
Appeal Nos. 18-2321, 18-2350

**United States Court of Appeals
for the Federal Circuit**

JANSSEN BIOTECH, INC.,
Plaintiff-Appellant,

v.

CELLTRION HEALTHCARE CO., LTD., CELLTRION, INC., and HOSPIRA, INC.,
Defendants-Cross-Appellants.

Appeal from the U.S. District Court for the District of Massachusetts,
No. 17-cv-11008-MLW, Judge Mark L. Wolf

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
ARGUMENT	4
I. The Contracts Unambiguously Assign the Invention to Centocor, J&J, and their Successors and Subsidiaries.....	4
A. The “Affiliates” Definition Does Not Create Ambiguity.....	5
B. The Patent Assignment Provision Does Not Create Ambiguity.	8
C. “Any” J&J Subsidiary Means All of Them.	10
II. The Extrinsic Evidence Does Not Support Janssen.	16
A. J&J Companies’ Treatment of “the COMPANY” in Other Litigation and with Departing Employees Supports Celltrion.	19
B. The Inventors’ Conduct Is Consistent With the Literal Definition of “the COMPANY.”	23
C. Janssen’s Internal Database Does Not Inform the Contracts’ Definition of “the COMPANY.”.....	24
D. The Post-2008 Employee Agreements Further Indicate that “the COMPANY” Covered J&J and All of Its Successors and Subsidiaries in the Pre-2008 Agreements.	26
III. The District Court Correctly Rejected Janssen’s “Disclaimer” Argument.....	28
CONCLUSION	30

TABLE OF AUTHORITIES

Cases

5907 Blvd. L.L.C. v. W.N.Y. Suites, L.L.C.,
2013 WL 3762695 (N.J. Super. Ct. App. Div. July 19, 2013)4, 7

Abbott Point of Care v. Epocal,
666 F.3d 1299 (Fed. Cir. 2012)1, 2, 10, 16

Atl. N. Airlines v. Schwimmer,
96 A.2d 652 (N.J. 1953)2, 9, 17, 18

Coffin v. Coffin,
146 A. 680 (N.J. Ch. 1929).....13

Conway v. 287 Corp. Ctr. Assocs.,
901 A.2d 341 (N.J. 2006)17, 18, 25

County of Morris v. Fauver,
707 A.2d 958 (N.J. 1998)18

CRI-Leslie, LLC v. Comm’r of Internal Revenue,
882 F.3d 1026 (11th Cir. 2018)14

United States v. Cook,
594 F.3d 883 (D.C. Cir. 2009).....14

Enovsys LLC v. Nextel Commc’ns, Inc.,
614 F.3d 1333 (Fed. Cir. 2010)29

Exxon Mobil v. Allapattah Servs.,
545 U.S. 546 (2005).....15

Frank Stamato & Co. v. Borough of Lodi,
71 A.2d 336 (N.J. 1950)14, 15

Gen. Dynamics Land Sys. v. Cline,
540 U.S. 667 (2004).....22

Grayzel v. Boston Sci. Corp.,
2015 WL 9694354 (N.J. Super. App. Div. 1991).....22

Hillman v. I.R.S.,
 263 F.3d 338 (4th Cir. 2001) 14

*Int’l Union, United Auto., Aerospace & Ag. Implement Workers of
 Am., U.A.W. v. Skinner Engine*, 188 F.3d 130 (3d Cir. 1999)..... 17

IpVenture, Inc. v. Prostar Comput., Inc.,
 503 F.3d 1324 (Fed. Cir. 2007)28, 29

*Jacoby & Meyers, LLP v. Presiding Justices of the First, Second,
 Third, and Fourth Dep’ts, App. Div. of the Sup. Ct. of N.Y.*,
 852 F.3d 178 (2d Cir. 2017)30

James v. Fed. Ins. Co.,
 73 A.2d 720 (N.J. 1950) 16

Kamen v. Kemper Fin. Servs., Inc.,
 500 U.S. 90 (1991)..... 16

Karl’s Sales & Serv. v. Gimbel Bros.,
 592 A.2d 647 (N.J. Super. Ct. App. Div. 1991)2, 16, 17

Kingston Trap Rock Co. v. Eastern Eng’g Co.,
 39 A.2d 422 (N.J. 1944) 19

Kolbe v. BAC Home Loan Servicing, LP,
 738 F.3d 432 (1st Cir. 2013)..... 18

Lexmark Int’l v. Static Control Components,
 572 U.S. 118 (2014).....30

Lone Star Silicon Innovations LLC v. Nanya Tech. Corp.,
 2019 WL 2292485 (Fed. Cir. May 30, 2019).....30

Mayer v. Dev. Corp. of Am.,
 541 F. Supp. 828 (D.N.J. 1981), *aff’d*, 688 F.2d 822 (3d Cir. 1982)..... 7

Puerto Rico Mar. Shipping Auth. v. Interstate Commerce Comm’n,
 645 F.2d 1102 (D.C. Cir. 1981)..... 12

Quinn v. Quinn,
 137 A.3d 423 (N.J. 2016) 15

R.R. v. Indiana,
106 N.E.3d 1037 (Ind. 2018) 14

Robinson v. Shell Oil,
519 U.S. 337 (1997).....22

Rockel v. Cherry Hill Dodge,
847 A.2d 621 (N.J. Super. Ct. App. Div. 2004)4, 7

Skidgel v. Me. Dep’t of Human Servs.,
994 F.2d 930 (1st Cir. 1993).....27

Telecom Int’l Am., Ltd. v. AT&T,
280 F.3d 175 (2d Cir. 2001) 17

Thompson v. Trenton Water Power,
73 A. 410 (N.J. 1909) 14

Twp. of White v. Castle Ridge Dev.,
16 A.3d 399 (N.J. Super. Ct. App. Div. 2011) 10

Util. Air Regulatory Grp. v. EPA,
573 U.S. 302 (2014).....22

Victory Constr. Co. v. United States,
510 F.2d 1379 (Ct. Cl. 1975).....27

VRG v. GKN Realty Corp,
641 A.2d 519 (N.J. 1994)17, 18

Whiting v. Johns Hopkins Hosp.,
416 F. App’x 312 (4th Cir. 2011)27

Woodhaven Lumber & Millwork, Inc. v. Monmouth Design & Dev. Co.,
2014 WL 1326994 (N.J. Super. Ct. App. Div. Mar. 18, 2014)2, 28

Rules and Other Authorities

Fed. R. Civ. P. 12(b)30

Restatement (First) of Contracts § 235 (1932)13, 14

Note: All emphasis added unless otherwise indicated.

INTRODUCTION

Four of six co-inventors assigned their rights in the '083 patent to “the COMPANY.” The “literal definition of ‘the COMPANY’” is undisputedly a broad group that includes, but is not limited to, Janssen. Appx152. That breadth was deliberate: it advances sweeping confidentiality, intellectual property, and non-compete obligations. And the same “literal definition” plainly applies to the entire agreement, including the patent-assignment provision. The result is that Janssen is not the sole patent owner and thus has no standing to sue alone.

Equally plain is what the contracts do *not* do: they do not provide one *written* definition of “the COMPANY” for the non-compete and confidentiality provisions but a different, *unwritten* definition for patent assignments. The contracts define “the COMPANY” once, and rely on that definition from top to bottom. Appx9407. Janssen may now find its contracts inconvenient, but “when the terms of a contract are clear, it is the function of a court to enforce it as written and not to make a better contract for either of the parties.” *Abbott Point of Care v. Epocal*, 666 F.3d 1299, 1302 (Fed. Cir. 2012).

Janssen wants the Court to hold that it alone owns the '083 patent, but it makes almost no effort to square that result with the contracts' text or basic contract law. Instead, Janssen reaches for every text-defeating principle it can find, and ultimately implores the Court to ignore the clear, broad, “*literal definition* of ‘the

COMPANY,” Appx152, and instead give an expressly defined term two different meanings in the same contract. But saving Janssen from its own contracts is not how contract interpretation works, in New Jersey or elsewhere—it is a search for the meaning of the contract’s text, not for other “intention[s] wholly unexpressed in the writing.” *Atl. N. Airlines v. Schwimmer*, 96 A.2d 652, 656 (N.J. 1953); *see Karl’s Sales & Serv. v. Gimbel Bros.*, 592 A.2d 647, 650 (N.J. Super. Ct. App. Div. 1991).

“Wholly unexpressed” intentions are exactly what Janssen relies on. Janssen attacks form contracts the J&J family used and enforced in court for years as “‘ambiguous’ and ‘poorly drafted.’” YellowBr. 39. And it contends that “the COMPANY[’s]” literal reading is “absurd” and that “[n]o rational company” would have intended to apply the term as written. *Id.* at 48.

The only absurdity here, however, is the idea that the drafter intended for a *single* expressly defined term to have *two* different meanings in the same contract. It would have been exceedingly simple to use a term other than “the COMPANY”—for example, “the employer”—within the patent-assignment provision. But that was not what Janssen chose. This Court’s task is not to write a “better contract” for Janssen, but to “enforce” the “clear” terms of its contracts “as written.” *Abbott Point of Care*, 666 F.3d at 1302. “Unambiguous language controls the rights and obligations of the parties, even if it was unwise in hindsight.” *Woodhaven Lumber*

& Millwork v. Monmouth Design & Dev., 2014 WL 1326994, at *6 (N.J. Super. Ct. App. Div. Mar. 18, 2014).

Lacking any good text-based argument, Janssen retreats to extrinsic evidence. But aside from self-serving employee testimony generated during this litigation (over a decade after the contracts were executed), none of Janssen’s extrinsic evidence involves *any* employee at *any* time even considering the contracts’ definition of “the COMPANY,” much less construing it as Janssen now proposes.

By contrast, Celltrion has offered volumes of extrinsic evidence showing that multiple J&J family companies have construed “the COMPANY” exactly as written. This includes letters J&J routinely sent to departing employees to advise them of their “continuing obligations to Janssen Biotech, Inc. *and the Johnson & Johnson family of companies* under [the] Employee Secrecy, Non-Competition and Non-Solicitation Agreement.” Appx9003; *see* Appx8996. It also includes at least eleven other lawsuits in which, where it worked to their advantage, J&J family companies asked courts to apply the broad, literal definition as written, so that entities other than a direct employer could be named as plaintiffs.

For example, Cordis, one of Janssen’s sister companies, unambiguously represented that *both* it and J&J “own[ed] all inventions, patentable or not, developed by [the defendant] while” he was employed by Cordis. Appx8972. In short, the literal definition of “the COMPANY” is not only correct—it is the

definition J&J has consistently relied on. Janssen downplays that evidence, but it is the *only* extrinsic evidence actually interpreting “the COMPANY.”

Janssen’s fallback argument is that it cured its standing problem through a “disclaimer” executed mid-litigation. That argument is equally unsound, and the district court correctly rejected it. Appx167. The Court should dismiss based on Janssen’s failure to join all co-owners.

ARGUMENT

I. The Contracts Unambiguously Assign the Invention to Centocor, J&J, and their Successors and Subsidiaries.

The district court’s ruling that Janssen is the sole owner of the ’083 patent turns on its finding that the “literal definition of ‘the COMPANY’” is ambiguous because, in the court’s view, a literal reading “conflicts” with other provisions. Appx150-152. But under New Jersey law, an ambiguity due to “conflict” exists only where “literal compliance with [two] provisions [is] impossible” or the contract’s language “confounds any clear understanding of the parties’ undertaking.” *5907 Blvd. L.L.C. v. W.N.Y. Suites, L.L.C.*, 2013 WL 3762695, at *5 (N.J. Super. Ct. App. Div. July 19, 2013); *Rockel v. Cherry Hill Dodge*, 847 A.2d 621, 625 (N.J. Super. Ct. App. Div. 2004). None of the three provisions Janssen identifies—the definition of “Affiliates,” the assignment provision, or the word “any”—fits that rule. None are irreconcilable with the literal definition of “the COMPANY.”

Janssen’s argument thus depends on ignoring the contracts’ unambiguous language: “The COMPANY means Centocor *and* Johnson & Johnson *and* any of their successors [etc.] *and* any of their existing and future subsidiaries [etc.]” Appx9407. By its terms, the “definition of ‘the COMPANY’ literally includes” at least two entities—“both Centocor and J&J.” Appx152. That much is beyond debate. Yet under Janssen’s reading, not only are *all* of the other entities after “Johnson & Johnson” excluded from “the COMPANY,” *so is “Johnson & Johnson” itself*. That is impossible to justify textually, and is inconsistent with the contracts’ purpose, which Janssen admits is to protect the proprietary information of the full J&J corporate family. Appx9407. Janssen’s concessions should be decisive and demand a broad, literal reading of “the COMPANY.” Janssen’s imaginary “conflicts” cannot shake that result.

A. The “Affiliates” Definition Does Not Create Ambiguity.

According to Janssen, the contracts’ definition of “Affiliates” renders their definition of “the COMPANY” ambiguous by requiring the latter “both [to] include[] and [to] exclude[] J&J.” YellowBr. 49-50 (capitalization normalized). But the “Affiliates” definition plainly is not intended to nullify the definition of “the COMPANY” in the immediately preceding sentence:

The COMPANY means CENTOCOR *and* JOHNSON & JOHNSON *and* any of their successors or assigns, purchasers, acquirers, *and* any of their existing and future subsidiaries, divisions or affiliates, *including* any such subsidiary, division or affiliate of Johnson &

Johnson to which I may be transferred or by which I may be employed in the future. Affiliates of the COMPANY are any corporation, entity or organization at least 50% owned by the COMPANY, by Johnson & Johnson or by any subsidiary of Johnson & Johnson.

Appx9407. Janssen fails to demonstrate any “conflict.”

First, Janssen claims “it would make no sense” for the definition of “Affiliates” to refer to “the COMPANY *or* J&J *or* its subsidiaries” if “the COMPANY” included J&J and its subsidiaries.” YellowBr. 49-50 (Janssen’s emphasis). But the definition’s purpose is to confirm an *expansive* definition of “the COMPANY,” one that includes *additional* entities, as long as at least 50% owned by the J&J family. And the definition expressly encompasses entities owned at least 50% collectively by “the COMPANY,” such as two J&J entities each owning 25% of a company. Janssen does not dispute that the “Affiliates” definition achieves this purpose, but merely observes that “real-world examples” may not yet exist. YellowBr. 50. That is a non-sequitur. These are forward-looking agreements designed to protect assets of “the COMPANY,” drafted broadly to cover arrangements that may not yet be in place. The definition of “Affiliates” makes ample sense, and does not “conflict” with the definition of “the COMPANY.”

Second, Janssen offers no alternative interpretation or purpose for the “Affiliates” definition. Indeed, if “the COMPANY” were limited to direct employers, as Janssen contends, defining “Affiliates” would be pointless.

Third, even if Janssen’s criticisms had any merit, the district court was not free to reject the literal definition of “the COMPANY.” The definitions may create *overlap*—or, at most, *redundancy*—but not *conflict*. Redundancy is a recognized *benefit* of contract drafting, to avoid loopholes and add clarity by “hit[ting] the head of the nail harder.” *Mayer v. Dev. Corp. of Am.*, 541 F. Supp. 828, 843 (D.N.J. 1981), *aff’d*, 688 F.2d 822 (3d Cir. 1982); *see* RedBr. 64. So it is here: overlap between “Affiliates” and “the COMPANY” makes doubly sure certain entities are included, and furthers the goal of ensuring broad protection for J&J’s confidential information and intellectual property, regardless of which J&J entity originated those assets.

Regarding that benefit, Janssen has no response. YellowBr. 50. And its reliance on an anti-redundancy principle cannot be taken seriously. If Janssen’s interpretation of “the COMPANY” were correct, then *all 55 words* after “CENTOCOR” are superfluous, including the entire “Affiliates” definition. RedBr. 64. That is no way to read a contract. The contracts’ literal definitions of “the COMPANY” and “Affiliates” are neither “impossible” to comply with simultaneously, nor “confound[ing] [beyond] clear understanding.” *5907 Blvd.*, 2013 WL 3762695, at *5; *Rockel*, 847 A.2d at 625.

B. The Patent Assignment Provision Does Not Create Ambiguity.

The contracts' patent assignment provision also does not "conflict" with the literal definition of "the COMPANY." The assignment provision states:

I agree to disclose promptly to the COMPANY all INVENTIONS conceived or made by me whether or not during my hours of employment or with the use of the COMPANY's facilities, materials or personnel, either solely or jointly with another or others during my employment with the COMPANY, and related to the actual or anticipated business or activities of the COMPANY, or related to its actual or anticipated research and development or suggested by or result from any task assigned to me or work performed by me for, or on behalf of, the COMPANY. I assign and agree to assign my entire right, title and interest therein to the COMPANY.

Appx9407 (underlining added). Janssen relies on the underlined phrase: "during my employment with the COMPANY," arguing the phrase "would make no sense if 'COMPANY' meant Centocor *and* J&J *and* J&J's 200-plus subsidiaries." YellowBr. 51 (original emphasis). Not so.

First, there is no conflict at all. By its terms, "the COMPANY" includes the inventor's direct employer, but is not limited to that employer. Therefore, employment with *any* entity in the J&J family *is* employment with "the COMPANY."

Second, the district court did not actually conclude (and Janssen does not argue) that phrase made the patent assignment provision irreconcilable with the literal definition of "the COMPANY," Appx152, which should end the analysis. Instead, the court purportedly found a conflict between its "*sense*" of what "the

assignment provision” “*suggests,*” *id.*, or “*implies,*” Appx150, and “the literal definition of ‘the COMPANY.’” Appx152. But Janssen offers no authority supporting a finding of “ambiguity” by comparing the “sense” of one term with another term’s “literal definition.” That circular reasoning assumes the interpretation leading to the purported conflict, and cannot withstand scrutiny. In New Jersey as elsewhere, text controls. *Schwimmer*, 96 A.2d at 656.

Third, Janssen ignores the common situation where employees are employed by multiple J&J companies over time. The broad, literal definition of “the COMPANY” accounts for that situation. Janssen’s direct-employer-only definition does not. In fact, Janssen’s narrow definition would require new contracts every time an employee transferred to a different direct employer within the J&J family—something Janssen has not shown ever happened. Janssen has no response and offers no alternative textual reading. *YellowBr.* 52-53.

Finally, if there is any “conflict” afoot, it is in Janssen’s arguments. Janssen asserts the identical phrase—“during my employment with the COMPANY”—has two different meanings in the same contract (along with “the COMPANY” itself). For the non-compete and confidentiality obligations, “during my employment with the COMPANY” broadly protects the entire J&J family. *RedBr.* 65-66. “[F]or the Assignment Clause,” however, Janssen argues that the *exact same phrase* refers

only to the employee's direct employer. YellowBr. 52-53. That makes no sense—indeed, it would add yet another term with multiple meanings.

Where a contract's language "is plain and capable of legal construction," as the definition of "the COMPANY" is here, "the language alone must determine the agreement's force and effect." *Twp. of White v. Castle Ridge Dev.*, 16 A.3d 399, 403 (N.J. Super. Ct. App. Div. 2011). Taking a contractual term with a single, clear definition, and giving it a second, special definition found nowhere in the contract improperly "make[s] a better contract for" Janssen than the one it actually drafted. *Abbott*, 666 F.3d at 1302.

C. "Any" J&J Subsidiary Means All of Them.

The district court relied on two purported "conflicts" to reject the literal definition of "the COMPANY," both addressed above. Janssen now spins statements in the court's opinion about the word "any" to try to manufacture a third basis for the decision, namely that "any" makes the definition of "the COMPANY" ambiguous because it could refer to "one or more" *or* "all" of J&J's family companies. YellowBr. 47-49 ("CENTOCOR and JOHNSON & JOHNSON ... and *any* of their existing and future subsidiaries, divisions or affiliates") (Janssen's emphasis).

There is no third basis. The district court observed that "[a]ny' may have at least two meanings," and added that "'any' J&J Family Company *could* reasonably

be construed to mean ‘one or more’ such companies.” Appx149-150. But the court did not hold the word “any” rendered “the COMPANY” ambiguous. *Id.* Quite the opposite—the court noted that “any” made no difference: “Even if ‘any’ means ‘one or more,’ ‘the COMPANY’ is still defined as ‘Janssen *and* J&J *and* any [J&J family company],” which, “[i]nterpreted literally ... includes at least two entities—Janssen and J&J.” Appx150 (district court’s emphasis).

Janssen never contests that point: whatever the meaning of “any,” “the COMPANY” literally includes at least Janssen *and* J&J, not merely the former or an employee’s direct employer. That alone defeats Janssen’s arguments, and confirms that the drafters *did* intend for “the COMPANY” to extend beyond solely the direct employer.

Moreover, even if “any” meant “one or more,” rather than “all,” “the COMPANY” would still include at least *four* entities: “[1] Centocor *and* [2] Johnson & Johnson *and* [3] any of their successors [etc.] *and* [4] any of their existing or future subsidiaries [etc].” Appx9407 (bracketed numbers added). By insisting it has standing even though *none* of J&J or its subsidiaries are joined, Janssen actually requires “any” to mean “*none* or more.”

Janssen’s “any”-based arguments are also wrong on their own terms.

First, syntax makes plain that “any” can only mean “all” here. “In affirmative sentences”—like the first sentence of the definition of “the COMPANY”—“any”

“means ‘every’ or ‘all.’” Appx8485 (B. Garner, THE OXFORD DICTIONARY OF AMERICAN USAGE AND STYLE 24 (2000)). Just as “You are required to produce *any* documents relating to the issue” means to produce *all* such documents, “The COMPANY means CENTOCOR and JOHNSON & JOHNSON and *any* of their” successors and affiliates means *all* of those entities. *Id.* That makes sense here, where “the COMPANY” is defined to encompass “*any ... future*” entities too. Appx9407.

Second, other terms in the definition of “the COMPANY” reinforce that “any” means “all” here. The definition’s first clause lists broad categories of J&J entities without qualification: “The COMPANY means CENTOCOR and JOHNSON & JOHNSON and *any* of their successors [etc.] and *any* of their existing and future subsidiaries [etc.]” Appx9407. The second clause begins with “*including*,” a transition that indicates the terms to follow are a subset of the words that came before: “*including* any such subsidiary, division or affiliate of Johnson & Johnson to which I may be transferred or by which I may be employed in the future.” *Id.* That use of “including” confirms the breadth of the first clause by indicating that “the COMPANY” is not limited to what follows in the second.

Janssen’s reading treats “*including*” as if it meant “limited to.” “[H]ornbook law” is directly contrary: “use of the word ‘including’ indicates that the specified list of [items] is illustrative, *not exclusive*.” *Puerto Rico Mar. Shipping Auth. v.*

Interstate Commerce Comm'n, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981); accord A. Scalia & B. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 132 (2012) (“the word *include* does not ordinarily introduce an exhaustive list”).

Third, Janssen offers no affirmative grammatical or linguistic reason to interpret “any” as “one or more” *in this case*. YellowBr. 47-48. Nor could it. A narrow reading of “any” would make little sense here. The definition of “the COMPANY” is not, for example, “a sentence implying that a selection or discretionary act will follow,” in which “any” can mean “one or more.” Appx8485 (Garner, *THE OXFORD DICTIONARY OF AMERICAN USAGE AND STYLE* 24 (*e.g.*, “[p]ick any books you like”). Instead, because context here makes plain that “any” means “all,” the district court’s observation that “any” *can* take on different meanings in other contexts makes no difference. YellowBr. 47-48. If the general versatility of a word like “any” rendered contractual provisions ambiguous, it would spell the death of contracts.

Finally, Janssen contends that reading the contract as written would produce “absurd result[s]” regarding patent ownership. YellowBr. 48-49. Janssen misunderstands that concept, which the district court did not rely on. It addresses the narrow circumstance where a strict literal interpretation “would lead to some absurdity, or repugnance or inconsistency with the rest of the instrument.” Restatement (First) of Contracts § 235 (1932); see *Coffin v. Coffin*, 146 A. 680, 681

(N.J. Ch. 1929) (same); *Thompson v. Trenton Water Power*, 73 A. 410, 412-13 (N.J. 1909). This is similar to the rule for statutory construction, where the “absurdity exception to the plain meaning rule ... is necessarily ‘very narrow’ and applies only when a straightforward application of [the] text would compel a truly ridiculous—or to use Justice Story’s word, ‘monstrous’—outcome.” *CRI-Leslie v. Comm’r of Internal Revenue*, 882 F.3d 1026, 1031 (11th Cir. 2018); accord *United States v. Cook*, 594 F.3d 883, 890-91 (D.C. Cir. 2009) (similar); *Hillman v. I.R.S.*, 263 F.3d 338, 343 (4th Cir. 2001) (similar).

“In such cases, so far as is necessary to avoid that absurdity or inconsistency, *but no further*, the ordinary sense of words may be modified and rules of grammar disregarded.” Restatement (First) of Contracts § 235; see Scalia & Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 237-38 (similar for statutes: “The absurdity must be reparable by changing or supplying a particular word or phrase whose inclusion or omission was obviously a technical or ministerial error.”). “Absurdity” is not a general license to rewrite or ignore literal contract language whenever a party may find the consequences inconvenient in a particular case. See *R.R. v. Indiana*, 106 N.E.3d 1037, 1042-45 (Ind. 2018) (refusing to apply absurdity exception where the text did not “lend[] itself to a clean and modest judicial fix”).¹

¹ The cases Janssen cites are consistent with this principle. YellowBr. 49. *Frank Stamato & Co. v. Borough of Lodi* simply recognized the general “absurd[ity]” of “requiring a non-defaulting party to a contract to get the permission of a defaulting

No “absurdity” would flow from reading the contracts as written. The contracts safeguard assets of “the COMPANY.” Appx9407; Appx9409; Appx9413; Appx9417. And they do so partly by assigning patents to “the COMPANY,” leaving the J&J family of companies free to execute further contracts among themselves to distribute ownership as it deems appropriate. Janssen also does not dispute that group patent ownership has advantages, such as obviating any need to draft and coordinate multiple transfer or license agreements between corporate family members. *See* RedBr. 60-61; *cf. Exxon Mobil v. Allapattah Servs.*, 545 U.S. 546, 565 (2005) (where “alternative explanation” for statutory language existed, declining to find an “odd” omission “absurd”).

That is reason enough to reject Janssen’s invocation of “absurd results.” Janssen notes that interpreting “any” as “all” could complicate Patent Office transactions and corporate bookkeeping, YellowBr. 48-49, but that is not “absurdity”; it is the unremarkable point that most contractual arrangements have pros and cons. Sophisticated companies can address those by means other than asking courts to invent litigation-specific exceptions to the terms of their contracts.²

party to the contract to bring suit.” 71 A.2d 336, 340 (N.J. 1950). The majority in *Quinn v. Quinn* did not rely on the doctrine at all. 137 A.3d 423, 429 (N.J. 2016).

² Janssen wrongly suggests that Celltrion waived its “challenge” to the district court’s understanding of “any.” There is no waiver. The district court did not hold that “any” rendered “the COMPANY” ambiguous, so there was no need to address the issue. *See supra* pp. 10-11. Instead, it explicitly reasoned that “[a]s the literal

Janssen ultimately resorts to arguing its own form contracts were so “poorly drafted” and ambiguous that courts should ignore the text and simply announce a result convenient to Janssen. YellowBr. 39. But neither Janssen nor the “court has [a] right ‘to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently’” to serve other purposes. *Karl’s*, 592 A.2d at 650. Where, as here, “the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written.” *Id.*; *Abbott Point of Care*, 666 F.3d at 1302. Under the literal definition of “the COMPANY,” four of six co-inventors assigned their interest in the ’083 patent to the J&J family as a whole. Janssen failed to join all of J&J’s subsidiaries and affiliates, and this case should thus be dismissed.

II. The Extrinsic Evidence Does Not Support Janssen.

Because the contracts unambiguously assign the ’083 patent to Janssen, J&J, and all of J&J’s successors and subsidiaries, the district court’s standing decision must be reversed. *James v. Fed. Ins. Co.*, 73 A.2d 720, 721 (N.J. 1950) (“when the

definition of ‘the COMPANY’ conflicts with the sense in which the term is used in at least *two provisions* of the contract, including the assignment provision, the term is ambiguous.” Appx152. Celltrion’s opening brief fully addressed both provisions, RedBr. 63-68, and further argued that “the contracts unambiguously assign the invention to Centocor, J&J, and its subsidiaries.” RedBr. 58-61 (capitalization normalized). There is no rule that appellants must discuss arguments that did not even support the district court’s decision. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (litigants waive issues, not arguments).

contract is clear the court is bound to enforce the contract as it finds it”); *Karl’s*, 592 A.2d at 650. Even if “the COMPANY” is ambiguous, the ruling must still be set aside.

Janssen’s brief treats New Jersey law as taking an anything-goes approach to extrinsic evidence. YellowBr. 53-54. But “New Jersey’s parol evidence rule is ‘usually rigid.’” *Telecom Int’l Am., Ltd. v. AT&T*, 280 F.3d 175, 190 (2d Cir. 2001). Extrinsic evidence “is adducible only for the purpose of interpreting the writing So far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant.” *Schwimmer*, 96 A.2d at 656; *Conway v. 287 Corp. Ctr. Assocs.*, 901 A.2d 341, 346-47 (N.J. 2006); *Int’l Union, United Auto., Aerospace & Ag. Implement Workers of Am., U.A.W. v. Skinner Engine*, 188 F.3d 130, 146 (3d Cir. 1999).

The cases Janssen cites are not to the contrary. All consider extrinsic evidence only to shed light on the meaning of specific contract language. Even extrinsic evidence supporting a mutual, contemporaneous intent cannot override specific contract language when “[t]he contract itself does not express [that] intent.” *VRG v. GKN Realty Corp*, 641 A.2d 519, 523-26 (N.J. 1994). In *VRG*, for instance, the New Jersey Supreme Court reversed a failure to enforce what “the contract language ma[de] clear,” despite extrinsic evidence about the “surrounding circumstances,” “the parties’ conduct,” and “custom or usage” supporting an unexpressed mutual

intent to the contrary. *Id.* at 551-553; *see Kolbe v. BAC Home Loan Servicing, LP*, 738 F.3d 432, 459 (1st Cir. 2013) (citing *Schwimmer*, 96 A.2d at 656; *Conway*, 901 A.2d at 347).

County of Morris v. Fauver, 707 A.2d 958, 969 (N.J. 1998), is similar. The State paid Morris County both more (for an earlier period) and less (for a later period) than contractually required. *Id.* For more than six years, both parties overlooked the incorrect payment amounts based on “mutual misconstruction of their contract.” *Id.* Rather than assign “controlling weight” to the parties’ conduct, however, the New Jersey Supreme Court instead required the parties to conform their conduct to the terms of their contract, which “were clear as written,” “should have been followed over the years,” and “continue[d] to apply.” *Id.* *Fauver* and *VRG* reject Janssen’s reliance on “course of conduct” evidence.

In any event, the extrinsic evidence that the district court and Janssen relied on in no way informs the “parties’ *objective* intent ... outwardly manifest[ed] to the other party,” about the meaning of “the COMPANY.” RedBr. 66-73. Janssen claims “Celltrion has little to say” about the extrinsic evidence. YellowBr. 56. But Celltrion detailed why, for each piece of extrinsic evidence the district court discussed, the findings were legally erroneous. *Compare* Appx156-160 (J&J family members’ earlier enforcement of the broad, literal definition of “the COMPANY”) *with* RedBr. 70-72 (same); *compare* Appx155 (inventors’ disclosures and

subsequent assignments) *with* RedBr. 69 (same); *compare* Appx153 (report from internal patent database) *with* RedBr. 69-70 (same); *compare* Appx153-154 (revision of J&J’s standard employment agreement in 2008) *with* RedBr. 72-73 (same). Janssen’s reliance on extrinsic evidence fails.

A. J&J Companies’ Treatment of “the COMPANY” in Other Litigation and with Departing Employees Supports Celltrion.

Janssen cannot reconcile its position here with the consistent positions J&J companies took in *eleven other* litigations about the meaning of “the COMPANY.” Those positions—the *only* extrinsic evidence specifically about the meaning of “the COMPANY”—directly refute Janssen’s position here.

Before this case, J&J family companies argued in court that the broad, literal definition of “the COMPANY” gave multiple J&J family entities the right to sue. For example, DePuy Spine, a J&J company, expressly interpreted “[t]he term ‘COMPANY’” as “defined to include *not only* [the employer] DePuy Spine *but also* ‘JOHNSON & JOHNSON and any of their successors or assigns, purchasers, acquirers, and any of their existing and future subsidiaries, divisions, or affiliates.’” Appx8788. That distinguishes this case from *Kingston Trap Rock v. Eastern Engineering*, in which the contracting parties “completely ignored” a disputed provision. 39 A.2d 422, 425 (N.J. 1944). *See* YellowBr. 54

Likewise, in ten other cases, multiple J&J family companies joined as plaintiffs to enforce the confidentiality and non-compete provisions of the employee

contracts. *See* Appx7352-7363. In each case, the J&J plaintiffs understood “the COMPANY” to mean what it plainly says (*any* of J&J’s family companies). In no case did J&J plaintiffs contend as Janssen now does that “the COMPANY” means *only* an employee’s direct employer.

Janssen contends those litigations are “unpersuasive and irrelevant.” YellowBr. 59-62 (capitalization normalized). They are not.

First, Janssen argues these cases do not matter because none of them “involved ownership of a patent or application of the Assignment Clause,” YellowBr. 59, for which Janssen argues a special definition of “the COMPANY” exists. YellowBr. 51-53. But the representations of J&J and its subsidiary Cordis in one case are directly to the contrary. *See* Appx8962-8979. J&J and Cordis *both* sued a former employee. Appx8975. Although only Cordis directly employed the defendant, Appx8968, J&J and Cordis represented that he assigned his inventions to *both* “plaintiffs,” stating that they (J&J and Cordis) jointly “own[ed] all inventions, patentable or not, developed by [the defendant] while at plaintiffs.” Appx8972. J&J and Cordis correctly interpreted “the COMPANY” there and correctly applied it to the patent assignment clause, such that inventions developed by an employee of *any* J&J family company are assigned to *all* J&J family companies.

Second, Janssen suggests those eleven cases do not matter because in the “vast majority” of other suits, only direct employers sought to enforce the non-compete or

confidentiality provisions. YellowBr. 60. Janssen has it backwards—lawsuits brought by a single plaintiff do not matter here. As in-house J&J attorney Anne Martinson testified, “[f]or the vast number of employees, the only information they had access to was the information belonging to their employer which is the operating company that employed them.” Appx7415(158:19-23). In those cases, it is not surprising that only the defendant’s particular employer brought suit. The cases that matter here are the numerous ones with *multiple* plaintiffs. Those plaintiffs could only be jointly present in those cases based on the broad, literal definition of “the COMPANY.”

Nonetheless, Janssen argues their presence might not have been based on the definition of “the COMPANY,” but rather on the phrase “*as a result of my employment by the COMPANY*” in the definition of “CONFIDENTIAL INFORMATION.” That phrase, Janssen now says, permitted multiple J&J companies to sue for breach of non-compete and confidentiality provisions even if “the COMPANY” means only an employee’s direct employer. YellowBr. 60-61. But Janssen never even attempted to show that the definition of “CONFIDENTIAL INFORMATION” could give a non-party to the contracts standing to sue. And no J&J entity ever made that argument—not once in *any* of the eleven lawsuits.

Third, Janssen argues that the J&J companies in those lawsuits may have interpreted “the COMPANY” to mean one thing in the assignment provision and

another thing in the non-compete and confidentiality provisions because the meaning can vary with “context.” YellowBr. 61-62. But in general, “where a contract repeats the same terms, such terms should be given the same meaning.” *Grayzel v. Boston Sci. Corp.*, 2015 WL 9694354, at *5 (N.J. Super. App. Div. 1991). And Janssen does not identify any “context” in the contracts that suggests an intent to depart from the meaning of “the COMPANY” as it is *literally defined*, or to vary its meaning. YellowBr. 61. It is not a word with “several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation, without being confused or getting confusing.” *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 667, 595-96 (2004) (“age”); *see Robinson v. Shell Oil*, 519 U.S. 337, 341-44 (1997) (“employee”). Instead, it is a defined term with a single “character” to serve the contracts’ singular “object”: protecting J&J’s proprietary assets across the broad J&J family. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 320 (2014).

Nor can Janssen reconcile its position here with the J&J companies’ routine, broad interpretation of “the COMPANY” when reminding departing employees about their ongoing obligations. *See* RedBr. 71. Janssen specifically reminded departing employees of their obligations to “the Johnson & Johnson *family of companies* under” agreements containing the same or similar definition of “the COMPANY.” Appx8990-9004. And in 2017—one day before Janssen opposed Celltrion’s motion to dismiss Janssen’s first two complaints—Janssen reminded

several former employees of “*Centocor Biologics, LLC*” that they “are prohibited from disclosing or using at any time any confidential information of *the Company* (as defined in the Agreement).” Appx9006-9020.

When it benefitted them, J&J family companies have enforced the provisions disputed here in court and have warned departing employees about their obligations, while *expressly* interpreting “the COMPANY” broadly to encompass the entire J&J family. Janssen cannot sidestep this—it is the *only* evidence directly discussing the meaning of “the COMPANY.”

B. The Inventors’ Conduct Is Consistent With the Literal Definition of “the COMPANY.”

In contrast to the J&J companies’ prior positions about the meaning of “the COMPANY,” the extrinsic evidence Janssen now relies on is both dubious and far afield from the contracts’ language. Both the inventors’ disclosures and “subsequent assignments” lack a critical link: there is zero evidence that any inventor ever considered, much less acted on, a non-literal definition of “the COMPANY.” YellowBr. 55.

Moreover, for the invention disclosure forms, Janssen argues that by “disclosing their inventions only to their employer Centocor, the inventors manifested their understanding that the patent assignment obligation runs only to Centocor.” *Id.* That argument simply repeats Janssen’s misunderstanding of the phrase “during my employment with the COMPANY.” As discussed above, “during

my employment with the COMPANY” clarifies that “the COMPANY” *includes*, but is not limited to, an employee’s direct employer. *See supra* § I.B. The commonsense protocol of employees *disclosing* their inventions to their direct employer (a member of “the COMPANY”) says nothing about to whom they *assigned* their inventions.

For the inventors’ assignments to Janssen, it argues they reflect the inventors’ understanding that Janssen alone owns the ’083 patent. YellowBr. 55-56. Not so. Those assignment forms post-dated the employee contracts by years. *Compare* Appx9407-9420 (employee contracts executed between Apr. 2001 and Jan. 2003) *with* Appx9448-9507 (assignments executed between Aug. 2005 and Apr. 2015). Four of six co-inventors had undisputedly already assigned their rights in the ’083 patent years earlier. Any later “assignments” by the inventors were necessarily ineffective. In any event, Janssen failed to introduce *any* evidence the inventors ever considered, much less construed, “the COMPANY.” *Compare* RedBr. 69 *with* YellowBr. 55-56.

C. Janssen’s Internal Database Does Not Inform the Contracts’ Definition of “the COMPANY.”

Janssen next contends that “Janssen and J&J have recognized that Janssen is the sole owner of the ’083 patent,” arguing that a report from “J&J’s internal patent database” reflects a “custom” or “practice” relevant to “resolv[ing]” purported “contractual ambiguities” here. YellowBr. 56-57 (citing Appx9511) (capitalization normalized). Not true.

In New Jersey, evidence of a contracting party's "custom" is relevant only if it actually elucidates "the *interpretation* placed on [a] disputed provision." *Conway*, 901 A.2d at 347. J&J's clerical record-keeping has no connection to the parties' interpretation of "the COMPANY."

No evidence showed that anyone involved in creating or maintaining J&J's database ever referred to the employee contracts or considered the term "the COMPANY." *See* Appx8775-8777(256:6-258:3). Janssen has no answer. Indeed, Janssen has all but abandoned its original reliance on the representations of J&J declarant Kenneth Dow, who introduced the database print-out. *Compare* YellowBr. 56-57 *with* RedBr. 68-69.

Janssen also provided no evidence about *when* the clerks input the relevant data. That is a critical omission because J&J amended its employee agreements in 2008 to convey inventions to "the EMPLOYER," rather than "the COMPANY." Appx8991-8992; Appx9044-9046. Even assuming against all evidence and logic that the data-entry "clerks" were relying on the employee agreements, Appx8775-8777(256:6-258:3), any information recorded *after* 2008 would say nothing about the meaning of "the COMPANY" in the contracts here.

J&J's internal patent database provides no insight into the meaning of "the COMPANY" or the contracts here. A company cannot acquire sole patent ownership simply by asserting that in its internal records.

D. The Post-2008 Employee Agreements Further Indicate that “the COMPANY” Covered J&J and All of Its Successors and Subsidiaries in the Pre-2008 Agreements.

Janssen contends that the 2008 amendments to J&J’s form agreements to require assignment of inventions to “the EMPLOYER,” rather than “the COMPANY,” merely “clarify” what was in the contracts all along. YellowBr. 57-59. Not so.

The amendments undermine Janssen’s position and illustrate precisely what Janssen is asking the Court to do under the guise of “interpreting” the older contracts. J&J’s 2008 amendments to its form agreements were substantial: they changed the definition of “the COMPANY,” added an entirely new definition for “the EMPLOYER,” and replaced “the COMPANY” with “the EMPLOYER” in the assignment provisions. Appx8991-8992; Appx9044-9046.

To contend that those amendments were nonsubstantive “clarif[ications],” Janssen relies on self-serving testimony from J&J attorney Martinson, provided specifically *for this litigation*. It offers no *contemporaneous* evidence about the amendments’ purpose. YellowBr. 57-59. And Martinson played no role in drafting the original contracts. Appx8678(23:3-12); Appx8709(182:5-8). Janssen has never offered, or argued that there exists, any contemporaneous evidence of the original intent of the earlier agreements, or evidence corroborating Martinson’s description of the amendment’s purported purpose. The “internal records” Janssen cites as

alleged support for a “longstanding custom” of assigning inventions to direct employers are the same reports from J&J’s patent database that, as discussed above, were drafted by “clerks” with no more information about the original intent than Martinson. YellowBr. 58; *see supra* p. 25.

None of the cases that Janssen cites advance its argument. YellowBr. 58-59. At best, they show that it is not always disingenuous to characterize an amendment to a statute or regulation as “clarifying” what was there all along.³ None of the amendments in those cases bear any relation to the amendments J&J made in 2008 to its form contracts, and Janssen does not contend that they do. Here, the “clarifying” label cannot be applied with a straight face. Again, J&J substantially re-wrote the controlling provisions. It changed the definition of “the COMPANY,” added an entirely new definition for “the EMPLOYER,” and replaced “the COMPANY” with “the EMPLOYER” in the assignment provisions. Appx8991-8992; Appx9044-9046. Janssen—*for this case*—wishes that its contracts had always been written that way, but they were not.

³ *Whiting v. Johns Hopkins Hosp.*, 416 F. App’x 312, 314-15 (4th Cir. 2011) (preamble issuing with revisions to regulations “made explicit” “the interest of clari[fying]” earlier regulations); *Skidgel v. Me. Dep’t of Human Servs.*, 994 F.2d 930, 936, 939 (1st Cir. 1993) (Senate Report “accompanying the amendment” explained a “[t]echnical [c]orrection[.]”); *Victory Constr. Co. v. United States*, 510 F.2d 1379, 1383, 1386 (Ct. Cl. 1975) (“cover sheet” of revision to a regulation “explain[ed] that the revised word [wa]s merely to make more explicit” the terms of an earlier regulation).

At base, Janssen asks the Court to rewrite or disregard its contracts. But New Jersey law is clear: “Unambiguous language controls the rights and obligations of the parties, even if it was unwise in hindsight.” *Woodhaven*, 2014 WL 1326994, at *6. The four co-inventor’s employee contracts were drafted and signed with eyes open, years ago, to broadly protect the assets of “the COMPANY.” The straightforward effect of those contracts is that “the COMPANY” as defined—not just Janssen—owns the ’083 patent. Janssen’s remorse or inconvenience in this case does not justify ignoring the century-old requirement that a patent plaintiff must join all co-owners. Janssen failed to do that here, and its case should be dismissed.

III. The District Court Correctly Rejected Janssen’s “Disclaimer” Argument.

The March 2017 “Disclaimer Agreement” between Janssen and J&J cannot cure Janssen’s standing defect. *YellowBr.* 62-64. Janssen continues to misread *IpVenture v. Prostar Computer*, 503 F.3d 1324 (Fed. Cir. 2007). Appx167-168. *IpVenture* did not hold that a patentee’s failure to join all co-owners can be cured by other co-owners’ “disclaimer” of ownership. In that case, Hewlett-Packard had employed an inventor of the patent at issue, who agreed “to assign [his ‘inventions’] to HP.” 503 F.3d at 1325-26. The defendant challenged plaintiff *IpVenture*’s standing because HP was not a party. *Id.* In an agreement with *IpVenture*, HP stated it “never [] had any legal or equitable rights” in the asserted patent. *Id.* at 1327.

“The question” presented to this Court *potentially* required two answers: (1) “whether Hewlett-Packard had an ownership interest in the [asserted] patent when the suit was filed, and *if so*,” (2) “the effect of Hewlett-Packard’s later statement” about “never [having] had any legal or equitable rights.” *Id.* at 1326. The Court concluded that HP never had an ownership interest because the inventor had agreed only “to assign” his invention to HP, but had not conveyed his interest “by written assignment.” *Id.* at 1326-27. Because the answer to question (1) was “no,” the Court did not need to, *and did not*, resolve question (2). *Id.* (describing HP’s “disclaimer” as “reinforc[ing],” “confirm[ing],” and “support[ing]” the conclusion of no ownership). Janssen’s assertion that HP’s “disclaimer” was “dispositive” is incorrect. YellowBr. 63.

Regardless, even if a “disclaimer” could remedy a patentee’s failure to join all co-owners in some cases, it cannot do so here—by *Janssen’s own admission*. Janssen concedes that if the inventors assigned their rights to all J&J entities existing in 2001–2003, then any “companies that were subsequently divested would retain rights in Centocor’s patents.” Appx5641; *see* RedBr. 74; Appx7594 (listing divested companies). J&J’s purported “disclaimer” thus cannot save Janssen, since J&J cannot disclaim the rights of all other covered entities, and certainly not entities that have since left its corporate family. *Enovsys v. Nextel Communications*, 614 F.3d 1333, 1340-44 (Fed. Cir. 2010), straightforwardly applies the rule that a patent

plaintiff must join all co-owners to have standing, and does not undermine the consequences of Janssen's concession in this case. YellowBr. 64.

CONCLUSION

The Court should reverse the district court's standing decision. The Court need not reach Janssen's standing, however, if it affirms the judgment of noninfringement. In *Lone Star Silicon Innovations v. Nanya Technology Corp.*—decided after the first three briefs in this appeal were filed—the Court clarified that, contrary to earlier precedent, Janssen's ownership is not jurisdictional. 2019 WL 2292485, at *6-8 (Fed. Cir. May 30, 2019) (discussing *Lexmark Int'l v. Static Control Components*, 572 U.S. 118, 128 n.4 (2014)). It follows from *Lone Star* and *Lexmark*, that **(1)** Janssen's failure to join all co-owners means that Janssen lacks a valid cause of action, and its case should be dismissed under Fed. R. Civ. P. 12(b)(6), not 12(b)(1), *Lone Star*, 2019 WL 2292485, at *7 n.6, and **(2)** the Court need not reach Celltrion's cross-appeal if it affirms the judgment of noninfringement. *See, e.g., Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third, and Fourth Dep'ts, Appellate Div. of the Supreme Court of the State of N.Y.*, 852 F.3d 178, 189 n.7 (2d Cir. 2017) (“prudential” standing questions “may [be] avoid[ed]” in favor of a decision “on the merits”).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

On June 18, 2019, this brief was submitted to the Court through the CM/ECF system, and thereby served on all parties.

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**CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMITATION**

This brief complies with the type-volume limitation of Fed. Cir. Rule 32 and Fed. R. App. P. 32. According to the word processing system used to prepare this document, the brief contains 6,998 words.

/s/James F. Hurst