 21 N.Y.S.3d 491, 493 (N.Y. App. Div. 2015).[5] Here, the Nortel and Cedar Point

[5] Invoking the framework of conditions precedent, the Superior Court stated that "[t]he Agreements only require action by Defendants after the Plaintiffs provide notice and tender control." Ex. A at 21.

Agreements use the unmistakable language of conditions precedent, such as "provided that" and "conditioned on." A297-A298 § 10; A310 § 6.1. This Court is free to rely on that basis to affirm. *See Windom v. William C. Ungerer, W.C.*, 903 A.2d 276, 281 n.18 (Del. 2006) (summary judgment may be affirmed on other grounds).

2. Charter provided notice in July 2020.

Each Agreement obligates Charter to notify Ribbon of an indemnification obligation. Because the 2018 letter and 2019 subpoena did not do so, the Superior Court correctly held that Charter did not provide notice until the July 2020 letter.

a. The Superior Court gave effect to the notice provisions' plain language.

Each Agreement specifies what sort of "claim" or "action" Ribbon must indemnify and then obligates Charter to provide notice of "the claim," "such action," or "such claim." A297-A298 § 10; A310 § 6.1; A327 § 7. Thus, each Agreement requires notice of "the claim," "such action," or "such claim" that the Agreement makes indemnifiable in the preceding clause. The Superior Court correctly held this language means that "Plaintiffs were required to provide written notice of a claim (*i.e.*, a claim by a third party for infringement that implicates Defendants[']intellectual property provided to Plaintiffs) that implicates Defendants' potential indemnification liabilities under the Agreements." Ex. A at 14. That is, Charter had an obligation to promptly notify Ribbon that Sprint had brought suit claiming

Ribbon's products violated its intellectual property and that Ribbon faced an indemnification obligation. *Id*. at 6.

Charter contends that the Superior Court "committed a threshold legal error by holding that notice under the Agreements means 'formal notice'" and requires Charter "to convey … detailed information" beyond the action in which it had been sued. Op. Br. 26, 28. That mischaracterizes the Superior Court's reasoning. Instead, the court identified the Agreements' key terms—"notifies," "notifying," and "notify"—and "adopt[ed] their plain and ordinary meaning," "turn[ing] to the dictionary for guidance." Ex. A at 13. "Merriam-Webster defines 'notify' as 'to give formal notice to,'" *id.* at 13-14, and "'[n]otice' is defined as a 'notification or warning of something, especially to allow preparations to be made,'" *id*. at 14 (quoting *Sprintz v. Div. of Fam. Servs.*, 228 A.3d 691, 700 (Del. 2020)). So, the Superior Court held that the Agreements required Charter to provide written notice that Sprint had brought a claim triggering Ribbon's indemnification obligations. *Id.* at 14-15.

Charter latches onto the Superior Court's single reference to "formal notice" when citing the definition of "notify." Op. Br. 26-28. But the Superior Court never held that notice requires formality; instead, the central question is whether the notice "contain[ed] information to allow the Defendants to begin investigating and

preparing for those [indemnification] obligations." Ex. A at 15. The court focused on the information Charter's communications conveyed, not their form.

Charter's criticisms of that straightforward interpretation fail. First, Charter complains that the court ignored a definition of "notify" that omits "formal notice." Op. Br. 26-27. That definition—"to give notice of or report the occurrence of"—is used when the information is the object of the verb notify, such as "He *notified* his intention to sue." *Notify*, Merriam-Webster.com.[6] The more common use of "notify" is when the recipient is the verb's object, such as "*notify* a family of the death of a relation." *Id*. Charter's proposed definition does not fit the contractual language because each Agreement uses Ribbon as the object of notification.

Second, Charter argues that "rather than rely on a dictionary definition, the court should have applied the governing law." Op. Br. 27. But giving unambiguous terms their ordinary meaning *is* the "governing law." *See supra* at 16-17. None of Charter's cases questions whether notice provisions and their required content should be given their plain meaning. *See Portfolio BI, Inc. v. Djukic*, 2024 WL 887047, at *4-5 (Del. Ch. Feb. 29, 2024) (holding the term "notice" ambiguous in a different context); *Thule AB v. Advanced Accessory Hldgs. Corp.*, 2010 WL 1838894, at *7-8 (S.D.N.Y. May 4, 2010) (indemnitee was not required to identify grounds for indemnification because provision did not require it); *Deutsche Bank Tr.*

[6] https://www.merriam-webster.com/dictionary/notify (last visited Sept. 2, 2025).

Co. of Americas v. Tri-Links Inv. Tr., 900 N.Y.S.2d 246, 253 (N.Y. App. Div. 2010) (indemnification agreement "sa[id] nothing about notice").

b. Notice was not provided until the July 2020 letter.

Charter mistakenly frames this case as a dispute over the level of specificity required to satisfy the Agreements. But the dispute here is whether the 2018 letter and 2019 subpoena were notice at all (*i.e.*, notice of an indemnification obligation).[7] There is no factual dispute on that question. A2416; A2458. The 2018 letter merely "notifies Defendants that Plaintiffs are required to produce documents in the Litigation that may contain Defendants' confidential information." Ex. A at 15; *see also* A2416. The inclusion of the Sprint Litigation's caption does not suggest that it is (supposedly) a suit in which Sprint claims that Ribbon's products infringe Sprint's patents. Charter's position cannot be reconciled with the fact that Sprint's complaint accused *Charter's* phone services, provided on complex networks with products from many suppliers, of infringement. A3594-A3601; A4745-A4773. Indeed, (1) Charter sent similar letters to dozens of entities whose information might be disclosed by Charter in the Sprint Litigation, *see* A2419-A2454, and (2) when

[7] Charter's notice-specificity cases (at 28) do not address this distinct dispute. *See, e.g.*, *Am. Auto. Ass'n of N. Cal. v. Barnes Assoc.*, 2020 WL 4729063, at *6 (Del. Ch. Aug. 13, 2020) (issue was notice's "sufficiency"); *Hill v. LW Buyer, LLC*, 2019 WL 3492165, at *8 (Del. Ch. July 31, 2019) (because agreement required specification of claim's "factual basis in reasonable detail," the "limited question of the specificity or detail in a claim" was a fact question).

Charter sent the letter, Charter itself avers that it had not yet "learn[ed] how Sprint alleged Charter infringed based on the specifics of Charter's networks and the specific equipment Charter used." A3231-A3232.

The 2019 subpoena likewise contains the Sprint Litigation caption, *see, e.g.*, A2458, and little else beyond a request for Ribbon's documents and testimony, Ex. A at 15; A2457; A2461. Charter served 23 other third-party subpoenas like this in the Sprint Litigation, including to other equipment suppliers. A404-A405 (ECF 183-194, 199-200); A406 (ECF 203); A409-A410 (ECF 241, 244, 247, 256); A411 (ECF 263, 265); A416 (ECF 324); A422 (ECF 387).

Charter (at 31) points out that its subpoena defined the term "Accused Products" as certain products sold by Ribbon and identified Sprint patents. A2463. But Sprint's complaint accused Charter's phone services, not the equipment of any single supplier, of infringement. As Charter previously argued in the Sprint Litigation, receipt of a non-party subpoena "does not create a plausible inference that the non-party thereby acquires detailed knowledge about the patents at issue in the case, let alone that anyone is suggesting the non-party's own products or services infringe." A3193-A3194. And here, Charter claims that it needed Sprint's non-public infringement contentions to understand what was accused. A856-A857. How then could Ribbon have known whether Sprint accused Ribbon's products of infringement when Ribbon had not seen those infringement contentions? A888. In

short, nothing in the 2018 letter or 2019 subpoena told Ribbon that Sprint had allegedly brought a claim that a Ribbon product infringed Sprint intellectual property, much less requested indemnification.[8]

When Charter decided to provide the notice required by the Agreements, it knew how to do so. In the July 2020 letter Charter sent Ribbon (and near-identical letters to other suppliers), Ex. A at 16; A2652-A2665; A2667-A2668, Charter said that it was "providing notice of this above matter to you pursuant to the indemnification provisions" of two Agreements (and sent the notice by overnight courier). A2653. The Superior Court correctly concluded that the 2020 letter was Charter's notice. Ex. A at 15.

Charter argues that its 2018 letter and 2019 subpoena gave "adequate notice" for two reasons: (1) from the information given, Ribbon "should … have understood" that the Sprint Litigation presented an indemnifiable claim, and (2) they must be understood "in the context of" additional information Ribbon may have known. Op. Br. 28, 31. These contentions flout the law and the Agreements.

[8] For the Cedar Point Agreement, Charter had to send notice "in writing by registered or certified mail, postage prepaid, overnight courier or electronic facsimile." A314 § 14.4. The 2018 letter was emailed, A2416, and the 2019 subpoena was served by a process server, A2457. Thus, under that Agreement, the 2018 letter and 2019 subpoena could not qualify as notice. Notably, the 2020 letter was sent by overnight courier. A2652.

Charter's "should have understood" standard conflicts with Delaware and New York law. Charter (at 28-29) cites *United Association Local 38 Pension Trust Fund v. Aetna Casualty & Surety Co*., 790 F.2d 1428, 1430 (9th Cir. 1986), for that standard, but numerous courts, including the Third Circuit, have rejected that decision, holding instead that insurers need not "sift through a renewal application and decide what should be forwarded to the claims department on the insured's behalf." *Am. Cas. Co. of Reading v. Continisio*, 17 F.3d 62, 69-70 (3d Cir. 1994); *accord Homsey Architects, Inc. v. Harry David Zutz Ins., Inc.*, 2000 WL 973285, at *14 (Del. Super. Ct. May 25, 2000); *Steadfast Ins. Co. v. Sentinel Real Estate Corp.*, 727 N.Y.S.2d 393, 400 & n.3 (N.Y. App. Div. 2001). Because the 2018 letter and 2019 subpoena served different purposes than notifying Ribbon of an indemnification obligation, Ribbon was not obligated to sift through them and divine such a notification. *See Homsey Architects*, 2000 WL 973285, at *14; *Steadfast Ins. Co.*, 727 N.Y.S.2d at 400. In any event, the letter and subpoena did not contain the information Charter itself deemed necessary to determining whether Ribbon products had been accused, so Ribbon could not have understood that it (purportedly) faced an indemnification obligation. *See supra* 22-24.

Charter's argument that the 2018 letter and 2019 subpoena must be understood "in the context of" additional information Ribbon may have known ignores that the Agreements required Charter to act, not for Ribbon to unilaterally

pursue defense and indemnity based on its own knowledge or desire. As the Superior Court explained, the parties bargained for "Plaintiffs to act, not Defendants"—once Charter "provide[d] written notice to Defendants of their potential indemnification obligations," then "[a]t that point, Defendants may have become obligated to defend and indemnify." Ex. A at 19. Because "[t]he Agreements allow Plaintiffs to defend themselves at their own cost," "[a]bsent Plaintiffs taking action to invoke contractual rights under the Agreements, Defendants would have no reason to believe that they would be required to indemnify Plaintiffs." *Id.*; *cf. DLO Enters., Inc. v. Innovative Chem. Prods. Grp., LLC*, 2021 WL 1943348, at *2 n.11 (Del. Ch. 2021) (while third party's notice may lessen prejudice from indemnitee's late notice, it is no substitute for indemnitee's timely notice if agreement requires notice).

Without an initial affirmative indication that Charter wanted Ribbon to indemnify, Ribbon was not obligated to do so. Ribbon naturally would assume that Charter either believed the Sprint Litigation was not covered by the Agreements or valued control at a higher amount than Ribbon's indemnification. Given Charter's desire for a global settlement with Sprint as well as the complexity of the Sprint Litigation, directed at entire networks and not the equipment of a single supplier, it was reasonable for Ribbon to conclude that—absent an indemnification notice—Charter would conduct the Litigation on its own, even if it meant paying its own costs. Notice *from Charter* was thus vital to the Agreements' operation. Ribbon

had no duty to combine the 2018-2019 communications with other knowledge it may have had and then inquire whether Charter was *sub silentio* requesting indemnification.

Charter's approach also ignores that for the Nortel and Cedar Point Agreements, notice was a condition precedent. *See supra* at 17-19. Sending a document that—at most—might cause the recipient to suspect its products were alleged to infringe is not compliance, let alone the *strict* compliance required.

Finally, Charter's approach would unnecessarily complicate the simple requirement of notice. *Cf. Nat'l Union Fire Ins. Co. of Pittsburgh v. Baker & McKenzie*, 997 F.2d 305, 309 (7th Cir. 1993) ("It is far easier for the insured to lick a postage stamp" than it is for the insurer to comb through documents from which a claim "could be inferred."). Courts should not be tasked with retroactively plumbing what the indemnitor could or should have known from all the circumstances about its indemnification obligations. And parties must know beforehand what notice is objectively sufficient, rather than slapping the "notice" label after the fact on documents that were plainly not notices.

The parties bargained to place on Charter a minimal obligation, but now Charter demands that Ribbon scour every communication and document in its possession to glean an indemnification obligation. Indeed, Charter urges that "[a]ny communication from a customer (like Charter) regarding a lawsuit would therefore

implicate indemnification." Op. Br. 5. This Court should refrain from adopting a rule that upsets the law's settled understanding of what constitutes notice of indemnification claims.[9]

In sum, notice here was not "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 and internal quotation marks omitted). The prompt notice provisions serve the vital objective of alerting Ribbon to its customer's contention of an indemnifiable claim so that Ribbon could, if warranted, assume the defense.

3. The 2020 letter was not prompt, and the late notice prejudiced Ribbon's ability to defend the Sprint Litigation.

The July 2020 letter constituted the requisite notice, but no rational juror could conclude that a notice sent on the eve of trial was either prompt or non-prejudicial. Thus, the Superior Court properly granted summary judgment.

a. The 2020 letter was not prompt as a matter of law.

"[P]rompt" means "performed readily or immediately." *Prompt*, Merriam-Webster.com.[10] Delaware and New York courts follow that straightforward

[9] Charter complains that the Superior Court refused to consider whether Ribbon was prejudiced in 2018 and 2019. Op. Br. 32-34. But prejudice is assessed when the delayed notice is finally received, not at the time of receipt of a non-notice. Ex. A at 15; *cf. DLO Enters.*, 2021 WL 1943348, at *2 n.11 (timeliness and prejudice would be assessed at the time contractually required notice was received).

[10] https://www.merriam-webster.com/dictionary/prompt (last visited Sept. 2, 2025).

definition. *See Specialty Dx Hldgs., LLC v. Lab. Corp. of Am. Hldgs.*, 2021 WL 6327369, at *11 (Del. Super. Ct. Dec. 16, 2021) ("without delay: very quickly or immediately") (citation omitted); *Barough Eaton Allen Corp. v. Int'l Bus. Machs. Corp.*, 1980 WL 8769, at *3 (N.Y. Sup. Ct. May 20, 1980) ("performed readily or immediately: given without delay or hesitation") (citation omitted).

The Superior Court correctly concluded that Charter's July 2020 notice was not prompt as a matter of law. Ex. A at 17.[11] Sprint's amended complaint was filed in December 2017 (31 months before the notice). *Id*. at 7. "Moreover, the July 2020 Letter was sent 22 months after the identification of accused products was served, 19 months after initial infringement contentions and 5 months after final infringement contentions." *Id*. at 17. New York courts have held far shorter delays to be too lengthy as a matter of law. *See, e.g.*, *Cruz v. W. Heritage Ins. Co.*, 41 N.Y.S.3d 897, 898 (N.Y. App. Div. 2016) (two-month delay); *Juvenex Ltd. v. Burlington Ins. Co.*, 882 N.Y.S.2d 47, 48 (N.Y. App. Div. 2009) (two-month delay); *Steinberg v. Hermitage Ins. Co.*, 809 N.Y.S.2d 569, 571 (N.Y. App. Div. 2006) (57-

[11] Charter (at 36) cites one insurance case stating that a notice's timeliness "is *ordinarily* a question of fact." *Sunrise One, LLC v. Harleysville Ins. Co. of New York*, 293 F. Supp. 3d 317, 330 (E.D.N.Y. 2018) (emphasis added) (citation and internal quotation marks omitted). But "a delay in notice may be unreasonable as a matter of law when no excuse for the delay is put forth or the proffered excuse is meritless." *Mount Vernon Fire Ins. Co. v. Abesol Realty Corp.*, 288 F. Supp. 2d 302, 311 (E.D.N.Y. 2003) (quoted by *Sunrise One*). That is precisely the framework the Superior Court applied here. Ex. A at 17.

day delay); *Young Israel Co-Op City v. Guideone Mut. Ins. Co.*, 859 N.Y.S.2d 171, 172 (N.Y. App. Div. 2008) (40-day delay); *see also Am. Ins. Co. v. Fairchild Indus., Inc.*, 56 F.3d 435, 440 (2d Cir. 1995) ("Under New York law, delays for one or two months are routinely held unreasonable."). So have Delaware courts. *State Farm Mut. Auto. Ins. Co. v. Johnson*, 315 A.2d 585, 587-88 (Del. 1973) (34-week delay), *supplemented*, 320 A.2d 345 (Del. 1974); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Rhone-Poulenc Basic Chems. Co.*, 1992 WL 22690, at *9-10 (Del. Super. Ct. Jan. 16, 1992) (eight-month delay), *aff'd sub nom. Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192 (Del. 1992).[12]

Charter provides no explanation whatsoever for its delay. Instead, Charter contends that the delay did not affect Ribbon and notes that Ribbon requested additional information to assess Charter's request. Op. Br. 36-37. But the impact of Charter's delay on Ribbon goes to prejudice, not promptness. *See infra* at 31-33. And Charter's cited evidence shows only that upon receiving notice 31 months after the Sprint Litigation began, Ribbon asked for various materials (all of which Charter possessed for months prior) to investigate the indemnification request. *See* A3420;

[12] Compounding the lack of promptness is the fact that notice is a condition precedent for the Nortel and Cedar Point Agreements that demanded strict compliance.

A3432. That unremarkable request has no bearing on whether Charter's notice was prompt.[13]

b. The late notice prejudiced Ribbon's ability to defend.

Charter's delay in providing notice prejudiced Ribbon's ability to defend the Sprint Litigation. Prejudice is relevant only under the Cedar Point and Sonus Agreements. The Nortel Agreement has no prejudice exception, so Charter's failure to provide prompt notice is "dispositive for this agreement." Ex. A at 17; *see also Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 660 N.E.2d 415, 421 (N.Y. 1995) (dismissing complaint for failure to comply with condition precedent). Neither case Charter cites for implying a prejudice requirement involved conditions precedent, which inherently demand strict compliance. *See Smurfit Newsprint Corp. v. Se. Paper Mfg.*, 368 F.3d 944, 951-52 (7th Cir. 2004); *Thor 680 Madison Ave. LLC v. Qatar Luxury Grp. S.P.C.*, 2020 WL 2748496, at *12 (S.D.N.Y. May 27, 2020).

In any event, Charter prevented Ribbon's participation in virtually all pretrial activities. Charter's notice came "on the eve of trial" and after many crucial milestones had passed—"after most discovery was finished, after claim construction and final contentions, … after dispositive briefing," and after "Sprint and Plaintiffs

[13] Charter also argues that the timing of its 2020 notice "must be evaluated in the content [sic] of the prior notices Charter had sent." Op. Br. 37. But Charter does not explain why prior non-notices would affect whether a proper notice was timely.

had already engaged in substantial settlement discussions." Ex. A at 18. That was indisputably prejudicial.

In *Conergics Corp. v. Dearborn Mid-West Conveyor Co.*, 43 N.Y.S.3d 6 (N.Y. App. Div. 2016), for example, the contract required the indemnitee to give prompt written notice and gave the indemnitors the sole right to defend the indemnitee. *Id.* at 8-9. The court explained that "to establish actual prejudice due to late notice, it suffices for an indemnitor afforded the right to control the defense of an indemnifiable claim to show that it was deprived of its right to exercise that right for a material portion of the proceedings on the claim." *Id.* at 13. It thus held that the indemnitee's 21-month delay "unquestionably constituted a material deprivation of [the indemnitors'] 'sole right' to" control the defense. *Id.* at 17. For example, the indemnitors could have "chosen to settle the matter at an early stage, thereby avoiding further defense costs." *Id*. at 18. Just so here.[14]

Charter offers three rejoinders regarding prejudice: (1) Ribbon knew of the Sprint Litigation from other sources; (2) Ribbon was never going to defend the suit; and (3) Ribbon could still participate in the rest of the action. Op. Br. 37-43.

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[14] Charter cites nothing for its statement that "where, as here, the underlying suit was still pending at the time of the notice, the issue of prejudice is one of fact." Op. Br. 40. The Superior Court recognized that this approach would render the "prejudice" clause meaningless, Ex. A at 18, and it directly conflicts with *Conergics*' holding that deprivation of the right to control "for a material portion of the proceedings" is prejudicial, 43 N.Y.S.3d at 13.

Charter's first reason reveals a fundamental misunderstanding of the Agreements' nature. Under the Agreements, awareness of the Sprint Litigation and its subject matter—as opposed to Charter's request for Ribbon's indemnification—is irrelevant. As the Superior Court explained, the Agreements require Charter to act first by requesting Ribbon's indemnification. Ex. A at 19; *see supra* at 26-27. This renders "notice of the litigation from outside sources … not relevant here" because the parties bargained for "actual written notice and not constructive notice." Ex. A at 18-19; *see also Am. Home Assur. Co. v. Republic Ins. Co.*, 984 F.2d 76, 78 (2d Cir. 1993) (where agreement required insured to provide notice, "[i]nformation coming to [insurer] from any other source would not satisfy the policy requirements"). Thus, no matter what Ribbon knew about the Sprint Litigation, it could not know about any indemnity obligation before notice from Charter, because Charter had to first provide actual notice for an obligation to potentially exist.

Accordingly, prejudice from late notice is measured at the time of actual notice, not at the time Ribbon learned of the existence of the suit from other sources. This also means the 2018 letter and 2019 subpoena do not ameliorate the prejudice resulting from the delayed 2020 notice. If anything, those documents would have indicated that Charter did *not* seek indemnification from Ribbon—if Charter knew how to communicate with Ribbon about the Sprint Litigation but did not perform the ministerial task of giving notice, what else should Ribbon have thought?

Charter's caselaw (at 38-39) is inapposite. Three cases involve contractual disputes with materially different terms and features. *See Trustwave Hldgs., Inc. v. Beazley Ins. Co.*, 2024 WL 1112925, at *13 (Del. Super. Ct. Mar. 14, 2024) (indemnitor claimed inability to preserve documents as its "material prejudice"); *Thor 680 Madison Ave.*, 2020 WL 2748496, at *12 (prejudice inquiry turned on whether notice was sufficient); *Dellicarri v. Hirschfeld*, 619 N.Y.S.2d 816, 817 (N.Y. App. Div. 1994) ("defendants [did] not claim … they were in any way prejudiced as a result of" non-compliant notice). And the last concerned a county ordinance that required only substantially compliant written notice of a tort claim before suing the county. *Hines*, 640 A.2d at 1028-30.

In any event, Charter overstates what Ribbon knew from outside sources. Charter's "evidence" proves only that Ribbon knew of the lawsuit, but Ribbon's review of the public information showed that Sprint accused Charter's phone services, not Ribbon's equipment, of infringement. A4368-A4370; A4372; A4375-A4381; A4396-A4403. All Charter can muster is evidence that Ribbon monitored the Sprint Litigation, Op. Br. 32 (citing A3988-A4001; A4360; A4404; A4611-A4622), and told another entity that it was aware Sprint had filed similar lawsuits (*i.e.*, covering the same patents/technologies) against other entities—hardly a "smoking gun," *id*. at 15, 29 (citing A4360). Charter cites no evidence that Ribbon knew, much less could have known, from these other sources that the Sprint

Litigation—or any of Sprint's lawsuits—(allegedly) involved claims that Ribbon's equipment infringed. After all, Charter itself argued below that it needed written discovery from Sprint, served on Charter in December 2018, to "first learn how Sprint alleged Charter infringed based on the specifics of Charter's networks and the specific equipment Charter used." A3231-A3232. Those infringement contentions, however, were not publicly filed and were not disclosed to Ribbon until after the July 2020 notice was sent. A888.

Charter's argument that Ribbon could not be prejudiced because it allegedly never would have defended the Sprint Litigation is wrong on the Agreements and the law. First, Charter ignores the Superior Court's explanation that "[t]his argument is flawed based on the plain language of the Agreements." Ex. A at 19. The Agreements (other than the Nortel Agreement) "forgive late notice, except if the Defendants' 'ability to defend' any claim is prejudiced"; consequently, "[i]t is the prejudice to Defendants' 'ability' to defend that matters, not prejudice in the outcome of the Litigation." *Id.* That objective analysis of how *the ability* to defend was affected renders irrelevant Charter's hypothesis as to what Ribbon would have done had Charter provided timely notice. *Id*.[15] Second, Charter cannot rely on counterfactual speculation about what Ribbon would have done when Charter is the

[15] In *Auster Oil & Gas, Inc. v. Stream*, 891 F.2d 570 (5th Cir. 1990), Louisiana law required a showing of "prejudice"—not prejudice to the "ability to defend"—and various facts demonstrated an absence of prejudice. *Id*. at 579.

party that made such speculation necessary. *Conergics*, 43 N.Y.S.3d at 18 (indemnitor "cannot be expected to show precisely what the outcome would have been had timely notice been given" since the "uncertainty" results from indemnitee's failure to comply, and indemnitee "should not be permitted to use that uncertainty as a weapon") (citation and internal quotation marks omitted).

Lastly, Charter implausibly asserts that depriving Ribbon of participation in virtually all pretrial activities was not prejudicial. Charter (at 40-41) points to two sentences of analysis in *Salvo v. Greater New York Mutual Insurance Co.*, 185 N.Y.S.3d 28 (N.Y. App. Div. 2023). But there, the late notice deprived the indemnitor of only initial involvement in the litigation. *Id*. at 30. That bears no resemblance to Charter's failure to give notice until the eve of trial.

Charter claims that the Sprint Litigation likely would have settled even if Ribbon had been involved and that Ribbon had ample time to participate in the eventual settlement. Op. Br. 41-43. Charter again ignores that it is Ribbon's "ability to defend" that must be prejudiced, not the outcome. And, in any event, the determination of "how much that [settlement] payment would be," *id*. at 41, depends on the timing of the negotiations and how the suit was defended—matters that Charter prevented Ribbon from controlling. *See Am. Ins. Co.*, 56 F.3d at 440 ("[T]he very deprivation of an opportunity to play a meaningful role in the studies and negotiations that determine the amount for which indemnification is sought is

substantial prejudice to an insurer."); *Quantum Servicing Corp. v. First Madison Servs. LLC*, 116 N.Y.S.3d 500, at *3 (N.Y. Sup. Ct. 2019) (delayed notice "deprived [indemnitor] of the opportunity to obtain an earlier, possibly more favorable, settlement"). Charter kept Ribbon in the dark throughout years of litigation and settlement discussions until terms were already tentatively reached. Op. Br. 42.

Tokio Marine v. Macready, 803 F. Supp. 2d 193 (E.D.N.Y. 2011), is not relevant. It addressed the inapplicable New York common law rule that when the "indemnitor had notice of the claim against it and an opportunity to take over the defense, the indemnitee need only show potential liability" (not actual liability) to recover for a settlement. *Id.* at 202 (citation and internal quotation marks omitted). And in *DLO Enterprises*, there was a genuine factual dispute about whether the indemnitee settled before notice was given, rendering defense futile in the face of a completed settlement deal. 2021 WL 1943348, at *2.

No business would contend that it could parachute into complex litigation on the eve of trial and defend a case without suffering any prejudice. The Superior Court properly held that no reasonable juror could find an absence of prejudice from the untimely 2020 notice.

* * *

Charter's task could not have been simpler. It needed only to send a prompt written notice, and its delay in doing so prejudiced Ribbon's ability to defend the

Sprint Litigation. That entitles Ribbon to summary judgment, and the Superior Court's decision should be affirmed.

II. The Superior Court correctly granted summary judgment because Charter failed to comply with the Agreements' control provisions.

A. Question Presented

Whether the Superior Court correctly held that Charter never turned over control of the Sprint Litigation to Ribbon, as required by the Agreements. A263-A264; A269-A272; A273; A276; A278; A4706-A4712.

B. Scope of Review

The scope of review is *de novo*. *LaPoint*, 970 A.2d at 191.

C. Merits of Argument

While Charter's failure to provide prompt notice is dispositive, equally so is Charter's failure to give control over the Sprint Litigation to Ribbon. This "provides a separate basis" for affirmance of the Superior Court's order. Ex. A at 20.

1. Turning over control is a condition precedent in all three Agreements.

Each Agreement makes affirmatively ceding control of the defense a condition precedent. Under the Cedar Point Agreement, Ribbon's indemnity "obligations are conditioned on [Charter] … giving [Ribbon] sole control of the defense thereof and any related settlement negotiations …." A310 § 6.1. Under the Sonus Agreement, "[Ribbon's] indemnification obligation is subject to [Charter's] (i) tendering to [Ribbon] (and its insurer) full authority to defend or settle any such claim …." A327 § 7. And under the Nortel Agreement, Ribbon will defend Charter

"provided that [Charter] … allows [Ribbon] to control, and cooperates with [Ribbon] in, the defense and any related settlement negotiations." A297-A298 § 10.

Thus, each Agreement uses words, such as "provided that," "conditioned on," and "subject to," that make giving control of the Sprint Litigation to Ribbon a condition precedent. *See, e.g.*, *Ford Motor Co. v. Earthbound LLC*, 2024 WL 3067114, at *10 (Del. Super. Ct. June 5, 2024) ("on the condition that" clause created a condition precedent); *Ellan Corp. v. Dongkwang Int'l Co.*, 2011 WL 4343844, at *2 (S.D.N.Y. Aug. 15, 2011) ("Under New York law, use of the language 'subject to' in a contract creates an express condition precedent."); *Nat'l Fuel Gas Distrib. Corp. v. Hartford Fire Ins. Co.*, 814 N.Y.S.2d 436, 437 (N.Y. App. Div. 2006) ("The notice requirement follows the word 'PROVIDED,' which indicates the creation of a condition."). In addition, handing over control is an action "entirely within [Charter's] control." *See Nat'l Fuel Gas Distrib.*, 814 N.Y.S.2d at 437. The control clauses are therefore quintessential conditions precedent, for it would be impossible for Ribbon to defend the Sprint Litigation until Charter gave Ribbon control.

Charter did not argue otherwise below. *See* A3254-A3259. Not until the summary-judgment hearing did Charter argue that the control provisions were not conditions precedent. *See* A4941; A4946-A4947. That was too late. *See Matrix Parent, Inc. v. Audax Mgmt. Co.,* 319 A.3d 909, 932 n.198 (Del. Super. Ct. 2024) (issues raised for first time at hearing are waived).

Because the control provisions were conditions precedent, Charter had the burden to prove strict compliance. *See supra* at 18.[16]

2. The Agreements require some action of turning over control.

The Superior Court held first that "[e]ach Agreement requires some action by Plaintiffs to turn over control of the Litigation or settlement discussions," and second that "[t]here is no evidence in the record that Plaintiffs took any such action." Ex. A at 20. Charter focuses on the first holding and lodges little objection to the second. Op. Br. 45-48. It argues primarily that "[t]he Agreements contain no such requirement [of turning over control], but instead require only that Charter allow Ribbon to control the action if Ribbon wanted control." *Id*. at 45.

Charter misleadingly claims all three Agreements require only that Charter "allow" Ribbon to control. *Id.* at 45. In fact, the Cedar Point Agreement requires that Charter "giv[e]" Ribbon "sole control," A310 § 6.1, and the Sonus Agreement demands that Charter "tender[]" to Ribbon "full authority," A327 § 7. Only the Nortel Agreement requires that Charter "allow[]" Ribbon "to control." A297-A298 § 10.

A plain reading of the operative terms—give, tender, and allow—confirms that the Agreements require "some action" of turning over control to Ribbon. Ex. A

[16] Although the Superior Court did not squarely resolve this issue, *compare* Ex. A at 20, *with id*. at 21, this Court may rely on that basis to affirm. *See supra* at 18-19.

at 20. Virtually every definition of "give" involves affirmative action. *See Give*, Merriam-Webster.com ("to make a present of"; "to grant or bestow by formal action"; "to put into the possession of another for his or her use; "to execute and deliver"; "to convey to another").[17] "Tender" is no different. *Tender*, Merriam-Webster.com ("to present for acceptance"; "to make a tender of"); *see also id.* ("tender" means "an offer or proposal made for acceptance").[18]

As for the Nortel Agreement, Charter dedicates only one sentence to interpreting the term "allow," so it is unclear how Charter defines the term. Op. Br. 45. Charter suggests the term prescribes a passive role without any affirmative action. *Id*. But to "allow" means to "permit," again indicating some action by Charter. *Allow*, Merriam-Webster.com[19]; *see also Permit*, Merriam-Webster.com ("to consent to expressly or formally"; "to give leave").[20] If a drawbridge operator is required to "allow" ships to pass, that order necessitates the actions of raising and lowering the bridge. If an air traffic controller must "allow" planes to land, the controller must take action to facilitate the landing—verifying runway availability, communicating landing clearance to the plane, and providing approach sequencing. When the party with the obligation to "allow" has the sole ability to enable the other

[17] https://www.merriam-webster.com/dictionary/give (last visited Sept. 2, 2025).
[18] https://www.merriam-webster.com/dictionary/tender (last visited Sept. 2, 2025).
[19] https://www.merriam-webster.com/dictionary/allow (last visited Sept. 2, 2025).
[20] https://www.merriam-webster.com/dictionary/permit (last visited Sept. 2, 2025).

person's activity—here, control of the Sprint Litigation—the term "allow" calls for action, not passivity. Thus, just like the terms "give" and "tender," "allow" demands affirmative action that facilitates Ribbon's control.

Charter complains that the Superior Court never specified the requisite action. Op. Br. 46-47. But Charter failed to take *any* action to hand over control. Ex. A at 20. Charter did not even make the belated offer that it made to two other suppliers, asking each if it would like to "simply take over our defense." A2960; A2973.

Charter detours into a straw-man argument about whether a "Control Notice" is required, whether it must be prompt, and whether a late Control Notice will be excused if non-prejudicial. Op. Br. 46-47. Neither the Superior Court nor Ribbon has ever made such an argument, and the dispositive point remains that Charter did nothing to cede control—not that its cession of control took the wrong form or was untimely and prejudicial.[21]

Charter next claims it had no obligation to take action because (1) Ribbon never asked for control and (2) any action was futile since Ribbon disclaimed responsibility for indemnification. Op. Br. 45, 47. On the former, none of Charter's

[21] Charter's suggestion that giving control need not be prompt is incompatible with the Agreements, which require turning over "*the* defense" and "*any*" settlement negotiations, or tendering "*full* authority." Delay in handing over the defense necessarily deprives Ribbon of part of what it bargained for, causing its own inherent prejudice to Ribbon's rights. In any case, if independent prejudice from delayed tender of control were required, it is amply established here.

cases (at 45-46) holds that a condition precedent of tendering control is itself *pre*-conditioned on the indemnitor acknowledging its defense obligations. *Koch Industries, Inc. v. Aktiengesellschaft*, 727 F. Supp. 2d 199 (S.D.N.Y. 2010), and *Deutsche Bank*, 900 N.Y.S.2d at 246, concerned an inapplicable New York law rule providing that an indemnitee may bind an indemnitor to a settlement if the indemnitor had notice and an opportunity to defend. 727 F. Supp. 2d at 222-23; 900 N.Y.S.2d at 252-54. Tender was not required under the contracts, and the indemnitors could have taken control after receiving notice. *Koch*, 727 F. Supp. 2d at 222-23; *Deutsche Bank*, 900 N.Y.S.2d at 252-54. And in *Time Warner Cable Enterprises LLC v. Nokia of America Corp.v*, 211 N.Y.S.3d 381 (N.Y. App. Div. 2024), the court held only that an action was not time-barred because the plaintiff's notice alerted the defendant to a continuing obligation to defend plaintiff in the underlying suit until its conclusion. *Id.* at 381-82.

As to futility, Charter offers one sentence and cites to its brief below. Op. Br. 47. That is a textbook case of waiver. *Ploof v. State*, 75 A.3d 811, 822 (Del. 2013), *as corrected* (Aug. 15, 2013). Setting that aside, by the time Ribbon informed Charter that it would not indemnify, Charter should have already tendered control of the Sprint Litigation, and its failure to perform the conditions precedent gave Ribbon ample reason to contest any indemnification obligation.

3. Charter offers no evidence that it turned over control.

The undisputed factual record shows that "Plaintiffs controlled throughout, handling all phases of the Litigation," and Plaintiffs "did not allow Defendants to control settlement discussions." Ex. A at 20. Long before Charter gave notice in July 2020, Charter and Sprint were engaged in settlement negotiations—which began on day one of the Sprint Litigation. *Id*. at 8. Once it gave notice, Charter did not inform Ribbon about any settlement discussions until after Sprint and Charter had reached a tentative settlement. *Id.* at 20. No rational juror could find that Charter strictly complied with its obligation to affirmatively cede to Ribbon control over the Sprint Litigation defense and settlement. *See Conergics*, 43 N.Y.S.3d at 17 (indemnitee's 21-month delay in providing required notice "unquestionably constituted a material deprivation of [the indemnitors'] 'sole right' to" control the defense); *see also Quantum Servicing Corp.*, 116 N.Y.S.3d 500, at *3 (32-month delay in providing the required notice materially deprived indemnitor of its contractual right to "assume control of the defense" and "the opportunity to obtain an earlier, possibly more favorable, settlement," as well as "left the [indemnitor] with the consequences of actions not taken by [the indemnitee]").

As noted above, Charter does not meaningfully argue that it took affirmative action to cede control of the Litigation. It argues only in passing that "Charter repeatedly and expressly offered Ribbon control throughout 2020 and 2021." Op.

Br. 47. Even assuming that puts the issue before this Court, *see Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 249 A.3d 106, 123 (Del. 2021) (omitted arguments are waived), Charter references nothing more than vague statements to Ribbon about assisting Charter in a "cooperative" and "common" defense or "the opportunity to discuss with Charter the option of assuming Charter's defense or to participate in some other manner." Op. Br. 17, 18, 21 (quoting A3418-A3419; A3423; A4830-A4831). It does not and cannot explain how those statements strictly comply with its obligation to affirmatively cede control to Ribbon.

CONCLUSION

The judgment of the Superior Court should be affirmed.

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CERTIFICATE OF SERVICE

I, Roger S. Stronach, hereby certify that on September 3, 2025, I caused a true and correct copy of the foregoing *Appellees' Answering Brief* to be served through File & Serve*Xpress* on the following counsel:

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