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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, Appellee.	)	**REDACTED PUBLIC VERSION FILED: OCTOBER 13, 2025**

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SUMMARY OF ARGUMENT

Ribbon's answering brief ("AB") spotlights all the disputed issues of fact and errors of law that require reversal of the Superior Court's order granting Ribbon summary judgment ("Order"):

1) Ribbon argues Charter's 2018 and 2019 notices were insufficient because they did not inform Ribbon that its products were accused in the Sprint/Charter Action. However, Ribbon does not explain why Charter's notices were required to convey that information, as the Indemnification Agreements require only notice of the lawsuit.

2) Ribbon argues there can be no disputed facts regarding Charter's purported failure to inform Ribbon in 2018 or 2019 that its products were accused because (i) Ribbon could not have known that its products were accused; and (ii) Sprint's complaint does not accuse Ribbon's products. However, those *are* disputed facts. Moreover, (i) Ribbon's communication to WOW contains the very information Ribbon claims it could not have known; and (ii) Sprint's complaint—and the 2019 notice—explicitly identify the Ribbon products by name as the accused products.

3) Ribbon argues it was prejudiced by its purported failure to receive notice in 2018 and 2019 because "prejudice from late notice is measured at the time of actual notice [in 2020]." There are no cases which support that proposition, and

it contradicts the Agreements which require Ribbon to demonstrate prejudice even if it never received "actual notice."

4) Ribbon argues Charter's 2020 notice was untimely even though Ribbon needed information to assess its indemnification obligations that did not even exist until 2020. That is so, Ribbon argues, because the information Ribbon needed was available to Charter "months" prior to the July 2020 notice. In fact, Charter had all that information for *less than two months* before the 2020 notice. The Superior Court never determined whether that trivial delay was reasonable or timely, a determination that in all events should have been left for the jury.

5) Ribbon argues it was prejudiced by the timing of the 2020 notice because Charter "prevented Ribbon's participation" in many pretrial activities. But Charter did not "prevent" Ribbon from anything. Ribbon knew everything it needed to know about the Sprint/Charter Action early enough to control virtually all pretrial activities. Ribbon *chose* not to participate in those activities.

6) Ribbon argues the control provisions require Charter to give Ribbon control before Ribbon says or does anything, and that "the dispositive point [is] that Charter did nothing to cede control—not that its cession of control took the wrong form or was untimely and prejudicial." Ribbon is wrong on both counts. The law is clear that, until Ribbon acted, Charter's only obligation was to provide notice.

Moreover, as Ribbon admits, Charter *did* offer Ribbon the option of taking control. Ribbon provides no explanation for why that was insufficient.

7) Finally, although the Superior Court did not find any contract provisions to be "conditions precedent," Ribbon says that all the control provisions, and the notice provisions of the Cedar Point and Nortel Agreements, are conditions precedent. They are not, as they are not prerequisites to Ribbon's indemnification obligations, are not within Charter's sole control, and/or are otherwise insufficient to overcome the strong presumption against conditions precedent. But even if those provisions were conditions precedent, it would not change the result—the Superior Court misinterpreted the Agreements, and questions of fact remain regarding whether Charter complied with the Agreements even under those misinterpretations.

ARGUMENT

A. "Prompt Notice" Is Not a Condition Precedent Under the Agreements

A centerpiece of Ribbon's answering brief is its contention that the notice provisions of the Cedar Point and Nortel Agreements are conditions precedent.[1] AB17-19. The Superior Court did not find that any provisions of the Agreements are conditions precedent, and they are not.

"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 arises." *Blue Cube Spinco LLC v. Dow Chem. Co.*, 2021 WL 4453460, at *10 (Del. Super. Sept. 29, 2021) (citation omitted; second emphasis in original). Both New York and Delaware employ a "strong presumption" against finding contract provisions to be conditions precedent absent a "clear[]" intent to create one. *Id.* at *10-11 (citations omitted); *Thomas & Betts Corp. v. Trinity Meyer Util. Structures, LLC*, 2021 WL 4302739, at *3 (2d Cir. Sept. 22, 2021); *HTI Fin. Sols. Ltd. v. Manhattan SMI KG Props. Fin. Ltd.*, 2024 WL 4451965, at *5 (S.D.N.Y. Oct. 9, 2024) (New York law). Courts will sometimes compare a disputed provision to other contract language to determine if a condition precedent was intended. *Cequel Commc'ns, LLC v. Mox Networks, LLC*, 2024 WL

[1] Ribbon does not contend that the notice provision of the Sonus Agreement is a condition precedent.

3924709, at *10 (S.D.N.Y. Aug. 23, 2024); *Facchina Constr. Litigs.*, 2020 WL 6363678, at *18 (Del. Super. Oct. 29, 2020).

The prompt notice provision of the Cedar Point Agreement cannot be a condition precedent because the agreement expressly states that Ribbon's indemnification obligations can exist even in the absence of prompt notice—*i.e.*, if Ribbon is not prejudiced by failure to receive prompt notice. A0310-A0311 § 6.1. Courts considering similar provisions have uniformly concluded that this does not create a condition precedent: "the plain language of the [agreement] precludes any reading of the prompt notice requirement as a condition precedent to the attachment of an obligation to indemnify" because a "lack of prompt notice" shall not relieve the indemnification obligation absent a showing of "actual[] prejudice[]." *Conergics Corp. v. Dearborn Mid-W. Conveyor Co.*, 144 A.D.3d 516, 522-23 (N.Y. App. Div. 2016) (original alterations); *CIH Int'l Holdings, LLC v. BT United States, LLC*, 821 F. Supp. 2d 604, 610-11 (S.D.N.Y. 2011) (New York law); *accord Facchina*, 2020 WL 6363678, at *18 (distinguishing a notice/prejudice provision from another provision to show the notice/prejudice provision was not a condition precedent); A4593-A4594, at 46:18-47:25.

And notwithstanding use of the phrase "provided that," the notice provision in the Nortel Agreement is not a condition precedent either. "[T]here are *no* cases under New York law which espouse a bright-line rule that" phrases like "on

condition that," "subject to" or "provided that" create "conditions precedent which demand strict compliance." *Thomas & Betts*, 2021 WL 4302739, at *2 (New York law) (emphasis in original); *Bank of New York Mellon Tr. Co., Nat. Ass'n v. Solstice ABS CBO II, Ltd.*, 910 F. Supp. 2d 629, 646 (S.D.N.Y. 2012) (New York law) (rejecting argument that the phrase "provided that" constituted condition precedent). When the parties to the Nortel Agreement intended to define the contours of Ribbon's indemnification obligations, they did so expressly. *See, e.g.*, A0297-A0298 §10 (Ribbon "has no [indemnification] obligation regarding any claim based on…"); A0298 §11 ("Notwithstanding the forgoing language, this [Provision] shall not apply to…").

Charter therefore need only substantially comply with the notice provisions. *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690 (N.Y. 1995); *City of Pittsburgh Comprehensive Mun. Pension Tr. Fund v. Conway*, 2024 WL 1752419, at *18-19 & n.231 (Del. Ch. Apr. 24, 2024).

Ribbon's only basis for distinguishing Charter's cases demonstrating that the Nortel Agreement contains a prejudice exception by operation of law is that the notice provisions in those cases were not conditions precedent. But the very reason they were not conditions precedent is that mere use of conditional-type language does *not* create a condition precedent. *See Smurfit Newsprint Corp. v. Se. Paper*

Mfg., 368 F.3d 944, 951-52 (7th Cir. 2004). Because the notice provision of the Nortel Agreement is not a condition precedent, a prejudice exception *is* imputed.

B. The Superior Court Improperly Imposed Unbargained-For Notice Obligations on Charter

Ribbon attempts to justify the Superior Court's reliance on the "notify" dictionary definition that requires "formal notice"—rather than the alternative definition that requires no formality—to read unbargained-for notice obligations into the Agreements. AB20-21. According to Ribbon, "notify" means "formal notice" when "the recipient is the verb's object, such as 'notify a family of the death of a relation.'" *Id.* at 21. The alternative definition, Ribbon says, applies only when "the information is the object of the verb notify." *Id.* An example of non-formal notice in the relied-on dictionary is "[s]he notified my arrival to the governor."[2] Ribbon's distinction is cut out of whole cloth. The dictionary merely demonstrates that sometimes notice will be formal and sometimes it will not. As Ribbon would have it, if the sentence regarding notice to the governor were rewritten to say "she notified the governor of my arrival," it would have an entirely different meaning, and "formal notice" would then be required. This clearly is not what the dictionary intended.

But even if Ribbon's distinction had merit, Ribbon still provides no explanation for why a "formal" notice must contain information beyond what the Agreements require—identification of the lawsuit. The Cedar Point Agreement

[2] *See Notify*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/notify (visited Sept. 22, 2025).

requires only that Charter provide Ribbon with prompt notice of the "action"—*i.e.*, the lawsuit. A0310-A0311 § 6.1. The Nortel and Sonus Agreements are similar. Both require Charter to notify Ribbon of a "claim," where "claim" refers to a lawsuit. A0297-A0298 § 10 ("[Ribbon] will defend [Charter] against *that claim*…and pay all costs and damages *that a court* finally awards or are agreed to in settlement"); A0327-A0328 § 7 ("[Ribbon] will defend [Charter] against any *such claim brought against Charter in the United States* by counsel retained at Sonus' own expense"; "tendering to [Ribbon]…full authority to *defend or settle any such claim*"). Each of Charter's notices *were* "formal" as used in the dictionary examples on which Ribbon relies, as they were sent by Charter lawyers in their official capacities. And each notice identified the Sprint/Charter Action, which is all the Agreements require.

Ribbon asserts that Charter's cases demonstrating that notices need contain only the information required by the contract are distinguishable because they do not address whether notice provisions should be given their "plain meaning." AB21-22. But the holdings in those cases are premised on the fact that there is no plain meaning of "notice" that requires bargained-for notices to contain information beyond that which was bargained for. That is why, as Ribbon itself explains, the *Thule* case held that "indemnitee was not required to identify grounds for indemnification because the [notice] provision did not require it." AB21 (citing *Thule AB v. Advanced Accessory Holdings. Corp.*, 2010 WL 1838894, at *7-8 (S.D.N.Y. May 4, 2010)).

That is exactly the case here. None of the Agreements require that a notice include identification of the accused products or any mention of indemnification.[3]

[3] Ribbon's footnote argument notwithstanding (AB24 n.8), the method of transmittal of Charter's 2018 and 2019 notices at least substantially complied with the Cedar Point Agreement because (i) Charter notified the right party; and (ii) literal compliance would have been impossible. A3246-A3247. The Superior Court did not address this inherently factual issue, and it is not a basis to affirm.

C. Even If Charter Was Required to Convey The Additional Information Identified by the Superior Court, Questions of Fact Would Still Exist as to Whether Charter's 2018 and 2019 Notices Conveyed That Information

Ribbon does not dispute that it knew it had indemnification obligations to Charter for patent infringement actions that accuse Ribbon products. Charter's Opening Brief ("OB") 29-31. Instead, Ribbon factually contends there was no way it could have known before Charter's 2020 notice that Ribbon's products were accused in the Sprint/Charter Action. Therefore, the logic goes, Charter's 2018 and 2019 notices could not have communicated that information to Ribbon. AB22-26; AB34-35. The implausibility of Ribbon's "facts" aside, they are of no use to Ribbon here, where "the facts of record, including any reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to [Charter]." *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009). Moreover, Ribbon's "facts" are demonstrably false and/or irrelevant:

1. Even though Charter's 2018 and 2019 notices effectively pointed Ribbon to Sprint's publicly-filed Amended Complaint—which Ribbon concedes it reviewed (AB34)—it contends it could not have known its products were accused because "Sprint's complaint accused Charter's phone services" rather than Ribbon's products. AB22-23. To the contrary, the Amended Complaint explicitly says that

Charter infringes by "using softswitches provided by Nortel and CedarPoint." A4746-A4747 ¶¶ 52-53.

2. Ribbon contends that the 2019 notice's express identification of Ribbon's equipment as the "Accused Products" cannot have informed Ribbon that its products were accused because Sprint did not accuse Ribbon's products. AB23-24. But the fact that Ribbon might disagree with the contents of a notice does not make that notice any less effective.

3. Ribbon argues that it cannot have known its products were accused from reading the Sprint complaint because Charter said "it needed Sprint's non-public infringement contentions to understand what was accused." AB23. But ***Charter never said that.*** As Ribbon itself concedes, Charter explained in a court submission that it needed the infringement contentions specifically to understand "**how** Sprint alleged Charter infringed…" AB23, AB35. A complaint contains only allegations—i.e. **that** the Ribbon products were accused—whereas the infringement contentions provide the "how." The deposition testimony on which Ribbon relies does not say otherwise. AB23 (citing A0856-A0857). In fact, that witness testified that the Amended Complaint contained all the information Ribbon needed to start defending Charter because the Amended Complaint accused Ribbon's equipment. A0865-A0864 at 75:24-76:9; A0954-A0955 at 164:5-165:14.

4. Ribbon argues the 2019 Subpoena cannot be notice because Charter purportedly admitted that third party subpoenas do not "suggest[] the non-party's own products or services infringe." AB23. Charter admitted no such thing. Charter was referring to a third party subpoena in another case that did not identify the accused products. In contrast, the 2019 Subpoena expressly identifies the Ribbon products as the "Accused Products."

5. Ribbon says, apropos of nothing, that Charter provided "similar letters" to the 2018 notice, and similar subpoenas to the 2019 Subpoena, to other entities. AB22-23. That is irrelevant. A single lawsuit can give rise to many indemnification obligations, and sending many notices does not negate the effectiveness of any single notice. And to whatever extent Ribbon is suggesting that Charter's 2018 and 2019 notices were not intended as indemnification notices, that too is irrelevant. *B&C Holdings, Inc. v. Temperatsure Holdings, LLC*, 2020 WL 1972855, at *11 (Del. Super. Apr. 22, 2020) ("subjective beliefs and intent" of sender "irrelevant to whether" notice satisfies contractual requirements) (subsequent history omitted).

6. Ribbon asserts it had no way to know that "***any*** of Sprint's lawsuits—(allegedly) involved claims that Ribbon's equipment infringed." AB34-35. In fact, WOW told Ribbon in February 2019 that Sprint's infringement contentions identified the Ribbon equipment as the accused technologies. OB15;

A4225-A4226. Ribbon responded by telling WOW that it knew the Sprint/Charter Action involved the same accused (Ribbon) technologies. OB15-16; A4360. And between 2018 and 2019, four other Ribbon customers told Ribbon that the Sprint suits against them implicate Ribbon's products. OB16; A4222-A4358.

***

Ribbon next cites insurance cases to contend that insurance-related notices must always make an explicit demand for coverage. AB25. However, each of these cases involve "claims-made" insurance policies, where transmittal of notice of a claim defines the coverage period. As the court explained in *American Casualty,* a delay in providing such notice on a claims-made policy would constitute "an unbargained-for expansion of coverage, *gratis,*…" *Am. Cas. Co. of Reading, Pennsylvania v. Continisio*, 17 F.3d 62, 68-69 (3d Cir. 1994) (citation omitted). The court distinguished this from "occurrence policies," where notice of a claim is intended to "help the insurer investigate, settle, and defend claims," where notice provisions are "liberally and practically construed" and where constructive notice is effective notice. *Id.* The Indemnification Agreements should be construed even more "liberally" than "occurrence policies" because, while the notice provisions are intended to help Ribbon "investigate, settle, and defend" an action, they do not require notice that a claim is being made against Ribbon. Unlike those insurance cases, the issue here is whether a "sophisticated" entity like Ribbon would have

understood the "significance" of the 2018 and 2019 notices to its "own interests." *Deutsche Bank Tr. Co. of Ams. v. Tri-Links Inv. Tr.*, 74 A.D.3d 32, 41 (N.Y. App. Div. 2010).

Finally, Ribbon contends that its knowledge of the Sprint/Charter Action is irrelevant to the sufficiency of Charter's 2018 and 2019 notices, and that it is relevant only to prejudice. AB25-26. Again Ribbon is wrong. If Ribbon obtained the information it had about the Sprint/Charter Action as a result of Charter's notices, then the notices strictly complied with the Agreements. And even if, for whatever reason, that was not strict compliance, Ribbon's knowledge is still relevant to the issue of substantial compliance.

D. The Superior Court Improperly Refused to Consider Whether Ribbon Was Prejudiced by any Lack of Proper Notice in 2018 and 2019

Ribbon barely even tries to defend the Superior Court's refusal to consider prejudice with respect to Charter's 2018 and 2019 notices, and relegates its entire response to a footnote. AB28 n.9.

Ribbon contends that *DLO Enterprises* says that "prejudice is assessed when the delayed notice is finally received, not at the time of receipt of a non-notice." *Id.* (citing *DLO Enters. Inc. v. Innovative Chem. Prods. Grp., LLC*, 2021 WL 1943348, at *2 n.11 (Del. Ch. May 13, 2021)). That case says nothing of the kind. There, an indemnitor received notice from a third party prior to the indemnitee's notice, and the court concluded that the third party's notice could not satisfy the indemnitee's notice obligation. However, the court also held that the third party's notice ***was*** relevant to whether the indemnitor was prejudiced by any late notice from the indemnitee,[4] and denied summary judgment on that basis. *DLO*, 2021 WL 1943348, at *2 & nn.11-13. Obviously, that prejudice would be determined at the time the indemnitor received notice from the third party. Otherwise, the earlier notice from the third party would be irrelevant to prejudice. Whatever position the indemnitor was in at the time of the indemnitee's notice would be dispositive.

[4] Elsewhere in its brief, Ribbon acknowledges that *DLO* stands for this proposition. AB26.

Ribbon does not so much as acknowledge that the Agreements require it to demonstrate prejudice even if it had never received any notice whatsoever from Charter (OB32-34), much less explain how that can be reconciled with its position that prejudice is only determined at the time a proper notice is received.

E. Disputed Issues of Fact Preclude Summary Judgment Regarding Whether Charter's 2020 Notice Was "Prompt"

As Charter explained, the Superior Court improperly engaged in pure month-counting to determine that Charter's 2020 notice was untimely. OB36-37. Ribbon makes that same mistake.

First, relying on a dictionary definition and cases unrelated to indemnification notice provisions, Ribbon argues that "prompt" notice requires "immediate" notice. AB28-29. This ignores the settled law, cited by the Superior Court, 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. That is why courts have rejected Ribbon's "immediate" interpretation. *Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n*, 2010 WL 11443362, at *17 (W.D. Okla. Dec. 10, 2010) (New York law) ("Under New York law, 'prompt' used in similar [prompt notice] contexts has not meant immediate, rather it has been interpreted as meaning within a reasonable time.").

Ribbon then continues its month counting exercise by citing a string of insurance cases in which "far shorter delays" have been deemed "too lengthy." AB29-30. However, those cases involved personal injury, environmental pollution accidents, and the like where the insurer has a "***need to protect itself from fraud by investigating claims soon after the underlying events***[.]" *See In re Brandon*, 97

N.Y.2d 491, 496-97 (N.Y. 2002). Fraud is not an issue under the facts and circumstances here.

Ribbon says it is unhelpful to Charter that the information Ribbon needed to assess indemnification, like expert reports, did not even exist until 2020 because Charter had that information for "months" prior to sending the July 20, 2020 notice. AB30. In fact, expert reports were not completed until June 12, 2020, barely over a month before Charter's 2020 notice. AR001-AR002. It was for the jury to decide whether that trivial delay was reasonable.[5]

Finally, relying on *Mount Vernon*, Ribbon argues timeliness of a notice can be decided as a matter of law if the sender does not provide an excuse for its timing. AB30-31; AB29 n.11 (citing *Mount Vernon Fire Ins. Co. v. Abesol Realty Corp.*, 288 F. Supp. 2d 302, 311 (E.D.N.Y. 2003)). It cannot. *Mount Vernon* merely states that summary judgment can be granted if a notice is untimely *and* no valid excuse is given for the delay. 288 F. Supp 2d at 311. Lack of an "excuse" does not itself make the notice untimely.

[5] Ribbon complains that Charter did not explain why its 2018 and 2019 notices are relevant to the timeliness of the 2020 notice. AB31 n.13. Obviously, the fact that the earlier notices conveyed everything Ribbon needed to know to indemnify and defend Charter is relevant to the timing of Charter's 2020 notice, which adds only an explicit demand for indemnification.

F. Disputed Issues of Material Fact Preclude Summary Judgment Regarding Whether Ribbon Was Prejudiced by the Timing of Charter's 2020 Notice

Ribbon's mantra for why it was prejudiced by the timing of Charter's 2020 notice is that "Charter prevented Ribbon's participation" in pretrial proceedings, and that Ribbon was "deprived of its right" to defend Charter. AB31-32. As Charter explained, these are factual issues for the jury, and all record evidence is to the contrary. OB37-43. Ribbon knew everything it needed to know to defend Charter at least as early as the date of its email to WOW, before anything substantive had happened in the case. It *chose* not to step in and defend Charter—*it was never "deprived of" or "prevented from" anything*.[6]

Ribbon contends that its earlier detailed knowledge about the Sprint/Charter Action is irrelevant to prejudice because the Agreements require Charter to provide that information to Ribbon. AB33. That is a non-sequitur. Whether Charter complied with the Agreements is a completely different issue than whether Ribbon

[6] Ribbon cites *Conergics* as support for its supposed "right" to defend Charter. Unlike the contract at issue in *Conergics*, however, Ribbon did not have the **right** to defend Charter. Instead, it had the **obligation** to defend Charter. *Conergics* distinguished the two. 144 A.D.3d at 518, 523-25. Ribbon's reliance on its supposed "right" fails for this additional reason.

was prejudiced by Charter's purported non-compliance. Ribbon itself acknowledges that the *DLO Enterprises* case says exactly that. AB26.[7]

Ribbon does not dispute that it never would have defended Charter—even if it had received the gold standard of notice—because it contends that the Sprint/Charter Action is not indemnifiable. Ribbon disputes even in its appeal brief that the Sprint/Charter Action implicated its equipment. Section C *supra*. Consequently, Ribbon cannot possibly have been prejudiced by any purported late notice.

Ribbon incongruously responds that it need not have actually suffered any prejudice in order to have been prejudiced in its ability to defend. Instead, Ribbon says prejudice is an "objective analysis"—in other words, a thought experiment where one considers whether a hypothetical company that would have defended Charter would have been prejudiced in its ability to defend. AB35. Ribbon cites no authority for this, and its position contradicts the plain language of the Cedar Point and Sonus Agreements, both of which require prejudice to *Ribbon's* ability to defend (not some hypothetical third party). OB8-9; A0310-A0311 § 6.1; A0327-

[7] Ribbon's contention that Charter's 2018 and 2019 notices would have indicated to Ribbon that Charter did not want indemnification is a question of fact for the jury. AB33. It's contentions that prejudice "is measured at the time of actual notice" (AB33) and that "Charter overstates what Ribbon knew" (AB34) are addressed in Sections C and D above.

A0328 § 7(a). It also contradicts the prejudice exception New York law imputes to the Nortel Agreement, which is prejudice to "the adverse *party*," *i.e.*, the party to whom notice is due under the contract. OB44; *Thor 680 Madison Ave. LLC v. Qatar Luxury Grp. S.P.C.*, 2020 WL 2748496, at *12 (S.D.N.Y. May 27, 2020) (emphasis added).

Finally, Ribbon contends it is immaterial that it had every opportunity to participate in the settlement discussions because the prejudice must be to the "ability to defend" and not the "outcome" of the case. AB36. Ribbon misses the point. The discussions that lead to settlement are frequently the most important part of defending a case. So it was with Sprint's litigation campaign, where all the many defendants Sprint sued either lost at trial or paid in settlement.

G. Summary Judgment on the Control Provisions Was Improper Even Under Ribbon's Reading Those Provisions

Ribbon contends that the Superior Court did not require a Control Notice, and that "[n]either the Superior Court nor Ribbon" ever argued that such a notice must be either prompt or "excused if non-prejudicial." AB43. Instead, Ribbon says, "the dispositive point [is] that Charter did nothing to cede control—not that its cession of control took the wrong form or was untimely and prejudicial." AB43.[8] As support for its contention that "Charter failed to take *any* action to hand over control" (*id.*, emphasis in original), Ribbon relies on the Superior Court's grant of summary judgment based on its assertion that "[t]here is no evidence in the record that Plaintiffs took any such action." Ex. A, 20. Even if Ribbon is correct about the Superior Court's interpretation of the control provisions, summary judgment was still inappropriate under that interpretation. It was based on a plainly inaccurate factual finding that Charter "never took any such action," which in all events should have been a question for the jury.

Charter recited pages of evidence wherein it kept asking Ribbon to get involved in the Sprint/Charter Action, including an offer for Ribbon "to discuss with Charter the option of assuming Charter's defense" entirely. OB18-22. The Superior

[8] Ribbon says in a footnote that if promptness/prejudice were required, they have been "amply established." AB43 n.21. The Superior Court never addressed these issues, and they would be questions of fact for the jury.

Court completely ignored this evidence. Ribbon acknowledges the evidence but contends, without explanation, that giving Ribbon the option to assume Charter's defense was insufficient. AB45-46. But Ribbon never explains ***why*** that was insufficient or ***what else Charter could possibly have been expected to do***. Short of somehow forcing control onto Ribbon, offering Ribbon control was Charter's only option.

Ribbon also argues that Charter did not allow Ribbon to control settlement discussions. AB45. But it ignores the Superior Court's finding that "settlement discussions that led to the actual settlement had not begun" when Charter sent the July 2020 letter. Ex. A, 17-18. Instead, Ribbon relies on two unsolicited settlement offers from Sprint in 2018 to falsely suggest that there were ongoing settlement talks from 2017 through July 2020, and argues that Charter's "delay" between 2018 and its offer of control was unreasonable. AB10, AB12-14, AB45-46. However, Ribbon itself explained that the Superior Court's order was based on Charter's purported failure to take *any* action, and that the issue was *not* that the control offer was "untimely." This purported delay is therefore irrelevant.

In any event, there was no delay. Once Charter provided notice to Ribbon, it was not required to separately advise Ribbon of any settlement discussions. OB42. Moreover, the settlement discussions that led to the "tentative" settlement occurred between February and April 2021. OB20. Months earlier, in December 2020,

Charter offered to let Ribbon have control of the case (OB18-19), which encompasses control over settlement. Ribbon refused control. And only four months later, with a year of settlement negotiations still ahead, Charter explicitly asked Ribbon to "reconsider its position" and "engage with Charter in connection with…the settlement discussions." OB21; A3456-3458. Even if delay, and concomitant prejudice, were relevant, those would be questions of fact for the jury.

H. The Superior Court Misinterpreted the Control Provisions

Contrary to the Superior Court's interpretation, Charter was not required to take any action to turn over control until Ribbon asked for (or indicated it wanted) control. OB45-47. Ribbon does not cite any authority as support for the Superior Court's interpretation, and attempts only in vain to distinguish Charter's cases. AB43-44. Towards that end, Ribbon contends that *Koch* and *Deutsche Bank* are distinguishable because "[t]ender was not required under the contracts, and the indemnitors could have taken control after receiving notice." *Id.* at 44 (citing *Koch Industries, Inc. v. Aktiengesellschaft*, 727 F. Supp. 2d 199 (S.D.N.Y. 2010) and *Deutsche Bank*, 74 A.D.3d at 41-44). But the same is true of the Cedar Point and Nortel Agreements. The requirement of a separate formal tender of control is not in those agreements—that requirement was improperly read into those agreements by the Superior Court. Moreover, although the Sonus agreement uses the word "tender," state supreme courts that have considered the issue have held that "notice of suit is sufficient to tender a defense." *E.g.*, *Home Ins. Co. v. Nat'l Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 532 & n.4 (Minn. 2003) (collecting cases).

Ribbon does not contend that the agreement at issue in *Time Warner Cable* lacked a tender requirement. AB44 (citing *Time Warner Cable Enters. LLC v. Nokia of America Corp.*, 211 N.Y.S.3d 381, 381-82 (N.Y. App. Div. 2024)). Instead Ribbon contends the court "held only that an action was not time-barred…" *Id.*

However, Ribbon ignores the court's reliance on *Deutsche Bank* to find that notice alone was sufficient because "formal tender of the defense to defendant was unnecessary." *Time Warner Cable*, 211 N.Y.S.3d at 382 (citing *Deutsche Bank*, 74 A.D.3d at 41).

Ribbon also relies on dictionary definitions as support for the Superior Court's finding that Charter was required to take "some action." AB41-43. This misses the point. Certainly, if Ribbon had indicated it wanted control, Charter would have had to take whatever reasonable actions were necessary to give it that control. That has no applicability here, where Ribbon did not ask for or want control and ultimately refused to take control.[9]

[9] Charter did not waive its futility argument. AB 44. The argument is not "one sentence"—Charter's statement that "Ribbon always disclaimed responsibility" is a reference to its fulsome argument that Ribbon refused to defend Charter. OB18-22. And on the merits, it does not matter when Ribbon told Charter it would not defend—the fact that it never would have defended renders futile any attempt to give it control. *Ashkenazi v. Kent S. Assocs., LLC*, 51 A.D.3d 611, 611-12 (N.Y. App. Div. 2008); A3258-A3259.

I. The Control Provisions Are Not Conditions Precedent

As Ribbon explains, the control provisions would have to be "entirely within [Charter's] control" in order be conditions precedent. AB40; *see also* Restatement (Second) of Contracts § 227[1]. Because Charter's obligation to give Ribbon control does not mature until Ribbon indicates it wants control, the control obligation is not entirely within Charter's control.

And even if Ribbon were not required to act first, the control provisions still would not be "entirely within Charter's control." "Allow" means "fail to restrain or prevent."[10] And as Ribbon says, "give" means "to put into the possession of another for his or her use." AB42. Both require action from Ribbon to either try to take control (in the case of "allow") or to actually take control (in the case of "give"). And to whatever extent "tender" means more than "notice," the same analysis applies.

But even if the control provisions were conditions precedent, such conditions need not be performed when "waived, excused, or prevented by the other party." *Smurfit*, 368 F.3d at 951. Ribbon's refusal to respond to Charter's early notices, and its later outright refusal to take control, prevented Charter from giving Ribbon control.

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[10] *Allow*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/allow (visited Sept. 22, 2025).

Finally, Charter did not waive these arguments. AB40. As Charter does here, it responded to Ribbon's conditions precedent argument below by explaining that Charter could not give Ribbon control unless Ribbon took control. A3254-A3259. Whatever ambiguity Ribbon might believe existed was clarified at oral argument, and the Superior Court considered Charter's argument. This is completely unlike *Matrix Parent, Inc. v. Audax Management Company, LLC* where "[p]laintiffs requested jurisdictional discovery for the first time" during oral argument and the Superior Court therefore declined to grant it that discovery. 319 A.3d 909, 932 n.198 (Del. Super. 2024).

But even if Charter had not addressed conditions precedent at all below, there still would be no waiver. Countering Ribbon's contention that the control provisions are conditions precedent does not constitute presenting an "entirely new theory of [the] case" as required for waiver. *LGM Holdings, LLC v. Schurder*, 2025 WL 1162999, at *7-8 nn.52, 54 (Del. Apr. 22, 2025). At worst, Charter would be providing an "additional reason to support" Charter's "steadfast argument" that the control provisions do not excuse Ribbon's indemnification obligations. *Id.* That is especially true here, where the Order appealed from does not address conditions precedent, and where Ribbon raises it as a purported alternative ground for affirmance.

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Dated: September 23, 2025

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I, hereby certify that, on September 23, 2025, a true and correct copy of Appellants' Reply Brief was caused to be served on the following counsel of record for Defendants/Appellees via File & Serve*Xpress*:

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