UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BASTIAN SOLUTIONS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:23-cv-00198-JRS-CSW
	)	
ATTABOTICS, INC,	)	
	)	
Defendant.	)	
	)	
	)	
Accelerate360, LCC,	)	
	)	
Interested Party.	)	

Findings of Fact and Conclusions of Law

This case came before the Court for a four-day bench trial on October 28, 2024, continuing through October 31, 2024. (Minute Entries, ECF Nos. 206–09.) Bastian Solutions, LLC brought this action against Attabotics, Inc. seeking: (1) declaratory judgment that Attabotics had a duty to defend and indemnify Bastian in litigation brought against Bastian by Accelerate 360, LCC ("A360"); (2) judgment against Attabotics for breach of contract; and (3) judgment against Attabotics for breach of express warranty. (ECF No. 11.) Attabotics asks the Court to deny declaratory judgment and find Attabotics not liable on the breach of contract and breach of warranty claims. (Def.'s Proposed Findings ¶ 382 at 152, ECF No. 212.) The Court appreciates and congratulates the Parties on the professionalism and quality of the advocacy throughout the pendency of this case. Having carefully considered all the

evidence, the Court now enters its Findings of Fact and Conclusions of Law under Federal Rule of Civil Procedure 52(a)(1).[1]

I. Findings of Fact

a. The Parties, The Product, and The Project

1. Plaintiff, Bastian Solutions LLC ("Bastian"), is an Indiana company. Bastian provides consulting, integration and other services for a variety of material handling systems—including, at issue here, for automated storage and retrieval systems. Bastian Solutions, https://www.bastiansolutions.com/ (last visited May 1, 2025).

2. Defendant, Attabotics Incorporated ("Attabotics"), is a Canadian corporation. Attabotics designs and builds a proprietary automated storage and retrieval system. Attabotics, https://attabotics.com/ (last visited May 1, 2025).

3. An automated storage and retrieval system ("ASRS") is a computer-controlled system that automatically moves items to and from storage. The benefits of an ASRS typically include reduced labor costs, more efficient use of space, and more accurate inventory tracking. Automated Storage and Retrieval System, https://en.wikipedia.org/wiki/Automated_storage_and_retrieval_ (last visited May 1, 2025).

4. The instant action relates to a contract between Bastian and Attabotics ("Parties") to provide an ASRS for a third-party, Accelerate360 ("A360").

[1] Any finding of fact should be deemed a conclusion of law to the extent appropriate, and vice versa.

5. In 2020, A360 contracted with Bastian to deliver an automated material handling system ("System"), which would include an ASRS, to A360's facility in Olathe, Kansas ("Olathe Project"). (Stipulations ¶ 1, ECF No. 200; *see also* Trial Tr. Vol. 1, 148:24–152:23, ECF No. 201.)

6. Bastian had successfully implemented numerous automated material handling systems using an ASRS from a company called AutoStore. (Padgett Testimony, Trial Tr. Vol. 1, 148:24–152:23, ECF No. 201.) Accordingly, Bastian initially recommended that A360 install AutoStore at their Olathe facility, with Bastian acting as integrator. (*Id.*) Bastian had little experience implementing other companies' ASRSs. (*Id.*)

7. A360 executives met with Attabotics' sales representatives at a trade show. A360 was intrigued and requested that Bastian make a proposal to A360 for the Olathe Project using Attabotics' ASRS, rather than AutoStore's. (Jones Testimony, Trial Tr. Vol 1, 51:16-52:12, ECF 201; Needham Testimony, Trial Tr. Vol. 2, 517:24–519:5, ECF No. 202.)

8. Attabotics' ASRS ("Attabotics Solution" or "Nest system") was made up of three primary components.

   a. A large three-dimensional, cubic structure called the "Nest." (Stipulations ¶ 4, ECF No. 200.) The Nest for the Olathe Project was approximately ninety-eight feet long, fifty-two feet wide, and thirty-two feet high. (Appendix H at H-10, Trial Ex. 11.)

b. Inventory is stored within the Nest and moved in and out of storage using robots called "ants." (Stipulations ¶ 4, ECF No. 200.)

c. The Attabotics Solution is primarily controlled by Attabotics' software called "Nexus." (*Id.*)

9. The Attabotics Solution was designed so that the Nexus software would receive an order and direct an ant to retrieve a bin within the Nest that contained the ordered item. The ant would deliver the bin (with the item inside) to a "picking station" outside of the Nest. At the picking station, a worker would remove the ordered item from the bin for shipping. The ant would then return the bin to its place in the Nest and proceed to the next order. (*Id.* ¶ 5)

10. While some of Bastian's executives expressed initial concerns about a lesser-known player like Attabotics providing its ASRS on the Olathe Project, after conducting vendor due diligence, Bastian was generally confident in the ASRS system Attabotics had to offer. (*See* Jones Testimony, Trial Tr. Vol. 1, 49:2–50:2; 53:2–55:19, ECF No. 201.) Bastian also recognized that implementing the Attabotics Solution for the Olathe Project would expand the portfolio of ASRS systems that Bastian could offer to future customers. (*See* Padgett Testimony, *id.* at 151:18–152:5.)

11. Bastian's role in the Olathe Project was to act as the "integrator" of disparate parts and software from numerous subcontractors into the System. This meant that Bastian would purchase the Attabotics Solution, combine it with other vendors' products, and provide Bastian's own services to deliver the System to A360. (*See*

Def.'s Proposed Findings ¶ 8 at 8, ECF No. 212; Pl.'s Proposed Findings ¶ 1 at 1, ECF No. 211.)

12. Attabotics' Nest system was only one part of the final deliverable System to A360. (*See* Dickinson Testimony, Trial Tr. Vol. 2, 391:1–393:9, ECF No. 202.) But the Nest was the primary component. (Jones Testimony, Trial Tr. Vol. 1, 47:9–14, ECF No. 201.)

13. In 2020, the Parties executed various documents outlining the details of their relationship on the Olathe Project; the documents, which include an "Integrator Agreement" and which will be identified and described herein below, are referred to collectively as the "Transaction Documents."

14. Bastian and A360 entered into their contract ("System Agreement") on December 18, 2020. (Stipulation ¶ 14, ECF No. 200; System Agreement, Trial Ex. 567.) The System Agreement is not a Transaction Document between Attabotics and Bastian.

15. The Parties implemented the Attabotics Solution for the Olathe Project in 2021 and 2022. (*See, e.g.*, Statement of Work, Trial Ex. 13 at 4; Trial Tr. vol. 2, 479:12–480:7-19, ECF No. 202 (S. Needham); Trial Tr. vol. 3, 729:7-18, ECF No. 203 (S. Needham) (Attabotics achieved throughput test in March 2022.)

16. Bastian, Attabotics, and A360 measured the performance of the System with two primary tests—a throughput test and an availability test. (*See* Pl.'s Proposed Findings ¶ 47 at 11, ECF No. 211; Padgett Testimony, Trial Tr. Vol. 1, 158:9–159:20, ECF No. 201.)

17. A "throughput test" measures output. (*See* Padgett Testimony, Trial Tr. Vol. 1, 158:18–159:20, ECF No. 201.) It measures how many bin "presentations" the ants can deliver from the Attabotics Solution in an hour. (*Id.*)

18. An "availability test" measures the percentage of time that the Attabotics Solution is operational. (*Id.*) Under certain circumstances, the Attabotics Solution could theoretically satisfy the throughput test but fail the availability test. (*Id.*) For example, if the Attabotics Solution is technically capable of making the required number of presentations per hour, but the Attabotics Solution is "down" for most of the day, then the System's Attabotics Solution would have passed the throughput test but failed the availability test. (*See id.*)

19. Ultimately, A360 determined that the project failed. (A360 Compl., Trial Ex. 371.) On July 29, 2022, A360 terminated the Olathe Project and sued Bastian for breach of contract in the Superior Court of the State of Delaware, ("Delaware Litigation"). (*See id*; Termination Letter, Trial Ex. 180.)

20. The A360 Complaint indicated that, at least in part, Bastian's breach of contract with A360 was caused by deficiencies in the Attabotics Solution. (*See, e.g.,* A360 Compl. ¶¶ 88–108 at 26–35, Trial Ex. 371; *see* Def.'s Trial Br. at 12, ECF No. 108 ("A360's allegations point the finger at Attabotics . . . ."); Gravelle Testimony, Trial Tr. Vol. 3, 822:19–21, ECF No. 203 (Answer: "A360 was choosing to blame Attabotics? Yeah, I believe that's true.")).

21. Bastian defended itself in the Delaware Litigation by arguing that the System had satisfied Bastian's System Agreement with A360. (Pl.'s Answer to A360 Compl. ¶¶ 103, 104, 107–10, 131, Trial Ex. 582.)

22. Simultaneously, Bastian sought defense and indemnification from Attabotics for the Delaware Litigation under Section 11.2 of the Integrator Agreement. (Demand Letters, Trial Exs. 38, 590–593.)

23. The Parties attended a mediation on November 10, 2022, in an attempt to resolve their dispute as to defense and indemnification; the mediation was unsuccessful. (Jones Testimony, Trial Tr. Vol 1, 90:1-12, ECF No. 201.) Bastian, Attabotics, and A360 participated in a three-way mediation on January 20, 2023. (Stipulations ¶ 30, ECF No. 200.) That mediation was also unsuccessful. (*Id.* ¶ 31.) Attabotics did not assume the defense of the Delaware Litigation.

24. Bastian and A360 entered a Settlement Agreement on July 28, 2023. (Settlement Agreement, Trial Ex. 370.) Bastian agreed to pay A360 $6,000,000 and an additional $1,000,000 if Bastian recovered future sums from Attabotics. (*Id.* ¶ 2.) Bastian agreed to forgo seeking $3,419,745.60 it had previously sought in its counterclaim against A360, and Bastian agreed not to seek reimbursement for the costs to dismantle the System. (*Id.*) Attabotics was not consulted about and, consequently, did not approve of the Settlement Agreement. (*See* Logan Testimony, Trial Tr. Vol 4 1088:19–22, ECF No. 204.)

b. The Parties' Transaction Documents

25. The collection of documents that memorialized the Parties' agreement on the Olathe Project is referred to as the "Transaction Documents." (*See* Integrator Agreement ¶ 19, ECF No. 11-1.)

26. On March 18, 2020, Attabotics provided Bastian with a "Proposal" for the Olathe Project. (Stipulations ¶ 6, ECF No. 200; *see* Proposal, Trial Ex. 596.) The Proposal is a Transaction Document incorporated into the Integrator Agreement. (*See* Am. Compl. ¶ 79, ECF No. 11 ("Attabotics and Bastian entered into the Integrator Agreement, which is a valid and enforceable contract, and which expressly incorporates the Attabotics Proposal."); Integrator Agreement ¶ 19, ECF No. 11-1 (explaining that a proposal for an approved opportunity is a Transaction Document and can be used to interpret the Parties' obligations)).

27. The Parties entered into the Integrator Agreement with an effective date of June 12, 2020. (Stipulations ¶ 8, ECF No. 200.) The purpose of the Integrator Agreement was to establish a general contractual relationship in which Bastian would act as an integrator for Attabotics' ASRS System; the Integrator Agreement would govern the Olathe Project and future projects, not yet contemplated. (*See* Integrator Agreement 1–2, ECF No. 11-1.)

28. Section 19 of the Integrator Agreement contains an order of precedence provision. It states that in the event a conflict arises between the Parties "with respect to the performance of any obligations required under this Agreement," the conflict will be resolved by applying the terms of transaction documents in the following descending order of precedence:

> a.) The Attabotics Proposal to which an Approved Opportunity pertains; b.) Other transaction documents signed by all Parties and issued subsequent to the Effective Date of this Agreement which clearly indicate the mutual agreement of the Integrator and Attabotics to alter, amend, supplement or change the express terms of this Agreement ("Other Transaction Documents"); c.) This Agreement; and d.) the Accepted Integrator Purchase Order.

(Integrator Agreement ¶ 19, ECF No. 11-1.)

29. The Parties agreed to some and disclaimed other warranties under section 15 of the Integrator Agreement. (Integrator Agreement ¶ 15, ECF No. 11-1.)

a. Section 15.2 disclaimers conspicuously state that "[t]his warranty sets forth Integrator and Integrator's Affiliate's exclusive remedy and Attabotics' entire liability for any breach of any condition or warranty relating to the products and software." (*Id.* ¶ 15.2.)

b. Attabotics disclaimed all warranties of 1) merchantability; 2) fitness for a particular purpose; or 3) conformity of its products to standards arising by law, course of dealing, course of performance, or usage of trade. (*Id.*)

c. The Parties agreed to a hardware warranty under Section 15.1, which, in pertinent part, states that Attabotics' services will be performed in a "workmanlike manner," based on "commercially reasonable practices and standards." (*Id.* ¶ 15.1.) For a period of twelve months following customer acceptance, Attabotics will "repair or replace defective parts" and "perform preventive maintenance." (*Id.*)

d. The Parties agreed to a software warranty under Section 15.3, which, in pertinent part, states that "in the event that [Attabotics'] software does not conform" to written specifications, for a period of twelve months from acceptance date, Attabotics will provide programming services to the extent that Bastian did not use the software in a manner "inconsistent with Attabotics' written specifications or the terms of the agreement." (*Id.* ¶ 15.3.) Attabotics also agreed to provide 24/7/365 phone support. (*Id.*)

30. Under section 21 of the Integrator Agreement, a Party's rights under the agreement will not be deemed to have been waived, changed, or amended, "except by written agreement executed by authorized officers of both the Integrator and Attabotics." (*Id.* ¶ 21.)

31. Attabotics and Bastian executed a Statement of Work for the Olathe Project; Attabotics executed on December 23, 2020, and Bastian executed on January 8, 2021. (Stipulations ¶ 10, ECF No. 200.)

32. Under the Statement of Work, the Olathe Project was divided into milestones, which were placed in a table and given completion dates; namely:

Activity	Start Date	Completion Date
P.O. Issued		Dec 18, 2020
Procurement and Manufacturing	Dec 21, 2020	Mar 19, 2021
Client Obtains Required Permits	N/A	Mar 19, 2021
Fall Protection Installed	TBD	Mar 19, 2021
Site Installation (permit dependant)	Mar 22, 2021	Jun 21, 2021
Attabotics Testing	Jun 22, 2021	Aug 6, 2021
Customer Acceptance Testing	Aug 7, 2021	Aug 26, 2021
Go Live	N/A	Aug 27, 2021
Ramp-Up Period (See 8.0)	Aug 30, 2021	Nov 24, 2021

(SOW 4, Trial Ex. 13.)

33. The Parties planned to test the System between August 7, 2021, and August 26, 2021, referred to as "Customer Acceptance Testing." (*Id.*) Under section 6.11.4 of the Statement of Work, Customer Acceptance Criteria were to be jointly developed and agreed to by the Parties. (*Id.* at 14.) The Customer Acceptance Testing was to "includ[e] pass/fail criteria." (*Id.*) And the criteria would be appended to the Statement of Work as "Appendix C." (*Id.*)

34. The Statement of Work also established a payment schedule. (*Id.* at 2–3.) Bastian agreed to pay Attabotics a certain percentage of the total purchase price upon completion of the milestones. (*Id.*) Customer Acceptance Testing was the final project milestone between the Parties, which was scheduled to be completed on

August 26, 2021.[2] (*Id.* 2–4.) Final payment was due upon successful completion of Customer Acceptance Testing.

35. The Parties were scheduled to "Go Live" immediately after completing Customer Acceptance Testing, on August 27, 2021. (*Id.* at 2–3.) "Go Live" meant that the system was ready to fulfill "real orders." (Jones Testimony, Trial Tr. Vol 1, 65:4–10, ECF No. 201.) The Statement of Work scoped the project for "50 ants (35 for go-live)." (SOW ¶ 6.2 at 5, Trial Ex. 13.)

36. Attabotics achieved "Go Live" on August 27, 2021. (Stipulations ¶ 26, ECF No. 200.)

i. *Appendix H vs. Appendix C*

37. The Parties executed a Purchase Order for the Olathe Project on or about the same time as the Statement of Work. (*See* Purchase Order, Trial Ex. 181; Email, Trial Ex. 11.)

38. The face of the Purchase Order contemplates "Appendix H" Acceptance Testing criteria as a part of the description and scope of work. (*See* Purchase Order 1, Trial Ex. 181). However, as noted above, under section 6.11.4 of the Statement of Work, Customer Acceptance Testing was to be memorialized as "Appendix C."

39. The Purchase Order contemplates an availability test, as outlined in Appendix H:

[2] The Transaction Documents use the terms "customer acceptance" and "final acceptance." The Parties used the terms interchangeably. (Rowe Dep. 167:21–168:3, ECF No. 156-4.) Customer acceptance appears to be the predominate term in the statement of work, and final acceptance is used in the Purchase Order and Appendix H to the purchase order.

Availability Requirements: Attabotics must prove a total availability of 98% during the availability test. Availability definitions align with Appendix H_Acceptance Testing 121620.

(*Id.* at 2.)

40. The Purchase Order contains a payment schedule, which states that the remaining balance of the total purchase price is due upon "Final Acceptance – As outlined in Appendix_H_Acceptance Testing 121620."

Start of Installation	10% of Total Price = $355,740.60
Completion of Installation	10% of Total Price = $355,740.60
Final Acceptance - As outlined in Appendix_H_Acceptance Testing 121620	20% of Total Price = $711,481.20
Total Price	$3,557,406

(*Id.* at 2.)

a. The final payment amount in the Purchase Order (20% of Total Price = $711,481.20), is inconsistent with the final payment amount in the Statement of Work, (10% of Total Price = $355,740.60). (*Id.*; SOW at 3, Trial Ex. 13.)

41. The Purchase Order states that the hardware components include 50 version 5 ants/robots. (*See* Purchase Order 2, Trial Ex. 181.)

42. Bastian attached Trial Exhibit 599 as Exhibit C-2, titled Exhibit Appendix C on the docket, to its Amended Complaint in this action. (*See* ECF No. 11-5.) In its Amended Complaint, Bastian stated that Exhibit C-2 was a "true and accurate copy of the Statement of Work." (Am. Compl ¶ 17 n.3, ECF No. 11.) But, Bastian maintained at trial that Appendix H governed final acceptance testing. (Am. Compl ¶ 17 n.3, ECF No. 11.)

43. In its Answer to the Amended Complaint, Attabotics "denie[d]" that Exhibit C-2 to the Amended Complaint was a "true and accurate copy of the Statement of Work," (Answer ¶ 17 at 6–7, ECF No. 39), though Attabotics now claims that Exhibit C-2 is Appendix C to the Statement of Work and governs the Parties' Customer Acceptance Testing. (Def.'s Proposed Findings ¶ 75 at 27, ECF No. 212.)

44. Attabotics cites Trial Exhibit 560 for the proposition that it satisfied the testing obligations under the Statement of Work. (*See* Def.'s Proposed Findings ¶ 234 at 124, ECF No. 212) ("And Bastian's internal project reports clearly show that Attabotics had 100% completed the 3 phases of testing in the Statement of Work.") (citing Email at 26, Trial Ex. 560)).

45. Trial Exhibit 560 includes Bastian's internal documentation of the Olathe Project and cannot be interpreted to represent the Parties' mutual understanding of final acceptance testing under section 6.11.4 of the Statement of Work. There is no evidence that the Parties discussed the contents of Trial Exhibit 560 prior to executing the Transaction Documents.

46. The pre-contracting communications between the Parties indicate, by a preponderance of the evidence, that the testing criteria contemplated in section 6.11.4 of the Statement of Work was memorialized in Appendix H to the Purchase Order. The Parties' communications also demonstrate that Exhibit C-2 to the Amended Complaint, Trial Exhibit 599, was not Appendix C to the Statement of Work, nor any final manifestation of the Parties' intent, but rather Bastian's honest mistake of not instead attaching Appendix H to the Amended Complaint. (*See* Trial

Tr. Vol 1, 166:22–167:2, 212–213, 260:8–12, ECF No. 201; Trial Ex. 517; Trial Ex. 599; Trial Tr. Vol 3, 740:1–741:2, ECF No. 203, 744:8–12, ECF No. 203).

47. The Court further concludes that the Parties' course of performance of the contract indicates that final acceptance was not achieved at the completion of Go Live, as contemplated in the Statement of Work. Instead the Parties' course of performance was consistent with Appendix H's acceptance testing criteria as the governing testing criteria.

48. Attabotics did not invoice Bastian after the project went live on August 27, 2021. In fact, Attabotics did not invoice Bastian for final payment until July 27, 2022, nearly a year after Go Live. (Invoice, Trial Ex. 528.)

49. On December 16, 2021, four months after Go Live, Shawn Needham, Senior Vice President of Operations at Attabotics, emailed Marvin Logan with Bastian, frustrated that A360 would not deploy Attabotics' Nexus version 34.1 software because "this will delay that final acceptance test until the new year. This is very frustrating for us as we want to conclude our portion of the [S]ystem." (Email at 2, Trial Ex. 537.)

50. On February 2, 2022, approximately 5 months after Go Live, Attabotics' Needham stated in an internal email that Attabotics needs to "close out App H testing because that closes our portion of the contract." (Email at 1, Trial Ex. 523.)

51. In sum, Attabotics' post-contracting behavior belies the conclusion that the Parties intended for final acceptance to necessarily occur before Go Live.

52. Nor did Attabotics behave as if it had met its final testing obligations after the August 26, 2021, throughput test. The Parties completed another throughput test the following year on March 2, 2022, as outlined in Appendix H, and Attabotics did not behave as if final acceptance had been achieved after the March 2, 2022, throughput test, such as demanding payment from Bastian, or reducing its investment in the project to what was minimally required under the service warranty.

53. Attabotics' post-contracting behavior suggests that, at the time of contracting, the Parties intended for final acceptance to be governed by the Appendix H availability test—not just a throughput test.

54. Appendix H was derived from Bastian's agreement with A360; the System Agreement includes a version of Appendix H called "Attachment H." (S*ee* System Agreement H-1, Trial Ex. 274.) While Appendix H states that the "System Acceptance Test" is between Bastian and A360, (Appendix H H-1, Trial Ex. 11), the Purchase Order between the Parties expressly incorporated Appendix H availability testing. (*See* Purchase Order at 1, 3, Trial Ex. 181.)

55. At times the Parties' behavior aligned with the Statement of Work. For example, Bastian's final payment on July 27, 2022, was for 10% of the purchase price, which aligns with the Statement of Work payment schedule, not the 20% contemplated in the Purchase Order. (*See* Invoice, Trial Ex. 528; SOW ¶ 4.0, Trial Ex. 13.)

56. But on balance, the Parties' conduct in the course of performance of the contract establishes, by a preponderance of the evidence, that the Parties intended, at the time of contracting, for the Appendix H availability test to govern final acceptance. This is so even if, under Appendix H, final acceptance of Attabotics' ASRS system would stretch after Go Live, and final payment for the Attabotics Solution would be contingent upon factors outside of Attabotics' control—such as successful integration with other vendors' products.

ii. Only 35 ants were required to satisfy acceptance testing under Appendix H.

57. The Parties do not dispute that, under the Purchase Order, the project could proceed to the August 27, 2021, "Go Live" with 35 ants. And the Parties do not dispute that the contract called for an additional 15 ants to be delivered to A360 by the end of the "Ramp Up" period, approximately 13 weeks after "Go Live." Accordingly, the Parties do not dispute that a total of 50 ants needed to be delivered by the end of the ramp-up period.

58. The Parties dispute, however, whether 50 ants, or only 35 ants, were necessary for Attabotics' system to pass acceptance testing under Appendix H; in other words, whether the additional 15 ants promised under the Purchase Order were "backup ants" or actual "production ants." (*See* Def.'s Proposed Findings ¶¶ 20–27 at 11–12, ¶ 244 at 60, ECF No. 212); (Trial Tr. Vol. 3, 661:3–6, ECF No. 203). The Parties' pre-contracting communications demonstrate that the Parties

contemplated a difference between production ants and backup ants. (*See* Trial Ex. 110.)

59. A360 believed that it had purchased a system that could operate with 50 production ants at a given time. Mark Davison, Chief Technology Officer at A360, testified as corporate representative: "[O]ur position was that 50 ants is what we purchased, and 50 ants were what should have been in the Nest for our use." (A360 30(b)(6) Dep. Excerpts, Davison Dep. Vol I 135:4-9, ECF No. 162-1.)

60. On July 5, 2022, Marvin Logan stated in an internal email to Bastian colleagues that "it is clear that the contract was only for 35 ants with 15 for redundancy. . . . We are going forward in the availability testing with 35 ants (or more, without penalty to us)." (Trial Ex. 563) (citing to email exchange between A360's Mark Davison and Bastian's John Padgett explaining that the 1/35 proration rate for Appendix H testing was "to account for the 15 extra ants.")

61. In the subsequent months, Bastian and Attabotics ran three availability tests, none of which were conducted with 50 ants. Bastian and Attabotics agreed that the tests passed. A360 did not participate in these tests.

a. On July 19, 2022, the Parties ran an availability test, which A360 interpreted as a failure. But Bastian argued that the test results were miscalculated, and the test was a pass. (Email chain, Trial Ex. 526.)

b. A second availability was conducted the next day, on July 20, 2022. A360 thought it failed, but Bastian's project management team lead, Tyler Lempa, sent an email to A360's Bill Vollz explaining that they

interpreted the July 20, 2022, test as a pass. (Email Chain, Trial Ex. 514.) Bastian commented that "only 35 ants (robots) needed for the test per table in section 1.5.2 in Appendix H." (*Id.*)

c. A third test was conducted later in the day on July 20, 2022. Lempa emailed Mark Davison, A360's Chief Technology Officer, and Volz, explaining that the System was a pass. (Email chain, Trial Ex. 512.) The test was conducted with 45 ants. (*Id.*) Bastian signed the System Acceptance Testing Approval Form attached to the back of Appendix H, stating that Bastian and Attabotics had conducted a successful test. A360 did not sign the form. (*Id.*)

62. In the evening of July 20, John Padgett, Bastian's account manager, emailed Chuck Rowe, Bastian's project manager, asking whether the System passed the acceptance tests. (Trial Ex. 564.) Padgett specifically asked whether the Attabotics Solution maintained 35 ants. (*Id.*) Rowe responded that Bastian interpreted the tests as passes, running one test with 35 and one with 45 ants; and, after noting they were running the test that day with 45 ants, he explained that if A360's objection is that the tests needed to be run with 50 rather than 45 ants, then "[t]hat point will have to be argued." (*Id.*)

63. On July 27, 2022, Bastian's Vice President of Legal and Human Resources sent a letter to A360's Chief Legal Officer, stating that the System passed the availability tests on July 19 and July 20. (Letter at 1, Trial Ex. 586.)

64. The Court finds that the Parties' pre-contracting communications and post-formation course of performance indicate that they intended that Final Acceptance under Appendix H could be achieved with only 35 ants.

iii. A360's approval was not required for the Parties to achieve final acceptance under Appendix H to the Purchase Order.

65. Bastian did not cite to, and the Court cannot find, any evidence of pre-contracting communications between the Parties indicating that final acceptance would be conditioned on A360's approval. To the contrary, the pre-contracting communications indicate that the Parties intended for final acceptance to be governed by objective metrics, such as throughput and availability rates.

66. Similarly, there is no evidence that the Parties' behavior during the course of performance in any way indicated that A360's approval was required to achieve final acceptance.

67. Rather, on July 27, 2022, Attabotics emailed Bastian an invoice for final payment directly to Bastian's apinvoices email. (Invoice, Trial Ex. 528.) Bastian paid the invoice, despite the fact that A360 had not accepted or approved of the Attabotics Solution, and the Attabotics Solution never passed an availability test with 50 production ants. (Invoice, Trial Ex. 528; Lempa Testimony, Trial Tr. Vol. 4, 1060:5–8, ECF No. 204.) However, Lempa noted that it was not typical for a vendor to submit directly to this apinvoices email without copying the project manager or first getting approval from Bastian, which did not happen in this instance. (*Id.*) He indicated that the invoice was unfortunately paid despite not

being approved by Bastian and that it should not have been paid because they had not passed System acceptance. (*Id*., 1060—1062.)

68. The evidence indicates that the Parties did not agree that final acceptance under the Purchase Order was to be conditioned on A360's approval.

69. The Court concludes that Attabotics was not bound by A360's arbitrary approval to determine if its system achieved final acceptance. Rather, final acceptance was measured by the objective testing metrics described in the Transaction Documents, specifically Appendix H.

c. Attabotics Breached its Promise to Deliver 50 Version 5 Ants for the A360 Project.

70. The face of the Purchase Order states that Attabotics will supply "50 ants/robots version 5." (Purchase Order 2, Trial Ex. 181.)

71. The Parties agreed that the project could proceed to Go Live with Version 4 ants, but that the Version 5 ants would be delivered by the end of the "ramp up period." (Email, Trial Ex. 60.)

72. The project achieved Go Live on August 27, 2021, which initiated the ramp up period. (*See* Stipulations ¶ 26, ECF No. 200; SOW 4, Trial Ex. 13.)

73. Attabotics never delivered any Version 5 ants to the A360 project, allegedly due to the COVID-19 pandemic causing supply chain issues. (Stipulations ¶ 23, ECF No. 200; Def.'s Proposed Findings ¶¶ 155–164 at 43–44, ECF No. 212.)

74. The last written communication between Bastian and Attabotics relating to the Version 5 ants was an email exchange on February 25, 2021, in which Attabotics

confirmed that it would deliver the first Version 5 robots by October 1, 2021, and all remaining Version 5 robots by the end of 2021. (Trial Ex. 117.)

75. There is no evidence that Bastian demanded delivery of the Version 5 ants in 2022.

76. The Integrator Agreement contains a *force majeure* clause which excuses performance of contractual obligations due to circumstances out of a party's control, "including supply and personnel effects caused by COVID-19." (Integrator Agreement ¶ 8, ECF No. 11-1.) Furthermore, each party agreed to "promptly notify the other Parties as soon as it becomes aware of such anticipated delays or failures, and of the equitable adjustment of schedules required thereby." (*Id.*)

77. The Court finds that Attabotics did not (1) notify Bastian that the delivery of the Version 5 ants would be delayed past the ramp-up period, or (2) present evidence that it proposed an equitable adjustment to the schedule. (*See* Needham Testimony, Trial Tr. Vol. 2, 576:6–17, ECF No. 202) (Needham agreeing he is not aware of any formal communication sent to Bastian invoking the *force majeure* clause and confirming that Attabotics did not send Bastian a change order proposing an equitable adjustment to the schedule.)

78. Ultimately, Attabotics breached its promise to Bastian to supply 50 Version 5 ants for the A360 project, and Attabotics' failure to perform was not excused under the *force majeure* clause.

d. Attabotics Incorporated is the Party to the Purchase Order.

79. The Integrator Agreement was entered into by "Attabotics, Inc." (Integrator Agreement 1, ECF No. 11-1.) It was signed by Chris Lewis, Chief Operating Officer of "Attabotics Corporation." (*Id.* at 14.)

80. The Statement of Work was agreed to by "Attabotics, Inc." (Statement of Work 1, Trial Ex. 13.) It was signed by Shawn Needham, Senior Vice President of Operations, and Andy Williams, Chief Revenue Officer. (*Id.* at 15–16.)

81. The Purchase Order, however, states that the Supplier is "Attabotics US Corp." (Purchase Order 1, Trial Ex. 181.)

82. Attabotics U.S. Corporation is a wholly owned subsidiary of Attabotics Incorporated. (Gravelle Testimony, Trial Tr. Vol. 3, 850:15–17, ECF No. 203.)

83. The Purchase Order was signed by Shawn Needham; the printed signature block indicates that Needham was signing as "Attabotics Representative." It does not indicate which entity he was signing for, as shown below.

(Purchase Order 3, Trial Ex. 181.)

84. At the time of the trial, Needham was employed as Senior Vice President of Operations at Attabotics, Inc., not Attabotics U.S. Corp. (*See* Needham Testimony, Trial Tr. Vol. 2, 543:12–544:11, ECF No. 202.) At the time of trial, he did not have

the authority to enter contracts on behalf of Attabotics U.S. Corp. (*Id.*) He cannot recall whether he had that authority when he signed the Purchase Order. (*Id.*)

85. The Parties dispute whether Attabotics, Inc. or Attabotics U.S. Corp. is the party to the Purchase Order. (Def.'s Proposed Findings ¶¶ 166–167 at 109, ECF No. 212; Pl.'s Proposed Findings ¶ 35 at 8, ECF No. 211.)

86. The entities' names are similar, and the entities share common principal officers.

a. Scott Gravelle is the CEO of both companies. (Gravelle Testimony, Trial Tr. Vol. 3, 850:15–23, ECF No. 203.)

b. Shawn Needham was SVP of Operations at Attabotics, Inc.; he signed the Purchase Order on behalf of Attabotics U.S. Corp. as the listed supplier; in doing so, Needham held himself out as SVP of Operations of Attabotics U.S. Corp., (*see* Purchase Order 3, Trial Ex. 181), although there is no evidence that he actually held this position at Attabotics U.S. Corp., (*see* Needham Testimony, Trial Tr. Vol. 2, 543:12–544:11, ECF No. 202.)

87. The entities' business purposes were similar; Attabotics U.S. Corp. was created to help Attabotics, Inc. do business in the United States. (*See* Gravelle Testimony, Trial Tr. Vol. 3, 849:20–850:7, ECF No. 203) (Attabotics CEO Scott Gravelle explaining, "Attabotics U.S. Corp. was set up for a number of reasons about us doing business in the United States," including for tax purposes and so its U.S.-based employees could work for a U.S. entity.)

88. The entities have the same principal place of business. The Integrator Agreement, Statement of Work, and Purchase Order state that Attabotics, Inc. and Attabotics U.S. Corp. is located at 7944 10th Street N.E., Calgary, Alberta, T2E 8W1, Canada. (*See* Integrator Agreement 1, ECF No. 11-1; Statement of Work 1, Trial Ex. 13; Purchase Order 1, Trial Ex. 181.)

89. The Integrator Agreement—between Attabotics, Inc. and Bastian Solutions, LLC—contemplates that the Parties to the Integrator Agreement would be bound by a future purchase order. (*See* Integrator Agreement ¶¶ 3.4.2, 18, 19, ECF No. 11-1.)

90. The Court concludes, by a preponderance of the evidence, that Attabotics, Inc. impressed upon Bastian the reasonable belief that Attabotics U.S. Corp. was entering the Purchase Order on behalf of its parent company, Attabotics Inc. Therefore, Attabotics Inc. is a party to the purchase order.

e. Indemnification under the Integrator Agreement and A360's Third-Party Claim

91. Bastian seeks indemnification from Attabotics for losses caused by the following contractual breaches under the Integrator Agreement and other Transaction Documents:

a. continuous failures of its Nest and Nexus software;
b. failure to provide 50 version 5 Ants, without any excuse for its failure to perform;
c. failing to disclose that the version 4 Ants used at the A360 project were prototypes and used equipment as opposed to new robots;
d. failing to provide a Nest system capable of operating with 50 Ants;

e. providing Nexus software that was so unreliable that it alone reduced overall Nest system availability to at best 92.6%, well below 98%availability;
f. failing to design, install or service the Nest or Nexus software in a good and workmanlike manner;
g. failing to provide Nexus software or a Nest system that conformed to the standard Attabotics represented it could satisfy;
h. failing to provide required repair and service support;
i. causing Bastian to miss milestones set forth in its agreement with A360 due to failures of Attabotics' Nest and Nexus software;
j. failing to pass System Availability Testing within the required time period;
k. causing Bastian to be in default under the System Agreement with A360 for not achieving System Acceptance Testing within the contractually required time period due to Nest and Nexus failures; and
l. causing A360 to terminate the System Agreement and file suit against Bastian due to failures of Attabotics' products and services.

(Pl.'s Proposed Findings ¶ 16 at 49, ECF No. 211.)

92. Bastian also seeks indemnification for losses caused by Attabotics' negligence, or more culpable conduct, in connection with the performance of its obligations under the Transaction Documents, in the following ways:

a. failing to use reasonable care in designing, manufacturing and/or maintaining the Nest, including both its hardware and software;
b. failing to provide 50 version 5 Ants without any excuse for its failure to perform;
c. knowingly failing to disclose that the version 4 Ants used at the A360 project were prototypes and used equipment as opposed to new robots;
d. knowingly failing to provide a Nest system capable of operating with 50 Ants without daily crashes;
e. knowingly failing to provide a Nest system capable of operating with more than 30 Ants without weekly crashes or with more than 40 Ants without daily crashes;

f. failing to design, install or service the Nest or Nexus software in a good and workmanlike manner;
g. knowingly failing to provide Nexus software or a Nest system that conformed to the standard Attabotics represented it could satisfy;
h. failing to provide required repair, service support;
i. causing Bastian to miss milestones set forth in its agreement with A360 due to failures of Attabotics' Nest and Nexus software;
j. failing to pass System Availability Testing in accordance with required time period;
k. causing Bastian to be in default under the System Agreement with A360 for not achieving System Acceptance Testing within the contractually required time period due to Nest and Nexus failures; and,
l. causing A360 to terminate the System Agreement and file suit against Bastian due to failures of Attabotics' products and services.

(*Id.* ¶ 17 at 49–50.)

93. Under the Integrator Agreement, the Parties agreed to a defense and indemnification provision:

> Except for Intellectual Property Infringement covered by Section 9.2 and subject to the limitations set forth in Section 12 below, each party hereto (the "Indemnifying Party") **shall defend the other party** and its Affiliates, directors, shareholders, officers, agents and employees (collectively, the "Indemnified Party") against any and all **third-party suits, claims, actions or proceedings** ("Third-Party Claim), and **shall indemnify the Indemnified Party against any costs, expenses, damages, awards, interest, penalties, fines,** (including reasonable attorneys' fees, disbursements and expenses) **finally awarded therein to such third party by a court of competent jurisdiction or agreed to by the Indemnifying Party in a monetary settlement of such Third-Party Claims**, and the costs of enforcing any right to indemnification under this Agreement for: **(a) material breach or non-**

> **fulfillment of any representations, conditions, warranties or covenants hereunder; (b) any negligent or more culpable act or omission of Indemnifying Party** (including any recklessness or willful misconduct) **in connection with the performance of its obligations under this Agreement**; (c) any bodily injury, death of any Person or damage to real or tangible personal property caused by the negligent acts or omissions of Indemnifying Party or the Indemnifying Party's negligence, intentional misconduct or defect in design or manufacture; or (e) allegation that the Indemnifying Party breached its agreement with a third party as a result of or in connection with entering into, performing under or terminating this Agreement.

(Integrator Agreement ¶ 11.2, ECF No. 11-1) (emphasis added.)

94. The Parties agreed to certain conditions and/or restrictions to defense and indemnification:

> In the event that any such Third-Party Claim is brought, the Indemnifying Party shall undertake and have **sole control [of] the defense and any related settlement of such action.** The Indemnified Party shall (a) have **promptly notified** the Indemnifying Party in writing of the Third-Party Claim, and (b) cooperate fully in the defense and settlement of the Third-Party Claim to the extent reasonably requested by the Indemnifying Party, at the Indemnifying Party's reasonable expense. Notwithstanding the foregoing, the Indemnified Party shall **not have any right**, **without the written consent** of the Indemnifying Party, to **settle any action** if such settlement arises from or is part of any criminal action, suit or proceeding or contains a stipulation or **acknowledgement of, any liability or wrongdoing** (whether in contract, tort of otherwise) on the part of the Indemnifying Party.

(*Id.*) (emphasis added.)

i. Attabotics was not prejudiced by any delay in receiving notice of A360's claim or lawsuit against Bastian.

95. On July 5, 2022, A360 informed Bastian that Bastian was in default of the System Agreement and the time to pass Acceptance Testing had passed. Still, A360 allowed Bastian to conduct three more availability tests on July 19, 20, and 21, 2022, which, from A360's point of view, all failed. (*See* Trial Exs. 172, 175, 178, 272, 273.)

96. In light of A360's position that the Olathe Project was a failure, Bastian sent a physical letter to Chris Lewis at Attabotics, dated July 28, 2022, stating that it was Bastian's "expectation that [A360] will make a damages claim against Bastian related to delays and the failure of the equipment supplied by Attabotics to meet the performance criteria." (Trial Ex. 38.)

97. Chris Lewis was designated as the person who "may" receive notice as required or contemplated by the Integrator Agreement. (*See* Integrator Agreement ¶ 20, ECF No. 11-1.)

98. On July 29, 2022, A360 filed its complaint against Bastian in the Superior Court of the State of Delaware. (A360 Complaint, Trial Ex. 92.)

99. On August 4, 2022, Attabotics' CEO, Scott Gravelle, responded to Bastian's July 28 letter. (Trial Ex. 39.) Gravelle's position was that the "Attabotics System" had fully satisfied the Integrator Agreement, that the dispute between Bastian and A360 was "just that: between Bastian and [A360]," and "since Attabotics is not in breach of the Integrator Agreement, Attabotics cannot be responsible for any

extraneous liability in relation to the Project, including for any breach by Bastian of the agreement it has with [A360]." (*Id.*) Attached to Gravelle's letter was an email from Tyler Lempa that argued to A360 that the July 20, 2022, System Availability Test had met Appendix H acceptance testing requirements thus qualifying as a "PASS." (*Id.*)

100. Attabotics' Shawn Needham received an email and physical letter, dated August 4, 2022, from A360's attorneys regarding A360's complaint in the Delaware Litigation. (Trial Ex. 589.) The letter discussed the potential exposure of confidential information in the suit. (*Id.*) While this was not a notification from Bastian of the A360 suit, it is evidence that Attabotics knew, by August 4, 2022, at the latest, that A360 had commenced the Delaware Litigation.

101. After A360 filed its complaint on July 29, 2022, Bastian's legal counsel attempted to send Attabotics several letters, the first formally requesting defense and indemnification, the second informing Attabotics about proposed redactions to confidential information contained in A360's complaint, and the third requesting that Attabotics accede to a mediation with Bastian pursuant to the dispute resolution provision, Section 13, of the Integrator Agreement. The letters were dated August 17, 25, and 29, 2022. All three were improperly emailed to scott.gravelle@attabotics.com. (*See* Trial Exs. 590–92.) Gravelle's actual email address was scott@attabotics.com, (Gravelle Testimony, Trial Tr. Vol. 3, 861:14–862:6, ECF No. 203), and Gravelle was not designated as the person to receive notice under the Integrator Agreement. (*See* Integrator Agreement ¶ 20.)

102. On September 21, 2022, Attabotics received a physical letter from Bastian, (Trial Ex. 593), which contained copies of the improperly addressed August demand letters. (Taft Response, Trial Ex. 208; Gravelle Testimony, Trial Tr. Vol. 3, 880:20–864:2, ECF No. 203.)

103. On September 22, 2022, Attabotics' outside legal counsel responded to the demand letters and explained that, while Attabotics disagreed with Bastian's legal characterizations, it agreed to pursue mediation as mandated by the Integrator Agreement. (Taft Response, Trial Ex. 208.)

104. Here, the Court finds that Attabotics was not harmed by the approximately eight-week delay in receiving formal written notice about the Delaware Litigation. Attabotics did not present any evidence or argument of prejudice. Indeed, prejudice appears unlikely because Attabotics was on notice by August 4, at the latest, that A360 had sued Bastian. In fact, Attabotics had already engaged and copied outside counsel when Gravelle sent his August 4 response letter to Bastian. (*See* Trial Ex. 39) (Matt Albaugh from Taft Stennius & Hollister cc'd). Also, Shawn Needham was made aware of the Delaware Litigation by the letter from A360's counsel. (Trial Ex. 589.)

105. Furthermore, prejudice is less likely here than in a typical indemnification agreement in which the indemnifying party is often an insurance company that is unlikely to be aware of an injury until it receives notice from the insured. Here, Attabotics was intimately involved in the Olathe project. It knew the status of the project and was aware that by the first week of July 2022, A360's position was that

the project had failed, and, if nothing changed, legal action was likely. (Trial Ex. 520).

106. In other words, Attabotics was familiar with the basic factual and legal circumstances which gave rise to the dispute between Bastian and A360, as well as its potential for liability. Attabotics could, and indeed appears to, have begun preparing its defense well in advance of receiving formal notice of A360's lawsuit.

107. The Court concludes by a preponderance of evidence that Attabotics was not prejudiced by the two month delay in its receiving formal notice of the Delaware Litigation.

ii. Bastian offered Attabotics sole control of the defense, which Attabotics did not undertake.

108. As noted, the defense and indemnification clause of the Integrator Agreement states that the indemnifying (defending) party "shall undertake and have sole control [of] the defense and any related settlement of such action." (Integrator Agreement ¶ 11.2, ECF No. 11-1.)

109. The Parties dispute whether Bastian ever offered Attabotics sole control of the defense in the Delaware Litigation, including whether Scott Gravelle's August 4 letter constituted a flat-out rejection of any such offer. (*See* Pl.'s Proposed Findings ¶ 35 at 8, ¶ 154 at 40, ECF No. 211; Def.'s Proposed Findings ¶ 45 at 83, ECF No. 212.)

110. Bastian's July 28, 2022, letter to Chris Lewis stated: "[Bastian] believe[s] it is likely that Accelerate will claim that the Work was not completed on time and that the installation and equipment were defective. To the extent that such claims

relate to the equipment and services provided by Attabotics, we expect that Attabotics will defend and indemnify us from such claims." (Trial Ex. 38). The August 17, 25, and 29 letters from Bastian's legal counsel reiterated Bastian's position that Attabotics was required to "defend and indemnify" it. (Trial Ex. 590–93.) Indeed, the August 17 letter to Gravelle stated: "Bastian . . . hereby demands that Attabotics . . . defend and indemnify Bastian against claims asserted by [A360] . . . in . . . litigation filed by [A360] against Bastian in Delaware Superior Court." (Trial Ex. 590). The letter went on to request confirmation "whether Attabotics will defend and indemnify Bastian" against A360's claims, or else Bastian would take Attabotics to arbitration. (*Id.*)

111. No part of Bastian's July 28 letter, or any of the August 17, 25, or 29 letters, suggests that Bastian intended to offer Attabotics anything other than sole control of the defense. The fact that Bastian did not use these magic words does not disqualify its demands.

112. Evidence indicating otherwise includes a part of Bastian's Amended Complaint in which it asserts that "[w]hile Attabotics owes Bastian a defense, because there would be a conflict of interest between Bastian and Attabotics, Bastian is entitled to retain its own counsel with Attabotics' reimbursement."[3] (Am. Compl. ¶ 42, ECF No. 11.)) Gravelle testified that this was Bastian's position during the November 2022 mediation between the Parties. (Gravelle Testimony, Trial Tr.

[3] Bastian failed to develop the "conflict of interest" argument with any designated analysis in its proposed findings or any reference to evidence in the record; thus the argument is deemed waived and the Court makes no finding of fact on it.

Vol. 3, 864:10–865:23, ECF No. 203.) However, Gravelle also testified that he did not authorize his representatives to offer to defend or indemnify Bastian at the November mediation. (*Id.* at 816:6-7.) And Bastian's CEO, Aaron Jones, testified that the mediation was unsuccessful because "there was no willingness to defend or indemnify or come up with any substance," and this remained Attabotics' position throughout. (Jones Testimony, Trial Tr. Vol 1, 90:2-91:15, ECF No. 201.)

113. Marvin Logan, Bastian's corporate representative, testified that he was unaware of Attabotics ever being offered sole control of the Defense. (Logan Testimony, Trial Tr. Vol. 4, 1088:2–15, ECF No. 204.) Yet, Attabotics' Gravelle confirmed that he "never authorized, in any capacity, [his] attorneys to defend and indemnify Bastian against A360," nor does he recall authorizing anyone from Attabotics to explore the terms of the tender of defense, assuming Attabotics was unhappy with Bastian's allegedly conditional offer. (Gravelle Testimony, Trial Tr. 3, 816:6-7, 817:9-818:15, ECF No. 203.) To the contrary, Gravelle's "position was [that] the dispute was between Bastian and A360[,]" "[Attabotics] hadn't breached the contract . . ., [and Attabotics] had no requirement to defend Bastian." (*Id.* at 923:20-924:3.)

114. Notably, the Integrator Agreement contemplates that, "in the event [a] Third-Party Claim is brought," the "Indemnifying Party shall *undertake* and have sole control [of] the defense;" nowhere does the provision require that the Indemnified Party first make an unconditional *offer* of sole control of the defense to the Indemnifying Party. (Integrator Agreement ¶ 11.2, ECF No. 11-1) (emphasis

added). The Court expands on the implications of this provision in its conclusions of law.

115. The fact that Bastian, upon filing the instant lawsuit, took the position that it would maintain its own defense for which Attabotics should reimburse it, is not evidence of whether Attabotics made any effort to undertake sole control of the defense in the first place, or whether Bastian extended sole control of the defense to Attabotics when it sought defense and indemnification after the filing of A360's lawsuit.

116. The Court finds by a preponderance of the evidence that Bastian's demands for defense and indemnity, (Trial Exs. 38, 590–93), offered Attabotics complete control of the defense.

117. Gravelle's August 4 letter responding to Bastian's July 28 letter stated that Attabotics was not in breach of the Integrator Agreement, and that any impending litigation between A360 and Bastian was between these parties alone. (*See* Trial Ex. 39.) While Gravelle's August 4 letter did not explicitly state Attabotics' refusal to defend and indemnify Bastian, it certainly conveyed the impression that Bastian was on its own.

118. Though the Court makes no such finding here, assuming that, under the Integrator Agreement, Bastian 's July 28, 2022, letter could not qualify as "prompt notice" of A360's third-party claim, Bastian's August 17, 2022, letter certainly fits the bill.

119. Attabotics did not receive Bastian's August 17 letter until September 21, 2022, at which point Bastian demanded the Parties engage in mediation on the defense and indemnification dispute pursuant to Section 13.2 of the Integrator Agreement. In its response to the delayed set of letters, Attabotics acceded to mediation but did not acknowledge nor agree to Bastian's multiple requests for defense and indemnification. (*See* Trial Ex. 208.) Nor has Attabotics presented any evidence indicating that it *ever* offered or endeavored to undertake sole control of the Delaware Litigation defense, either at the November 2022 or January 2023 mediations, or at any other point in the leadup to this litigation.

120. The Court finds by a preponderance of the evidence that Attabotics, after being tendered sole control of the defense by Bastian, did not undertake the defense of the Delaware Litigation.

iii. Attabotics never approved of the Settlement Agreement between Bastian and A360.

121. The Court finds that Attabotics never approved of the Settlement Agreement entered into by Bastian and A360. (*See* Logan Testimony, Trial Tr. Vol 4, 1088:19–22, ECF No. 204) (Question to Marvin Logan as Bastian's corporate representative: "Bastian never consulted Attabotics about that settlement agreement you reached with A360 . . . did it?" Answer: "No.").

iv. The Settlement Agreement did not stipulate or acknowledge Attabotics' liability or wrongdoing.

122. Under section 11.2 of the Integrator Agreement, a party is not entitled to indemnification if it stipulated to or acknowledged the indemnifying party's liability or wrongdoing in a settlement agreement with a third-party. The provision states:

> **Notwithstanding the foregoing**, the Indemnified Party shall not have any right, without the written consent of the Indemnifying Party, to settle any action if such settlement arises from or is part of any criminal action, suit or proceeding or **contains a stipulation or acknowledgement of, any liability or wrongdoing** (whether in contract, tort of [sic] otherwise) on the part of the Indemnifying Party.

(Integrator Agreement ¶ 11.2, ECF No. 11-1) (emphasis added.)

123. Bastian and A360 entered into the Settlement Agreement on July 28, 2023. (Settlement Agreement, Trial Ex. 370.) An introductory whereas clause states that "the Parties acknowledge and agree that the A360 claims in the Dispute and the Litigation relate to equipment, software, and services supplied by Attabotics, Inc. ("Attabotics") for the System." (*Id.* at 1.)

124. Under the Settlement Agreement, a portion of Bastian's payment to A360 was contingent upon Bastian's later recovery from Attabotics. Bastian agreed to pay A360 $1,000,000 "following a settlement, final unappealable judgment, insurance payment, reimbursement, payment in bankruptcy or otherwise from Attabotics." (*Id.* ¶ 2 at 2.)

125. In the weeks leading up to the agreement, Bastian and A360 negotiated over how much of the settlement amount would be contingent on Bastian's recovery from Attabotics. (*See* Emails, Trial Ex. 569.)

126. Attabotics cites to an email from Bastian CEO, Aaron Jones, to A360, in which Jones states:

> One thing to emphasize is that we can only recover [the $1,000,000] to the extent the claim by A360 is the result of the failure of the Attabotics system. We believe that is clearly true, but A360 has to be prepared to back us up on that position with a statement in any settlement agreement to that affect and the willingness to provide documents and witnesses.

(*Id.* at 2.)

127. The Court finds that Bastian did not stipulate to Attabotics' liability or wrongdoing in its Settlement Agreement with A360.

128. The face of the Settlement Agreement only acknowledges that the dispute "relates to" services supplied by Attabotics. (*See* Settlement Agreement at 1, Trial Ex. 370.) It does not comment on whether Attabotics may be liable or at fault for the claims contained in A360's complaint.

129. Although Jones's email references Attabotics' liability and/or wrongdoing, a closer look at the communication indicates that the Parties were assessing the likelihood of Bastian's ultimate recovery from Attabotics for negotiation purposes, rather than acknowledging or stipulating to liability.

130. Bastian initially proposed a settlement to A360, half of which would be contingent on Bastian's recovery from Attabotics. (Email Chain at 4–5, Trial Ex. 569.) A360 did not agree because it was not certain of the likelihood of Bastian's success in recovering from Attabotics, so A360 requested to review Bastian's agreement with Attabotics to assess the strength of Bastian's claim. (*Id.* at 3.)

Ultimately, the parties agreed that $6 million will be paid to A360 upfront, with only $1 million contingent on Bastian's successful recovery from Attabotics. (*Id.* at 1–2.)

131. The Court concludes by a preponderance of evidence that A360 and Bastian did not acknowledge or stipulate to Attabotics' liability in the Settlement Agreement. Rather, any discussion about Attabotics' fault in the dispute was for purposes of assessing Bastian's likelihood of success in a suit against Attabotics, so that A360 and Bastian could reach an appropriate settlement.

II. Conclusions of Law

a. Attabotics Incorporated is Bound by the Purchase Order.

1. Attabotics U.S. Corp., a fully owned subsidiary of Attabotics, Inc., is listed as the supplier on the Purchase Order, and it is the case that parent companies are generally not held liable for the actions of their subsidiaries. (Def.'s Proposed Findings ¶ 170 at 110, ECF No. 212) (citing *Esmark, Inc. v. N.L.R.B.,* 887 F.2d 739, 753 (7th Cir. 1989)). Attabotics argues that to hold it liable for Attabotics U.S. Corp.'s debts, the burden is on Bastian to pierce the corporate veil—to demonstrate that the corporate form was so ignored, controlled, or manipulated that Attabotics U.S. Corp. was a mere "instrumentality" of Attabotics, Inc. (Def.'s Proposed Findings ¶¶ 171–72 at 110, ECF No. 212) (citing *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994)).

2. In *Smith v. McLeod Distributing, Inc.*, the Indiana Court of Appeals explained that *Aronson* "concerned piercing the corporate veil in order to hold a shareholder

personally liable for a corporate debt." 744 N.E.2d 459, 463 (Ind. Ct. App. 2000). The *Smith* Court clarified that the *Aronson* factors were not intended to be exclusive, "particularly when a court is asked to decide whether two or more affiliated corporations should be treated as a single entity." *Id.*

3. In cases where a plaintiff seeks to pierce the corporate veil to hold one corporation liable for the debts of a closely related entity, courts may also consider whether: "(1) similar corporate names were used; (2) the corporations shared common principal corporate officers, directors, and employees; (3) the business purposes of the corporations were similar; and (4) the corporations were located in the same offices and used the same telephone numbers and business cards." *Oliver v. Pinnacle Homes, Inc.*, 769 N.E.2d 1188, 1192 (Ind. Ct. App. 2002) (citing *Smith*, 744 N.E.2d at 463).

4. Furthermore, courts may disregard the separateness of corporations when they are manipulated or controlled as one enterprise to "permit one economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise." *Id.* (citing *Smith*, 744 N.E.2d at 463).

5. "While no one talismanic fact will justify with impunity piercing the corporate veil, a careful review of the entire relationship between various corporate entities, their directors and officers may reveal that such an equitable action is warranted." *Stacey–Rand, Inc. v. J.J. Holman, Inc.,* 527 N.E.2d 726, 728 (Ind. Ct. App. 1988).

6. Attabotics is correct that Bastian failed to present evidence or argument that the *Aronson* factors applied. (Def.'s Proposed Findings ¶¶ 174 at 111, ECF No. 212.)

However, in *Smith*, the party seeking to pierce the veil also failed to present evidence of the *Aronson* factors. *See* 744 N.E.2d at 463–64. Yet, the *Smith* court found that the evidence in the record was sufficient to pierce the veil of related entities, based on its own factors as laid out above. *Id.*

7. Similarly, here, when considering the *Smith* factors, the evidence presented at trial shows that Attabotics, Inc. was liable for Attabotics U.S. Corp.'s contractual obligations under the Purchase Order.

8. The Court found as matters of fact that (1) the entities used similar names, (2) the entities shared common principal officers, (3) the corporation's business purposes were similar, and (4) the entities were headquartered in the same office.

9. The Court found that the Integrator Agreement between Attabotics, Inc. and Bastian contemplated that the Parties would be bound by a future purchase order.

10. The Court found that Attabotics, Inc. caused Bastian to reasonably believe that its subsidiary, Attabotics U.S. Corp., was acting on behalf of its parent company, Attabotics Inc. And thus, Attabotics, Inc. was a party to the Purchase Order.

11. Accordingly, to prevent unfairness to Bastian, it is equitable under the circumstances to hold Attabotics Inc. liable for the obligations under the Purchase Order. *See LinkAmerica Corp. v. Cox*, 857 N.E.2d 961, 968 (Ind. 2006) (explaining that the presumption that a parent and a subsidiary are independent entities can be overcome with clear evidence that "the parent utilizes its subsidiary in such a manner that an agency relationship can be perceived"); *see also Helms v. Rudicel*,

986 N.E.2d 302, 309 (Ind. Ct. App. 2013) ("A principal is liable for the acts of his agent that were committed within the scope of the agent's actual or apparent authority. Apparent authority refers to a third party's reasonable belief that the principal has authorized the acts of its agent; it arises from the principal's manifestations to a third party and not from the representations or acts of the agent.") (internal citations omitted).

b. Exhibit C-2 to the Amended Complaint is not Judicially Admitted as Appendix C to the Statement of Work.

12. Bastian attached Trial Exhibit 599 as Exhibit C-2 to the Amended Complaint, titled "Exhibit Appendix C" on the court docket, (ECF No. 11-5.) Attabotics argues that under Federal Rule of Civil Procedure 10(c), "a copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes," (Def.'s Proposed Findings ¶ 151 at 106, ECF No. 212) (quoting Fed. R. Civ. P. 10(c)), and "it is a well-settled rule that a party is bound by what it states in its pleadings," (Def.'s Proposed Findings ¶ 150 at 106, ECF No. 212) (citing *Help At Home Inc. v. Med. Cap., L.L.C.*, 260 F.3d 748, 753 (7th Cir. 2001)). Attabotics argues that when a party makes an assertion in a pleading, "[j]udicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told a court by the most formal and considered means possible." (Def.'s Proposed Findings ¶ 150 at 106, ECF No. 212) (quoting *Soo Line R. Co. v. St. Louis Sw. Ry. Co.*, 125 F.3d 481, 483 (7th Cir. 1997)).

13. However, Bastian points out that, in its Answer to the Amended Complaint, Attabotics "denies" that Exhibit C to the Amended Complaint is a "true and

accurate copy of the Statement of Work." (Pl.'s Proposed Findings ¶ 53 at 12, ECF No. 211) (quoting Answer ¶ 17 at 6–7, ECF No. 39.)

14. "[A] district court has the discretion to treat an allegation in a party's pleading as a judicial admission" and "to bind the party to that admission." *Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1014 (7th Cir. 2000), *as amended on denial of reh'g and reh'g en banc* (June 1, 2000); *Bedrosian v. U.S. Dep't of Treasury, Internal Revenue Serv.*, 42 F.4th 174, 184 (3rd Cir. 2022); *see also United States v. Belculfine*, 527 F.2d 941, 944 (1st Cir. 1975) ("[C]onsiderations of fairness . . . require that trial judges be given broad discretion to relieve parties from the consequences of judicial admission in appropriate cases."); *Coral v. Gonse*, 330 F.2d 997, 998 n.1 (4th Cir. 1964) ("Of course, even a judicial admission does not always foreclose a different position. If the District Court, convinced that an honest mistake had been made, the original allegation was untrue and that justice required relief, it may, in its discretion, relieve the party of its otherwise binding consequence.").

15. The Court finds that Attabotics' Answer to the Amended Complaint negates any potential judicial admission in Bastian's Amended Complaint. An answer is a "pleading." *See* Fed. R. Civ. P. 7(a)(2). Thus, Attabotics' answers are subject to judicial admission, just as Bastian's allegations are. To treat as judicial admissions both Parties' pleadings would be to create opposite and contrary findings.

16. Because of the Parties' contrary pleadings, the Court declines to exercise its discretion to treat Bastian's attachment of Exhibit C-2 to the Amended Complaint,

though asserted as a true and accurate copy of the Statement of Work, as a judicial admission. *See, e.g., Moll v. Telesector Res. Grp., Inc.*, 94 F.4th 218, 252 (2d Cir. 2024) ("Accordingly, in this case, in which each side has retreated from its factual pleading to endorse the opposite proposition, we think it appropriate that neither pleading should be viewed as conclusive against the pleader; rather, as a matter of judicial discretion, each is deemed to have been superseded."); *see also* Baicker-McKee & Janssen, Federal Civil Rules Handbook 353–54 (2025) (explaining that under Federal Rule of Civil Procedure 8(b), the purpose of admissions and denials in a defendant's answer to a complaint is to "distinguish for both the opponent and the court those allegations which are contested from those which are conceded").

17. Bastian says that it made an "honest mistake" when it attached Trial Exhibit 599 as Exhibit C-2 to the Amended Complaint, (Pl.'s Proposed Findings ¶ 11 at 46–47, ECF No. 211), and the evidence demonstrates as such. The Court concluded, as a matter of fact, that Exhibit C-2 to the Amended Complaint was not, in fact, a Transaction Document between the Parties, nor any manifestation of the Parties' agreement.

18. The Court finds that Bastian did not make a judicial admission in its pleading that Exhibit C-2 to the Amended Complaint, Trial Exhibit 599, was Appendix C to the Statement of Work.

c. The Parties Bargained for an Attabotics Solution that would Achieve Final Acceptance Based upon the Completion of Appendix H Testing Criteria, Including the Appendix H Availability Test; and the Appendix H Testing Could be Successfully Completed with 35 Ants.

19. Under Indiana law, the primary purpose in the construction of contracts is to "ascertain and give effect to the mutual intention of the parties." *Haegert v. Univ. of Evansville*, 977 N.E.2d 924, 937 (Ind. 2012) (quoting *Hutchinson, Shockey, Erley & Co. v. Evansville-Vanderburgh Cnty. Bldg. Auth.*, 644 N.E.2d 1228, 1231 (Ind. 1994)).

20. In addition to pre-formation communications, courts can look to the Parties' conduct during the course of performance of the contract to ascertain the Parties' intent at the time of contracting. 11 Williston on Contracts § 32:14 (4th ed.) ("Given that the purpose of judicial interpretation is to ascertain the parties' intentions, the parties' own practical interpretation of the contract—how they actually acted, thereby giving meaning to their contract during the course of performing it—can be an important aid to the court."); *see also* Restatement (Second) of Contracts § 202 (1981) ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning. But such 'practical construction' is not conclusive of meaning. Conduct must be weighed in the light of the terms of the agreement and their possible meanings. Where it is unreasonable to interpret the contract in accordance with the course of performance, the conduct of the parties may be evidence of an agreed modification or of a waiver by one party.").

21. If contract language is deemed ambiguous, "[c]ourts may properly consider all relevant evidence to resolve an ambiguity" to determine the Parties' intent at the time of contracting. *Celadon Trucking Servs. v. Wilmoth*, 70 N.E.3d 833, 839

(Ind. Ct. App. 2017) (quoting *Tender Loving Care Mgmt. v. Sherls*, 14 N.E.3d 67, 72 (Ind. Ct. App. 2014)).

22. The Court found as a matter of fact that the Parties' pre-contracting communications indicated that the Parties intended for Appendix H to the Purchase Order to govern the System's, including Attabotics Solution, acceptance criteria and that Appendix H final acceptance testing could be achieved with only 35 ants.

23. The Court found that the Parties' behavior during the course of performance evidenced that Appendix H governed system acceptance and that only 35 ants were required to achieve final acceptance.

24. Therefore, the Court concludes that the Parties agreed that final acceptance would occur when the System passed Appendix H testing, including the availability test, with the minimum of 35 production ants.

25. To be sure, the Integrator Agreement says that in the event of a conflict, the Statement of Work should take precedence over the Purchase Order. (Integrator Agreement ¶ 19, ECF No. 11-1.) Had Attabotics produced credible evidence of the existence of an Appendix C under 6.11.4 of the Statement of Work that established acceptance criteria for the System, the Court may have considered applying the Integrator Agreement's order of precedence provision.

26. But the Court found as a matter of fact that Exhibit C-2 to the Amended Complaint, Trial Exhibit 599, was *not* Appendix C to the Statement of Work. It was a draft version of Appendix C that was attached by mistake to Bastian's pleading, and it does not represent the Parties' mutual intent.

27. Accordingly, the Court cannot give effect to the order of precedence provision with regard to Appendix C, because there is no credible evidence of the existence of Appendix C testing criteria, as contemplated in 6.11.4 of the Statement of Work.

28. In the alternative, Attabotics asks the Court to look at the structure of the Statement of Work and conclude that, because the Parties achieved Go Live, Attabotics passed the acceptance criteria contemplated by the Statement of Work. It is true that under the Statement of Work, Go Live was to take place upon achievement of final acceptance. (SOW ¶ 6.11.5.) But the Statement of Work is clear that "successful completion of [client acceptance testing] will constitute final acceptance of System by Client." (*Id.* ¶ 6.11.4.) The only document that plausibly represents the Parties' agreed-upon client acceptance testing criteria is Appendix H to the Purchase Order, which includes an availability test.

29. Therefore, Appendix H to the Purchase Order governed final acceptance testing criteria, and under Appendix H, final acceptance required Attabotics to pass an availability test and could be satisfied with 35 ants.

d. Final Acceptance Under Appendix H to the Purchase Order was Achieved.

30. As noted, the Court found as a matter of fact that the Parties behaved as if they achieved final acceptance under Appendix H to the Purchase Order.

31. Bastian does not appear to dispute that, at least from a technical perspective, the System passed the Appendix H July 19 and 20, 2022, availability tests. (*See* Pl.'s Proposed Findings ¶¶ 137–144, ECF No. 211.) Instead, Bastian argues (1) that the tests were invalid because A360 "declared" them as invalid or as failures, and

(2) even if the System momentarily passed the Appendix H final acceptance testing, practically speaking, the Attabotics Solution was never stable and ultimately caused A360 to sue Bastian for breach of contract. (*See id.*)

32. The Court finds that A360's approval was not a necessary condition for Attabotics to achieve final acceptance under its contract with Bastian. Although final acceptance and A360's approval were closely correlated, the Purchase Order states that Final Acceptance occurs as outlined in Appendix H, and Appendix H states that Acceptance occurs upon successful completion of the availability test, not upon A360's approval. (Project Milestone Table, Purchase Order at 2–3, Trial Ex. 181; Appx. H at H-5, Trial Ex. 11.) A360's approval may be circumstantial evidence of whether the availability test was in fact satisfied, but it was not a condition of acceptance.

33. Bastian could have expressly conditioned its final acceptance of Attabotics Solution on A360's approval of Attabotics' System, but it did not. The Court cannot re-write the contract to condition final acceptance on A360's approval. *See Wenning v. Calhoun*, 827 N.E.2d 627, 630 (Ind. Ct. App. 2005) ("The court cannot re-write and then enforce contracts, which, to the knowledge of the court, the parties themselves did not enter into.").

34. Bastian also emphasizes that the Attabotics Solution was fundamentally unable to scale up beyond 35 production ants, regardless of the requirements of the acceptance testing metrics. (*See* Pl.'s Proposed Findings ¶ 103 at 25, ECF No. 211) (citing Richardson Dep. 134:13—144:3). But as the Court found, Attabotics and

Bastian agreed that only 35 ants were required to achieve final acceptance. A360's expectations that the System would be able to operate with 50 production ants is irrelevant for determining whether Bastian and Attabotics achieved final acceptance under Appendix H.

35. In sum, the Court concludes that the System achieved final acceptance under Appendix H to the Purchase Order. Therefore, Attabotics is not in breach with respect to final acceptance testing criteria.

e. Attabotics Breached its Promise to Deliver the Version Five Ants.

i. Attabotics breached its promise to deliver the version 5 robots.

36. The Parties do not dispute that the Contract required Attabotics to supply Version 5 ants by the end of the Ramp-Up Period. (*See* Email, Trial Ex. 60.)

37. The Court found that Attabotics never delivered the Version 5 robots.

38. As noted, the Integrator Agreement contains a *force majeure* clause, which excuses performance of contractual obligations due to circumstances out of the Parties' control; each party agreed to "promptly notify the other Parties as soon as it becomes aware of such anticipated delays or failures, and of the equitable adjustment of schedules required thereby." (Integrator Agreement ¶ 8, ECF No. 11-1.)

39. "The party seeking to excuse its performance under a force majeure clause bears the burden of proof of establishing that defense." *Specialty Foods of Indiana, Inc. v. City of South Bend*, 997 N.E.2d 23, 28 (Ind. Ct. App. 2013).

40. The Court found that Attabotics did not promptly notify Bastian that delivery of the Version 5 robots would be delayed due to COVID-19, nor did Attabotics propose an equitable adjustment to the schedule.

41. Therefore, Attabotics breached its promise to deliver the 50 version 5 ants by the end of the Ramp-Up period, and performance was not excused under the *force majeure* clause.

ii. Bastian failed to prove damages resulting from Attabotics' failure to deliver the Version 5 ants.

42. To prevail on a breach of contract claim, a plaintiff must prove by a preponderance of the evidence (1) the existence of a contract, (2) the defendant's breach, and (3) damages. *Holloway v. Bob Evans Farms, Inc.*, 695 N.E.2d 991, 995 (Ind. Ct. App. 1998); *see also Gared Holdings, LLC v. Best Bolt Prods.,* 991 N.E.2d 1005, 1012 (Ind. Ct. App. 2013) (explaining that the plaintiff bears the burden of proving the elements of breach of contract by the preponderance of the evidence).

43. Under Indiana law, "[i]n order to recover on a breach of contract claim, the alleged breach must be a cause in fact of the plaintiff's loss." *Parke State Bank v. Akers*, 659 N.E.2d 1031, 1034 (Ind. 1995) (citation omitted). The breach need not be the only cause, but it must be "a substantial factor in bringing about the harm." *Id*; *see also Otter Creek Trading Co. v. PCM Enviro PTY, Ltd.*, 60 N.E.3d 217, 230 (Ind. Ct. App. 2016) ("The party seeking such damages bears the burden of proving by a preponderance of the evidence that the breach was the cause in fact of its loss.").

44. Although the timing of delivery was staggered, the Court found that Bastian was ultimately promised a Attabotics Solution that would meet Appendix H

acceptance criteria with 35 Version 5 ants and an additional 15 Version 5 ants for redundancy. It received an Attabotics Solution that met Appendix H acceptance criteria with 35 Version 4 ants and 15 Version 4 ants for redundancy. Bastian presents no evidence or argument establishing the loss caused by Attabotics delivering Version 4 instead of Version 5 ants.

45. An objective measurement of damages is necessary for an award of monetary damages. *See Persinger v. Lucas*, 512 N.E.2d 865, 868 (Ind. Ct. App. 1987) ("A damage award must be referenced to some fairly definite standard, such as cost of repair, market value, established experience, rental value, loss of use, loss of profits, or direct inference from known circumstances."). Bastian has not attempted to quantify the damages it suffered due to Attabotics' failure to deliver the Version 5 ants, nor proposed an objective, reasonably certain way to calculate such damages.

46. Because Bastian has failed to prove damages suffered as a result of Attabotics' failure to deliver the Version 5 ants, it is not entitled to recover on this part of its breach of contract claim.

f. Bastian Failed to Prove Breach of Warranty.

i. Bastian failed to prove a substantive breach of the warranties under the Integrator Agreement.

47. Bastian asks the Court to conclude that Attabotics breached the warranties under the Integrator Agreement, (Pl.'s Proposed Findings ¶ 170 at 43, ¶ 54 at 59, ECF No. 211), but fails to cite to any evidence in the record indicating as such.

48. For example, Section 15.1 of the Integrator Agreement says that Attabotics will perform all services in a "good and workmanlike manner, based upon

commercially reasonable practices and standards" and that it will "repair or replace defective parts." (Integrator Agreement ¶ 15.1, ECF No. 11-1.) Bastian did not cite any specific facts from the record demonstrating that Attabotics failed to perform services in a good and workmanlike manner, or that Attabotics failed to repair or replace defective parts. Nor did Bastian propose how the Court should interpret the terms "good and workmanlike" or "commercially reasonable practices and standards."

49. Similarly, Section 15.3 of the Integrator Agreement requires Attabotics to provide "programming services" in the event that the Attabotics Solution's software does not conform to written specifications for a period of 12 months. (Integrator Agreement ¶ 15.3, ECF No. 11-1.)

50. Bastian does not cite any specific facts from the record to establish: (1) when the warranty period began, (2) that the software did not conform to written specifications, or (3) that Attabotics failed to fulfill its warranty obligations.

51. In contrast, Attabotics cites to facts from the record suggesting that it serviced the Attabotics Solution in a good and workmanlike manner according to commercially reasonable practices and standards, (Def.'s Proposed Findings ¶ 296 at 136, ECF No. 212) ((citing Am. Compl. ¶¶ 23–24, ECF No. 11) ("Attabotics has performed numerous repairs on the system's hardware and software . . . Attabotics also performed routine maintenance and software updates to the system.").) Attabotics asks the Court, in turn, to find that Attabotics met its service warranty obligations. (*See* Def.'s Proposed Findings ¶¶ 299–300 at 137, ECF No. 212.)

52. The Court cannot cull Bastian's proposed findings of fact to make an independent determination that Attabotics breached its warranty obligations.

53. Furthermore, as noted, under the warranties provision of the Integrator Agreement, "[i]n no event shall Attabotics have any liability under this Agreement under warranty" for use of the Attabotics Solution in a manner "inconsistent with Attabotics' written specifications" or use "beyond the intended design parameters." (Integrator Agreement ¶ 15.5.1, ECF No. 11-1.)

54. In its proposed findings, Attabotics argues that the System was specified to run with 35 ants and the remaining ants were extra. (*See* Def.'s Proposed Findings ¶¶ 276–278 at 132–33, ECF No. 212) (citing Logan Email, Trial Ex. 563.) Attabotics asks the Court to conclude that Bastian exceeded the Attabotics Solution's design by using more than 35 ants in the System, and that Attabotics is therefore not liable for any breach of warranty under section 15.5.1 of the Integrator Agreement. (Def.'s Proposed Findings ¶¶ 279–282 at 132–34, ECF No. 212.)

55. As noted, the Court found as a matter of fact that the Parties agreed that only 35 production ants were required to achieve final acceptance, and 15 ants were to be provided as extras or backup.

56. Bastian does not cite to any facts in its proposed findings of law to suggest that Attabotics' alleged breach of warranties occurred when the System operated with 35, or fewer, ants.

57. Therefore, taken together, the Court finds that Attabotics is not liable for breach of warranty because Bastian failed to meet its burden to establish that (1)

Attabotics failed to satisfy its warranty obligations, and (2) that the use of the Attabotics Solution during alleged breach of warranty was consistent with the Attabotics Solution's written specifications and design parameters.

ii. Bastian failed to prove damages for a breach of warranty.

58. Even if Bastian had proven a breach of the substantive warranty provisions, Bastian failed to prove damages. Bastian seeks rescission of the contract price in the amount of $3,557,406, as well as prejudgment interest. (Pl.'s Proposed Findings ¶ 58, 59 at 60, ECF No. 211.)

59. As a preliminary matter, the Court cannot rescind the contract because there was no evidence or argument presented indicating that Attabotics can be restored to its pre-contracting position. *See Van Bibber Homes Sales v. Marlow*, 778 N.E.2d 852, 857–58 (Ind. Ct. App. 2002) ("The party seeking rescission of a contract bears the burden of proving his right to rescind and his ability to return any property received under the contract. . . . A decree of rescission may be rendered where the party seeking rescission is not in default and the defaulting party can be restored to the same condition he occupied before the making of the contract.") (cleaned up) (citing *Barrington Mgmt. Co. v. Paul E. Draper Fam. Ltd.*, 695 N.E.2d 135, 141 (Ind. Ct. App. 1998)).

60. As the Court has noted throughout, the Parties negotiated a services warranty. Bastian requests reimbursement of the entire contract price without citation to legal authority. But Attabotics did not warrant that it would pay the full

cost to repair or replace a defective Attabotics Solution. It promised to service the Attabotics Solution.

61. Bastian does not cite to any legal authority in support of the proposition that it is entitled to a full rescission of the contract price as a remedy for Attabotics' alleged breach of a service warranty.

62. Even if Bastian could prove that Attabotics breached its warranty, the Court cannot independently cull the record and Indiana case-law to fashion an appropriate remedy.

63. Therefore, the Court finds that Bastian failed to prove damages as an essential element of its breach of warranty claim under Count III.

g. Attabotics Breached its Duty to Defend and Indemnify Bastian under the Integrator Agreement.

64. While the Integrator Agreement is not a contract for insurance, case law that interprets insurance contracts can be persuasive in the indemnification context. *See, e.g., Roadsafe Holdings, Inc. v. Walsh Constr. Co.*, 164 N.E.3d 726, 728, 732 (Ind. Ct. App. 2021) (applying insurance industry case law to an indemnification provision in an agreement between a general contractor and sub-contractor for a construction project).

65. Under Indiana law, unambiguous insurance contracts are construed according to the ordinary rules of contract interpretation. *See Von Hor v. Doe*, 867 N.E.2d 276, 278 (Ind. Ct. App. 2007). Accordingly, the Court "may not extend coverage beyond that provided in the contract, nor may [the Court] rewrite the clear and unambiguous language of [the] document." *Id.* "If an insurance contract is

clear and unambiguous, the language therein must be given its plain and ordinary meaning." *Id.*

66. Some special rules of construction of ambiguous terms in insurance contracts have been developed due to the "disparity in bargaining power" between insurers and the insured. *Id.* Here, however, there is no disparity in bargaining power. Accordingly, to the extent that there are ambiguities in Section 11.2 of the Integrator Agreement, they are still subject to the ordinary rules of contract interpretation.

67. As a preliminary matter, the Court finds that the requirements for prompt notice of a third-party claim; full cooperation by the Indemnified Party in the defense and settlement of the third-party claim, to the extent reasonably requested by the Indemnifying Party; and the prohibition on the Indemnified Party settling third-party claims by stipulating to liability or wrongdoing, are all conditions to indemnification and/or the duty to defend. *See Indiana State Highway Comm'n v. Curtis*, 704 N.E.2d 1015, 1018 (Ind. 1998) (in pertinent part, "a condition precedent is a condition that must be performed . . . before the duty to perform a specific obligation arises."); *see, e.g.*, *City of Plymouth v. Michael Kinder & Sons, Inc.*, 137 N.E.3d 312, 316 (Ind. Ct. App. 2019) ("[A]ny settlement between the parties was subject to a condition precedent, and it is undisputed that the condition was not satisfied. That is, the Commission never approved the offer to settle with Kinder for $130,000."); *Miller v. Dilts*, 463 N.E.2d 257, 260–61 (Ind. 1984) ("[D]uties to

notify and to cooperate are conditions precedent to the insurance company's liability to its insured.").

68. As a general rule, "an express condition must be fulfilled or no liability can arise on the promise that the condition qualifies." *Indiana State Highway Comm'n*, 704 N.E.2d at 1018 (citing 5 Williston on Contracts § 675 (3d ed. 1961), Restatement (Second) of Contracts § 224 (1981) (if a condition does not occur, performance of a duty subject to a condition cannot become due and if the condition can no longer occur, the duty is discharged)). "Indiana courts have consistently recognized this rule." *Id.*

69. However, a condition can be excused if the requirement "will involve extreme forfeiture or penalty and its existence or occurrence forms no essential part of the exchange for the promisor's performance." *Id.* at 1019 (quoting 5 Williston on Contracts § 769 n. 2 (3d ed. 1961)); *see also* 13 Williston on Contracts § 38:6 (4th ed.) ("As a general rule, unless the performance is waived, excused, or prevented by the other party, or unless it repudiates the contract, conditions . . . must be literally met or exactly fulfilled, or no liability can arise on the promise qualified by the conditions.").

i. Bastian's notice to Attabotics regarding the A360 complaint satisfied the notice condition to the duty to defend.

70. Under section 11.2 of the Integrator Agreement, "prompt[]" and "written" notice of a "third-party claim" is a condition precedent to defense and indemnity.

71. Bastian's position is that its July 28, 2022, letter served as notice of A360's claim; Attabotics argues, in turn, that A360 did not file its suit until July 29, 2022,

so the July 28 letter could not constitute "prompt notice" by Bastian of a "third-party claim" as defined by the Integrator Agreement. Bastian argues in the alternative that, even if its July 28 letter did not constitute notice, and Attabotics did not receive formal notice until September 21, 2022, a two-month delay is not unreasonable under Indiana law.

72. When interpreting a contract, the Court must "ascertain the parties' intent and mak[e] every attempt to construe the language of the contract 'so as not to render any words, phrases, or terms ineffective or meaningless.'" *Alexander v. Linkmeyer Dev. II, LLC*, 119 N.E.3d 603, 612 (Ind. Ct. App. 2019) (quoting *Four Seasons Mfg., Inc. v. 1001 Coliseum, LLC*, 870 N.E.2d 494, 501 (Ind. Ct. App. 2007)).

73. "'A word or phrase is ambiguous if reasonable people could differ as to its meaning.' . . . A term is not ambiguous solely because the parties disagree about its meaning." *Celadon Trucking Servs., Inc. v. Wilmoth*, 70 N.E.3d 833, 839 (Ind. Ct. App. 2017) (quoting *Broadbent v. Fifth Third Bank*, 59 N.E.3d 305, 311 (Ind. Ct. App. 2016)). "If the [contract] language is deemed ambiguous, the contract terms must be construed to determine and give effect to the intent of the parties when they entered into the contract. 'Courts may properly consider all relevant evidence to resolve an ambiguity.'" *Id.* (quoting *Tender Loving Care Mgmt., Inc. v. Sherls*, 14 N.E.3d 67, 72 (Ind. Ct. App. 2014)).

74. The Integrator Agreement defines "third-party claims" as "third-party suits, claims, actions *or* proceedings." (Integrator Agreement ¶ 11.2, ECF No. 11.) On the one hand, considering only the four corners of the contract, the Parties' use of the

disjunctive "or" indicates that each item in the list holds a distinct meaning—in other words, a suit is different from a claim, and so on. On the other hand, the phrase "third-party claims" is ambiguous; a claim may arise before a lawsuit is filed, and the existence of a claim does not militate legal action. Alternatively, a claim may refer specifically to legal action. Reasonable people could disagree as to the meaning of the term. Thus, the Court may consider extrinsic evidence to construe the Parties' intent.

75. In its July 28 letter, Bastian repeatedly indicates its *expectation* that A360 "*will make* a damage claim against Bastian" and "*will claim* that the Work was not complete on time . . .," as well as expressing its desire to "reduce the possibility that [A360] *will make a claim* against Bastian." (Trial Ex. 587) (emphasis added). Moreover, Bastian endeavored to send notice of the Delaware Litigation to Attabotics through its August 17 letter, evidencing an understanding that the July 28 letter did not constitute formal notice. While the Court takes pause in rendering the Integrator Agreement's four-part definition of "third-party claims" meaningless, judging from the evidence, the Court concludes that the Parties intended and mutually understood "third-party claims" to refer to third-party lawsuits.

76. Thus, Bastian's July 28 letter did not constitute prompt written notice of a third-party claim under the Integrator Agreement.

77. Bastian argues in the alternative that a two-month delay in Attabotics' receipt of formal notice is not unreasonable. Although the Parties' agreement was not one for insurance, "prompt" notification is an amorphous, context-specific

provision. Thus, the Court relies on case law from the insurance industry when construing this vague term.

78. In the insurance context, the purpose of notice conditions is to "give[] the insurer an opportunity to make a timely and adequate investigation of all the circumstances surrounding the accident or loss." *Indiana Farmers Mut. Ins. Co. v. N. Vernon Drop Forge, Inc.*, 917 N.E.2d 1258, 1274 (Ind. Ct. App. 2009) (quoting *Miller*, 463 N.E.2d at 265). To determine whether notice is "timely" or "reasonable," courts look to the effect of the timeliness of notice and whether the indemnifying party was prejudiced. *See Miller*, 463 N.E.2d at 260–61 ("Where prejudice is created by the insured's noncompliance with the policy's provisions, the insurance company is relieved of its liability under the policy.").

79. The Court found as a matter of fact that Attabotics was not prejudiced by the delay in receiving formal notice from Bastian of the A360 litigation. The Court concluded that Attabotics was intimately involved in the Olathe Project and was aware of A360's position in July of 2022 that the project was a failure, and that a lawsuit was likely. Attabotics knew about the Delaware Litigation by August 4, 2022, and was not prejudiced by the two-month delay in its receipt of Bastian's formal notice.

80. Therefore, the Court finds that Bastian's notice was sufficiently prompt to satisfy the notice condition to the duty to defend.

ii. Attabotics breached its duty to defend under the Integrator Agreement by not undertaking sole control of the Delaware Litigation defense.

81. In Attabotics' view, Bastian failed to tender sole control of the Delaware Litigation defense to Attabotics; and under the Integrator Agreement, Bastian was not entitled to offer, and Attabotics was not required to accept, anything less. Attabotics also argues that, because Bastian was first to breach the Integrator Agreement by failing to tender sole control of the defense, Bastian is not entitled to assert any defense and indemnification rights it may have had under the contract. (Def.'s Proposed Findings ¶ 71-75 at 89-90, ECF No. 212.)

82. The Court agrees with Bastian that no part of the Integrator Agreement required it to make an unconditional tender of the defense to Attabotics. (*See* Pl.'s Proposed Findings ¶ 30 at 52–53, ECF No. 211.) Rather, the onus was on Attabotics, as the Indemnifying Party, to "undertake sole control" of the Delaware Litigation defense. (Integrator Agreement ¶ 11.2, ECF No. 11-1.) Had the evidence demonstrated that, at any point, Attabotics sought to undertake sole control of the Delaware Litigation defense, only to have Bastian refuse to hand it over, the Court's analysis may have come down differently.

83. However, the Court concluded as a matter of fact that, despite several requests from Bastian that Attabotics defend it against impending/existing claims from A360, Attabotics never agreed or endeavored to undertake the Delaware Litigation defense. Here, Attabotics had notice of and the opportunity to control the Delaware Litigation defense, but apparently held firm in its original position that it had not breached the Integrator Agreement and did not owe Bastian a defense.

84. The Court concludes that Attabotics breached its duty to defend under the Integrator Agreement by failing to undertake sole control of the Delaware Litigation defense.

iii. Bastian is entitled to indemnification under the Integrator Agreement, despite the fact that it entered the Settlement Agreement without Attabotics' approval.

85. Attabotics argues that, under the Integrator Agreement, the Indemnifying Party is only responsible for damages "finally awarded . . . to such third party by a court of competent jurisdiction or agreed to by the Indemnifying Party in a monetary settlement of such Third Party Claims." (Integrator Agreement ¶ 11.2, ECF No. 11-1.) Because Attabotics did not agree to Bastian's settlement with A360, Attabotics contends that it is not responsible for indemnifying Bastian for the settlement amount.

86. The Court found that Attabotics did not agree to Bastian's settlement of the Delaware Litigation. This fact is undisputed by the Parties.

87. However, "[w]hen interpreting a contract, [the Court] will read it as a whole to ascertain its intended meaning." *Sisters of St. Francis Health Servs., Inc. v. EON Props., LLC*, 968 N.E.2d 305, 311 (Ind. Ct. App. 2012). Section 11.2 begins:

> "[E]ach party hereto (the "Indemnifying Party") shall defend the other party . . . against any and all third-party suits, claims, actions or proceedings ("Third-Party Claim), *and* shall indemnify the Indemnified Party against any costs, expenses, damages, awards, interest, penalties, fines, (including reasonable attorneys' fees, disbursements and expenses) finally awarded therein to such third party by a court of competent jurisdiction or agreed to by the Indemnifying Party in a monetary settlement of such Third-Party Claims, and the costs of enforcing any right to indemnification under this Agreement."

(Integrator Agreement ¶ 11.2, ECF No. 11-1) (emphasis added).

88. The agreement goes on to explain which third-party claims are covered under the indemnification agreement—the Parties do not dispute that A360's claims in the Delaware Litigation are covered—and requires the Indemnifying Party to "undertake and have sole control [of] the defense and any related settlement" of the third-party claim. (*Id.*)

89. Reading Section 11.2 in its entirety, it is obvious to the Court that the language cited by Attabotics is triggered only once the Indemnifying Party has taken up its duty to "defend . . . *and* [] indemnify." If the Indemnifying Party has undertaken its duty to defend, it is entitled to sole control over the defense and any settlement with the third-party. Where the Indemnifying Party is defending the third-party claim, the Indemnified Party is not entitled to, on its own initiative, settle with the third-party, and then seek indemnification for the settlement amount from the Indemnifying Party.

90. Here, however, where Attabotics was on notice of the third-party claim, was offered sole control of the defense, and made no attempt to undertake it, Bastian was not expected to consult Attabotics before settling the Delaware Litigation. It makes little practical sense to interpret the Integrator Agreement as requiring an Indemnified Party to seek approval of its settlement of a third-party claim from an Indemnifying Party that has shirked its duty to defend and indemnify. Had it known about the settlement, the likelihood of Attabotics approving it, given its position throughout, is miniscule. It cannot be the case that, having failed to

undertake the defense, Attabotics maintained final say over any settlement agreement Bastian entered into with A360.

91. *Roadsafe Holdings, Inc. v. Walsh Construction Company* is instructive here. 164 N.E.3d 726 (Ind. Ct. App. 2021). In *Roadsafe,* a driver sued a contractor (Walsh) for negligence; the contractor, in turn, sued its subcontractor (Roadsafe), alleging that Roadsafe had breached its duty to defend and indemnify Walsh in its litigation with the driver. The Indiana Court of Appeals applied insurance law to the dispute and held that, because Roadsafe had breached its duty to defend, Walsh was justified in litigating and settling the driver's claim against it. *Id.* at 732. And, because Roadsafe did not defend under a reservation of rights or seek a declaratory judgment on its duty to defend, it was on the hook to indemnify Walsh for the settlement amount and related damages incurred. *Id.*

92. "An indemnitor who denies liability on an indemnity contract thereby confers on the indemnitee the right to exercise reasonable judgment in settling the case without further consultation with the indemnitor." *Sink & Edwards, Inc. v. Huber, Hunt & Nichols, Inc.,* 458 N.E.2d 291, 297 (Ind. Ct. App. 1984). Here, Attabotics' position was that it had not triggered the defense and indemnification provision of the Integrator Agreement, and did not owe Bastian a defense. And Attabotics took no steps to preserve its rights under the contract.

93. Attabotics' failure to undertake the Delaware Litigation defense left Bastian with little choice but to proceed with defending the case as it saw fit. This includes settling with A360.

94. Attabotics cites to *West Bend Mutual Insurance Company v. Arbor Homes LLC* for the proposition that, when a contract contains a "consent provision," "any insured that settles a claim without [the insurer's] knowledge or consent does so at the insured's own expense under the express language of this provision." (Def.'s Proposed Findings ¶ 96-98, ECF No. 211) (quoting 703 F.3d 1092, 1096 (7th Cir. 2013)). The trouble here is that the Integrator Agreement does not contain a voluntary payment provision akin to that in *West Bend* or *Travelers Insurance Company v. Maplehurst Farms, Inc.,* 953 N.E.2d 1153 (Ind. Ct. App. 2011). Such a provision reads "no insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without [the insurer's] consent[;]" it assigns a duty to the insured in the event that a claim may arise. *W. Bend Mut. Ins. Co.,* 703 F.3d at 1095; *Travelers Ins. Co.,* 953 N.E.2d at 1156. The provision at issue in the Integrator Agreement does not create any duty for the Indemnified Party; rather, it clarifies the scope of indemnification when an Indemnifying Party assumes its duty to defend.

95. Duties assigned to the Indemnified Party under the Integrator Agreement include prompt notice of a third-party claim and full cooperation in its defense/settlement, as requested by the Indemnifying Party, as well as the limitations outlined in the "notwithstanding" provision. Seeking approval of a settlement agreement from an Indemnifying Party that has failed to uphold its own contractual responsibilities is not one such duty.

iv. Because the Settlement Agreement did not stipulate or acknowledge Attabotics' liability or wrongdoing, Bastian is not precluded from indemnification on that basis.

96. As noted, the Integrator Agreement's "notwithstanding" provision precludes the Indemnified Party from settling a third-party claim in a manner that stipulates to or acknowledges the Indemnifying party's liability or wrongdoing. (Integrator Agreement ¶ 11.2.) The Court found as a matter of fact that the Settlement Agreement did not stipulate to or acknowledge Attabotics' liability or wrongdoing. Therefore, Bastian is not precluded from indemnification on that basis.

97. The Court concludes that Attabotics breached its duty to defend and indemnify under the Integrator Agreement, and Bastian is entitled to indemnification.

v. Bastian is entitled to recover damages for Attabotics' breach of Section 11.2 of the Integrator Agreement.

98. As a result of Attabotics' breach of Section 11.2, Bastian seeks to recover:

(1) $7,000,000, to compensate Bastian for amounts paid, or to be paid, to A360, to settle the Delaware Litigation;

(2) $3,419,745.60, to compensate Bastian for invoices released as part of the settlement of the Delaware Litigation;

(3) $539,000, to compensate Bastian for removing the Attabotics Solution, as required by A360 following termination of the System Agreement;

(4) Attorneys' fees and costs incurred defending the Delaware Litigation;

(5) Attorneys' fees and costs incurred enforcing ¶ 11.2 of the Integrator Agreement;

(6) Prejudgment interest at the rate of 8% simple interest, calculated as follows:

a. Settlement prejudgment interest: $2,410 per day (($7,000,000 + $3,419,419.60 + $577,641.40) * 8.0% / 365) * 487 days (July 28, 2023 to November 26, 2024) = $1,173,670.[4]

99. "In a breach of contract action, the measure of damages is the loss actually suffered by the breach. That said, the non-breaching party is not entitled to be placed in a better position than it would have been if the contract had not been broken." *Maples Health Care, Inc. v. Firestone Bldg. Prods.,* 162 N.E.3d 518, 528 (Ind. Ct. App. 2020) (citing *Sisters of St. Francis Health Servs., Inc.,* 968 N.E.2d at 313 (Ind. Ct. App. 2012)).

100. Bastian's settlement with A360 included a lump sum payment of $6,000,000 and up to $1,000,000 more depending on what, if anything, Bastian recovered from Attabotics.

101. Bastian is entitled to recover the settlement amount it paid to A360 in the amount of $6,000,000, assuming it was fair and reasonable, which Attabotics does not dispute. *See Sequa Coatings Corp. v. N. Indiana Commuter Transp. Dist.,* 796

[4] The preceding damages demand and prejudgment interest calculation is taken directly from Bastian's proposed findings. (Pl.'s Proposed Findings ¶ 45, 60, ECF No. 211.) There appear to be several typographical errors in Bastian's prejudgment interest calculation that contradict its damages valuations. The interest calculation seemingly totals the unpaid invoices at $3,419,419.60, rather than $3,419,745.60, and the removal costs at $577,641.40, as opposed to $539,000. The Court concludes that the values included in the interest calculation are errors, and the correct values are those listed in Bastian's damages demand and referenced several times throughout its brief: $3,419,745.60 for the invoices and $539,000 for the removal costs.

N.E.2d 1216, 1230 (Ind. Ct. App.), *decision clarified on reh'g*, 800 N.E.2d 926 (Ind. Ct. App. 2003); *Roadsafe Holdings, Inc.,* 164 N.E.3d at 731-732.

102. Bastian is not, however, entitled to recover an extra $1,000,000 arising from its contingency agreement with A360. (*See Pflanz v. Foster*, 888 N.E.2d 756, 759 (Ind. 2008) ("In contribution or indemnification cases, the damage that occurs is the incurrence of a monetary obligation that is attributable to the actions of another party. That is why, generally, parties bringing contribution and indemnification claims must wait until after the obligation to pay is incurred, for otherwise the claim would lack the essential damage element."). Bastian is not obligated to pay A360 $1,000,000; depending on its recovery, it may pay A360 nothing, $1,000,000, or anywhere in between. Bastian's decision to condition a portion of its settlement agreement on the outcome of this litigation was done at its own expense. Attabotics is not required to indemnify Bastian for it.

103. As part of its Settlement Agreement with A360, Bastian also agreed to forfeit its counterclaim for unpaid invoices owed to it by A360 in the amount of $3,419,745.60. Bastian cites to a case from the California Court of Appeals to argue that it is entitled to recover the value of the claim it gave up in settlement. (Pl.'s Proposed Findings ¶ 45 at 56, ECF No. 211) (citing *Earth Elements, Inc. v. Nat'l Am. Ins. Co.,* 41 Cal. App. 4th 110, 116 (1995)). *Earth Elements,* though not binding on this Court, is on point—"[t]here is no analytical distinction between surrendering money in exchange for a settlement and exchanging any other item of value." 41 Cal. App. 4th at 116.

104. In response, Attabotics argues that it is not responsible for indemnifying Bastian for either 1) A360's wrongdoing in failing to pay Bastian's invoices, or 2) Bastian's own negligence in settling meritless claims with A360, assuming Bastian was entitled to final payment. (Def.'s Proposed Findings ¶ 349-356.) But "[t]he damage [here] was the payment made to settle a covered claim, i.e., damages directly resulting from a breach of the duty to indemnify, something clearly within the contemplation of the parties at the time they entered into the [] contract. The issue here is whether [insured] is entitled to be compensated for the value of that which it gave up in return for the settlement. That answer is clearly yes." *Earth Elements, Inc.*, 1 Cal. App. 4th at 116.

105. The fact of the matter is, once Attabotics abandoned Bastian, Bastian was entitled to proceed with defending the Delaware Litigation as it saw fit. This includes reaching a settlement with A360. Assuming Bastian's agreement to forfeit its counterclaim against A360 was fair and reasonable, it is irrelevant which party would have triumphed had the matter gone to trial. Attabotics, having breached its duty to defend, forfeited its right to object to the terms of Bastian and A360's settlement (assuming the terms are fair and reasonable, which Attabotics does not dispute). Bastian is entitled to recover the value of the claim it forfeited, in the amount of $3,419,745.60.

106. Bastian also seeks to recover the cost of removing the Attabotics ASRS System from A360's warehouse in the amount of $539,000. While Section 12 of the Integrator Agreement reserves the Parties' rights to seek incidental/consequential

damages when a Party is in breach of the indemnification provision, Bastian makes no argument that its removal costs "flow[] naturally and probably from the breach and [were] contemplated by the parties when the contract was made." *Indianapolis City Mkt. Corp. v. MAV, Inc.,* 915 N.E.2d 1013, 1024 (Ind. Ct. App. 2009). It does not appear that, had Attabotics complied with its duties under Section 11.2, it would have been required to indemnify Bastian for the cost of removing its system from the Olathe warehouse. Bastian has failed to demonstrate that it is entitled to recover removal costs as a result of Attabotics' breach.

107. Bastian is entitled to recover attorneys' fees and costs expended in defending the Delaware Litigation and incurred in enforcing ¶ 11.2 of the Integrator Agreement. *See Bethlehem Steel Corp. v. Sercon Corp.,* 654 N.E.2d 1163, 1168 (Ind. Ct. App. 1995) ("An indemnitee is entitled to recover attorney's fees expended defending the underlying claim and prosecuting the claim for indemnification."); (Integrator Agreement ¶ 11.2) (explaining that Indemnifying Party shall indemnify against "the costs of enforcing any right to indemnification under this Agreement[.]").

108. Bastian is entitled to pre-judgment interest at a rate of 8%. Ind. Code § 24-4.6-1-101; *Roadsafe Holdings, Inc.,* 164 N.E.3d at 734 (Ind. Ct. App. 2021) ("The award of prejudgment interest is considered proper when the trier of fact does not have to exercise judgment in order to assess the amount of damages."); *Song v. Iatarola,* 76 N.E.3d 926, 939 (Ind. Ct. App.), *on reh'g*, 83 N.E.3d 80 (Ind. Ct. App.

2017) ("The current interest rate is 8% when there is no contract by the parties specifying a different interest rate.") (citing Ind. Code § 24-4.6-1-101).

109. In sum, Bastian is entitled to recover $9,419,745.60, plus $1,641,357 in pre-judgment interest, calculated at a rate of 8%, for a total of $11,061,102.60.

Conclusion

Declaratory Judgment on Count I of the Amended Complaint, (ECF No. 11), is **granted**. The Court **orders and declares** that (1) Attabotics was contractually required to defend Bastian in the Delaware Litigation, pursuant to Section 11.2 of the Integrator Agreement; (2) Attabotics is required to indemnify Bastian with respect to the settlement agreement reached in the Delaware Litigation, as limited by the contents of this Order; and (3) Attabotics is required to pay to Bastian reasonable attorneys' fees incurred in the Delaware Litigation and reasonable attorneys' fees associated with enforcing Section 11.2 in this litigation.

Attabotics is **liable** on Count II for breach of contract. Attabotics is **not liable** on Count III for breach of warranty.

The Court awards the following:

(1) $6,000,000, to compensate Bastian for amounts paid to A360 to settle the Delaware Litigation;

(2) $3,419,745.60, to compensate Bastian for invoices released as part of the settlement of the Delaware Litigation;

(3) Prejudgment interest at the rate of 8% simple interest, calculated as follows:

$2,064.60 per day (($6,000,000 + $3,419,745.60) * 8.0% / 365) * 795 days (July 28, 2023, to September 30, 2025) = $1,641,357.

The Court further finds that Bastian should be awarded: (4) its reasonable attorneys' fees and costs related to the Delaware Litigation; and (5) its reasonable attorneys' fees and costs related to this case, both to be proven in accordance with Federal Rule of Civil Procedure 54(d)(2) and Local Rule 54-1. Bastian **shall** file a motion for attorneys' fees by **October 30, 2025.**

Final judgment under Federal Rule of Civil Procedure 58 will be entered accordingly.

SO ORDERED.

Date: 9/30/2025

JAMES R. SWEENEY II, CHIEF JUDGE
United States District Court
Southern District of Indiana

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