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IN THE

Supreme Court of the State of Delaware

CLAUDE GENDREAU and THE CLAUDE GENDREAU INVESTMENT TRUST U/A/D MARCH 16, 2013, Defendants/Counterclaim Plaintiffs-Below/Appellants, v. MOVORA, LLC (F/K/A OSSIUM NEWCO LLC); OSSIUM BIDCO, LLC; and VETERINARY ORTHOPEDIC IMPLANTS, LLC (F/K/A VETERINARY ORTHOPEDIC IMPLANTS, INC.), Plaintiffs/Counterclaim Defendants-Below/Appellees.	**No. 447, 2025** Court Below: Superior Court of the State of Delaware C.A. No. N23C-05-034-MAA [CCLD]

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This is an indemnification dispute arising from a corporate acquisition. Defendant Claude Gendreau is a renowned veterinary surgeon. In 1992, he founded Veterinary Orthopedic Implants, LLC ("VOI"), a company that manufactures and sells surgical implant devices for animals. Until 2020, VOI was co-owned by Claude Gendreau, the Claude Gendreau Investment Trust, and three other individuals, including Claude Gendreau's nephew Patrick Gendreau ("Sellers").[1] Sellers sold the company to Plaintiffs Movora LLC and Ossium Bidco LLC ("Buyers") for $100 million. Movora and Ossium were wholly owned subsidiaries of Fidelio Capital II AB, a Swedish private equity firm that invested in companies throughout the veterinary supply chain. The sale of VOI (the "Transaction") was memorialized in an Amended and Restated Membership Interest Purchase and Exchange Agreement dated June 11, 2020 (the "MIPA").

At the time of the Transaction, VOI was defending a patent infringement lawsuit brought by DePuy Synthes Products, Inc. in a Florida federal court. In the MIPA, Sellers agreed to indemnify Buyers for "Damages suffered by [VOI] as a result of, or in connection with, the Patent Litigation." Each Seller agreed to be

[1] This brief will henceforth refer to Claude Gendreau and the Claude Gendreau Investment Trust collectively as "Claude" and Patrick Gendreau as "Patrick."

severally, but not jointly, liable for the percentage of any indemnification award corresponding to their pre-Transaction ownership share.

Three years later, in 2023, the Florida jury found that VOI and Fidelio had willfully infringed DePuy's patents and awarded approximately $60 million in damages, subject to potential trebling. VOI and Fidelio subsequently settled the case with DePuy, resolving the patent litigation upon VOI's payment of $70 million. The settlement covered not only VOI's pre-Transaction sales, but also its post-Transaction sales made under Buyers' control, including sales that infringed a patent that did not exist at the time of the Transaction and sales of products that had not been developed at the time of the Transaction.

On May 4, 2023, Plaintiffs—Buyers and VOI—sued Sellers, alleging that under the MIPA's indemnification provision, they were entitled to recover the full settlement amount—$70 million—plus attorney's fees.

All Sellers settled except for Claude. Plaintiffs' claims against Claude proceeded. As relevant here, the Superior Court issued a Memorandum Opinion (Exhibit A) ("Mem. Op.") granting summary judgment to Plaintiffs on Claude's defense and counterclaim that Plaintiffs had violated the implied duty of good faith and fair dealing. But it denied summary judgment to both sides on numerous issues and, in February 2025, conducted a bench trial.

The Superior Court issued a Post-Trial Opinion (Exhibit B) ("Post-Trial Op.") on August 29, 2025 (revised October 1, 2025), awarding Plaintiffs $40 million in damages, which included loan interest and attorneys' fees for the patent litigation. The Superior Court determined that Claude was liable for the entire settlement except the value of the forward-looking license on certain VOI products, scaled by Claude's 55.55% ownership interest in VOI prior to the Transaction. In the Superior Court's view, Claude was liable even for the portion of the settlement attributable to Plaintiffs' independent post-Transaction business decisions,[2] including their decision to willfully infringe. On October 1, 2025, the Superior Court issued an Order Regarding Post-Trial Issues (Exhibit C) awarding Plaintiffs prejudgment interest on the principal amount of $35 million (Claude's proportionate share of the $70 million settlement less the value of the license, plus attorneys' fees).

Claude appeals the damages judgment on contract and policy grounds and the prejudgment interest award as an impermissible windfall.

[2] The post-Transaction VOI made its business decisions under Buyers' control. For ease of reference, this brief will use "Plaintiffs" when discussing VOI's post-Transaction business conduct, "Buyers" when referring to Movora and Ossium as parties entering into the MIPA, and "VOI" when discussing facts specific to the company.

SUMMARY OF ARGUMENT

1. The Superior Court misinterpreted the MIPA's indemnification provision as requiring Sellers to indemnify Plaintiffs for any damages with any attenuated chain of connection to the eventual settlement. Post-Trial Op. at 22-25. Properly construed, the MIPA does not indemnify Plaintiffs for damages arising from Plaintiffs' *independent* post-Transaction business decisions. In Delaware, indemnity provisions are construed "strictly against the indemnitee," and cover liability only that the indemnitor "specifically assume[s]." *Alcoa World Alumina LLC v. Glencore Ltd.*, 2016 WL 521193, at *7 (Del. Super. Ct. Feb. 8, 2016), *aff'd sub nom. Glencore Ltd. v. St. Croix Alumina, LLC*, 150 A.3d 1209 (Del. 2016) (TABLE). Where, as here, a party seeks indemnification for damages arising from its own intentional conduct, courts demand "specific language that clearly manifests such an intent." *Id.* at *8 (cleaned up). No such language exists here. For good reason: it would have made no commercial sense for Sellers to agree that Plaintiffs could profit off new infringing sales to their heart's content and then force Sellers to pay the penalty. This Court should vacate and remand, clarifying that (1) sales of new products that did not exist at the time of the Transaction, and (2) sales infringing a new patent that had not been applied for at the time of the Transaction, are not indemnifiable.

2. If, as Plaintiffs contend, the indemnification provision covers Plaintiffs' post-Transaction willful infringements, the provision is void as against public policy.

The Superior Court erred in ruling otherwise. Post-Trial Op. at 38-42. Both in and outside Delaware, the law universally prohibits contracts that indemnify parties for their future intentional misconduct. *See James v. Getty Oil Co.*, 472 A.2d 33, 38 (Del. Super. Ct. 1983). The reason is obvious: such contracts incentivize indemnitees to break the law. Permitting full indemnification would incentivize the intentional invasion of federally protected intellectual property rights and vitiate patent law's goals in rewarding innovation and deterring infringement.

3. If the Court holds that the indemnification provision requires Sellers to indemnify Plaintiffs for their post-Transaction conduct, it should at a minimum hold that Plaintiffs were required to carry out that conduct in good faith. The Superior Court erroneously granted summary judgment to Plaintiffs on Claude's defense and counterclaim that Plaintiffs violated the implied duty of good faith and fair dealing. Mem. Op. at 24-26. That duty inheres in every contract in Delaware. When a contract affords a party discretion to act in a manner that inflates the other party's liability, the party must refrain from exercising that discretion unreasonably. This indemnification provision—which subjects Claude to liability based entirely on Plaintiffs' discretionary conduct—is the paradigmatic example of a contract imposing an implied duty to exercise discretion in good faith.

4. The Superior Court should not have awarded prejudgment interest to Plaintiffs because the court already awarded Plaintiffs compensatory interest. Order

Regarding Post-Trial Issues at 2-6. Prejudgment interest compensates prevailing plaintiffs for the lost use of their funds. Here, Plaintiffs did not lose the use of their funds. Instead, Plaintiffs paid the DePuy settlement via a loan. Plaintiffs paid interest on the loan, but they were indemnified for that interest. Awarding prejudgment interest *in addition to* that interest would confer an improper windfall.

STATEMENT OF FACTS

A. Claude and VOI

Dr. Claude Gendreau is a renowned veterinary surgeon who has been practicing since the 1960s. A450-52. He founded Veterinary Specialty Center in Chicago, which specialized in canine surgery and grew to have two hundred employees. A452-53. In 1992, Claude founded Veterinary Orthopedic Implants, LLC ("VOI"). A321. VOI manufactures and sells surgical implant devices for animals. A458-59, 1293. VOI grew into a global company supplying thousands of veterinary surgical products. A474-77. These products include various bone plates designed for tibial plateau leveling osteotomy ("TPLO") procedures, a common surgery for dogs with cranial ligament injuries. A1314.

Claude co-owned VOI with former defendants Patrick Gendreau, Brian Beale, and Timothy Van Horssen. A321. Claude subsequently delegated management of VOI's day-to-day operations to his nephew Patrick, so that he could focus on his surgical practice. A459-60. Patrick became the CEO of VOI and led the company through its sale in 2020 (the "Transaction"). A460, 570. Claude remains a leader in his field and continues to perform veterinary surgeries full-time at the age of 84. A455-58, 477-80.

B. DePuy Initiates the Patent Litigation.

In November 2018, DePuy filed a patent infringement lawsuit against VOI in the United States District Court for the Middle District of Florida. A938. DePuy

alleged that VOI's "Swiss," "Elite," and "CBLO" bone plates infringed DePuy's U.S. Patent No. 8,523,921 (the "'921 Patent"), which covers surgical plates used for TPLO procedures. A940-41, 1169, 1179-80. The Swiss, Elite, and CBLO plates accounted for approximately 20% of VOI's revenue, with the rest of VOI's business coming from other products and services in its portfolio. A471, 1314. In late 2019 or early 2020, VOI launched another TPLO plate called "NXT," which was designed to avoid the '921 Patent and was never accused of infringing that patent. A1716.

C. Buyers Target VOI and Conduct Extensive Due Diligence.

Fidelio Capital II AB ("Fidelio") is a Swedish private equity firm that invests in companies throughout the veterinary supply chain. A330, 335. As part of its effort to establish a dominant presence in the implant market, Fidelio acquired two VOI competitors, Kyon and BioMedtrix. A1254, 1716.

Fidelio began discussions with Patrick about a potential acquisition of VOI in fall of 2019. A331, 1716. Fidelio engaged in extensive due diligence, hiring Morrison Foerster LLP ("MoFo") for legal analysis and Ernst & Young ("EY") for financial assessment. A1132.

In December 2019, MoFo prepared a memorandum assessing the patent litigation risk. A1208. The memorandum outlined possible outcomes in the litigation and anticipated that VOI had a 65-75% likelihood of prevailing. A1208-09, 1228. One of the outcomes was the "worst case scenario" (10%

likelihood, A1228) where DePuy prevails on the merits and recovers enhanced damages. A1218. That scenario estimated $38.5 million in monetary exposure ($11.5 million in compensatory damages trebled by willful infringement, plus attorney's fees). A1218-22. Both MoFo and EY concluded that VOI could be permanently enjoined from selling products accused of infringement (i.e., Swiss, Elite, and CBLO plates) if DePuy prevailed. A1222, 1410.

D. Buyers and Sellers Execute the MIPA.

To acquire VOI, Fidelio formed two wholly owned Delaware limited liability companies: Ossium BidCo LLC ("Ossium") and Movora LLC ("Movora"). A320-21. On June 11, 2020, Buyers (Ossium and Movora) and Sellers (VOI's co-owners, including Claude) executed the MIPA. A955. Under the MIPA, Fidelio agreed to pay approximately $100 million for VOI. A972, 1033. That amount included a $20 million Contingent Closing Note, meant to offset any damages or settlement costs from the patent litigation. A972, 1033.

Two provisions in the MIPA are particularly relevant to this case. First, section 8.2(a) of the MIPA sets forth the parties' indemnification agreement regarding the patent litigation. Sellers agreed to:

> severally (in proportion to their Percentage Interests) but not jointly indemnify, defend and hold harmless the Buyer…from and against any and all Damages arising out of or relating to … (iii) any Damages suffered by the Company as a result of, or in connection with, the Patent Litigation[.]

A1013. The MIPA defines "Patent Litigation" as "the patent litigation pending in the United States District Court for the Middle District of Florida under the caption *DePuy Synthes Product, Inc. et al. v. Veterinary Orthopedic Implants, Inc.*, 3:18-cv-01342-HES-PDB (M.D. Fla.), together with any appeals therefrom and any related or derivative Actions." A968. "Damages" includes "any losses, liabilities, damages, awards, … payments (including amounts paid in settlement), costs and expenses." A963.

Second, the MIPA designates Patrick as the "Sellers' Representative," empowering him to act as Sellers' "exclusive agent and attorney in fact" to make "determinations in respect of [the MIPA]," including to "control the defense of the Patent Litigation and any settlement negotiations relating thereto on behalf of [VOI]." A1004-05, 1007. The MIPA requires Patrick to obtain Buyers' consent to settle unless certain conditions are met. A1005. The MIPA also provides that Patrick would remain VOI's CEO post-closing. A1045.

After the Transaction, Fidelio united VOI, Kyon, and BioMedtrix under the Movora umbrella to form Vimian. A336-37. When Fidelio launched the IPO of Vimian, it was valued at over $3.2 billion, with a significant portion of that revenue sourced from VOI's business in veterinary products. A1694-95. Patrick remained as VOI's CEO—terminable-at-will—until he resigned in December 2022. A570, 1045. Patrick initially reported to the Movora board—including Fidelio's

Investment Director Theodor Bonnier and Fidelio's CEO Gabriel Fitzgerald—and, following Vimian's creation, to Vimian's CEO Fredrick Ullman. A1045, 1267.

E. Post-Transaction, DePuy Expands the Patent Litigation.

Following the Transaction in June 2020, VOI under Buyers' control continued to profit immensely from selling products accused of patent infringement by DePuy (i.e., Elite and CBLO plates), and in fact, increased its sale of Elite plates until they were phased out in August 2022. A2025. In June 2021, DePuy filed a Second Amended Complaint bringing Fidelio into the patent litigation and accusing Fidelio of infringement. A1457.

At the time of the Transaction, NXT plates did not infringe any DePuy patents. In July 2020, after the Transaction, DePuy applied for a new patent that would cover NXT plates. A542-43, 1578. The patent issued in June 2021 as U.S. Patent No. 11,026,728 (the "'728 Patent"). A1515-16. The '728 Patent was a "continuation" of the '921 Patent that shared a common specification but covered a different scope. A1516-17. After the '728 Patent issued, DePuy filed a Third Amended Complaint in which it claimed that NXT sales post-dating the issuance of the '728 Patent infringed that patent. A1517, 1560. Because the '728 Patent did not issue until June 2021, sales prior to that date could not be alleged as infringing. Notwithstanding the '728 Patent and the new allegations, Plaintiffs not only continued selling NXT plates but dramatically increased their sales, from

approximately $610,000 in 2019 to over $2.6 million in each of 2021 and 2022. A2025.

F. The Jury Finds Willful Patent Infringement and VOI Attempts to Circumvent the Verdict.

The patent litigation proceeded to trial in January 2023. Post-Trial Op. at 11. After considering detailed evidence of VOI and Fidelio's pre- and post-Transaction sales of accused products, the jury returned a verdict finding both VOI and Fidelio jointly and severally liable for willful patent infringement. A549, 1098-102, 1110-15. The jury awarded DePuy approximately $60 million in damages, more than five times the $11.5 million that MoFo had estimated as a worst-case-scenario award. A1113, 1218. Because the jury found willful infringement, the damages were subject to trebling under federal patent law, raising VOI and Fidelio's potential exposure to almost $180 million. Subsequently, DePuy moved for a permanent injunction enjoining VOI and Fidelio from infringing the '921 and '728 Patents. A1599.

Immediately following the adverse verdict—and in the face of the trebling risk and an expected permanent injunction—Plaintiffs took actions that dramatically worsened VOI's position. Plaintiffs directed large-scale shipments totaling approximately 30,000 Compresiv/Versiv ("C/V") plates to veterinarians who did not order them. A1709-14, 2033-34. The C/V plates were new products that Fidelio's affiliate, BioMedtrix, developed after the Transaction and Buyers directed VOI to

begin selling in early 2022. A1137, 2063-64. VOI introduced C/V plates during the patent litigation trial as non-infringing alternatives; DePuy countered with evidence that C/V plates too infringed the '728 Patent. A1759, 2040-41.

Alarmed by VOI's attempt to "flood[] the market with infringing products," DePuy filed motions for enhanced damages and a temporary restraining order on January 20, 2023. A1626, 1656-60. The district court held a hearing on these motions on February 15, 2023, during which DePuy featured VOI's post-Transaction Elite/NXT sales and post-verdict C/V bulk sales. A1744, 1760, 1765, 1797. One week later, the district court entered a permanent injunction against VOI and Fidelio, expressing concern that their "fire sale to flood the market with large quantities of TPLO plates … shows that [VOI and Fidelio] have no respect for the jury verdict and sought to evade the effect of the requested permanent injunction." A2014. The injunction covered all products found at trial to be infringing and any "variations thereof that are not colorably different." A2020.

Undeterred by the district court's rebuke, VOI and Fidelio refused to cease sales of C/V plates. On March 2, 2023, DePuy moved for an order to show cause and to find VOI and Fidelio in contempt. A2033-34. DePuy argued that VOI and Fidelio "continue[d] to undertake affirmative acts to bring about infringement by their customers," including providing "tutorials, trainings, and workshops teaching

and encouraging customers to use the infringing" plates. A2053. The district court scheduled a two-day contempt hearing for early April, 2023. A2059.

G. VOI and Fidelio Reach a $70 Million Settlement with DePuy.

It was in the shadow of these developments—a verdict finding willful infringement, a permanent injunction in place, pending contempt proceedings, a tangible risk of trebled damages—that DePuy, Fidelio, and VOI discussed settlement. DePuy's initial settlement offer was a $90 million lump-sum payment. A2056. Throughout negotiations, DePuy increasingly used the pending contempt proceedings to extract significant leverage. A1142-43. VOI and Fidelio were acutely concerned about the contempt proceedings and the risk of the jury verdict being trebled to $180 million. VOI and Fidelio considered a contempt finding "a very serious thing" that they "absolutely [did] not" want. A534, 552. VOI's new CEO, Colleen Flesher, wrote a contemporaneous note highlighting that the federal "judge even called it a firesale" and "settling would avoid [a] finding [of] contempt [and] future possible monetary" consequences. A2096. Following the first day of the contempt hearing, DePuy increased its settlement demand to $100 million. A1145.

On April 3, 2023, the parties reached a Settlement and License Agreement. A1116. VOI and Fidelio jointly agreed to pay DePuy $70 million in exchange for a release of "all Claims … DePuy had or claims to have had against VOI/Fidelio."

A1117-18. In addition, the settlement granted VOI and Fidelio a license for C/V. A1118. The parties stipulated to a consent judgment stating that VOI and Fidelio willfully infringed the '921 and '728 Patents. A1126. VOI financed the $70 million payment with a loan bearing interest at 7-8 %. A1148-67.

The same month, Plaintiffs demanded that Sellers indemnify them for the settlement pursuant to Section 8.2(a) of the MIPA. Sellers refused, and Plaintiffs initiated this litigation.

H. Proceedings Below

Plaintiffs—Buyers and VOI—filed their Complaint on May 4, 2023, seeking indemnification for the entire $70 million settlement and associated costs. The Complaint named Sellers—Claude, Patrick, Beale, and Van Horssen—as defendants. A85. Patrick, Beale, and Van Horssen later reached settlements with Plaintiffs, leaving only Claude as a defendant. A33, 40, 49.

The parties filed cross-motions for summary judgment. The Court denied the motions in large part but granted Plaintiffs' motion with respect to Claude's defense and counterclaim that Plaintiffs violated the implied duty of good faith. The Superior Court reasoned that the indemnification provision had no contractual gap triggering the duty of good faith. Mem. Op. at 24-26.

A five-day bench trial was held in February 2025. Post-Trial Op. at 15. The Superior Court issued its Post-Trial Opinion on August 29, 2025 (revised October 1,

2025), holding that the MIPA's indemnification provision covered the entire settlement except the amount attributable to the forward-looking C/V license. Post-Trial Op. at 31. The court construed the indemnification provision broadly to include damages related to Plaintiffs' sale of new products developed after the Transaction and sales infringing the new '728 Patent. Post-Trial Op. at 22-25. In addition, the court rejected Claude's argument that public policy prohibited Plaintiffs from recovering damages arising from their own willful misconduct. Post-Trial Op. at 38-42. The court awarded Plaintiffs damages in the amount of $40,172,084.49: Claude's 55.55% share of the settlement amount (after excluding $9.8 million attributable to the C/V license) plus approximately $7.8 million in loan interest and $4.3 million in attorneys' fees for the patent litigation. Post-Trial Op. at 62 n.366.

On October 1, 2025, the Superior Court issued its Order Regarding Post-Trial Issues, addressing among other things the availability of prejudgment interest. The court disagreed with Claude's argument that prejudgment interest would result in a windfall for Plaintiffs. The court awarded Plaintiffs prejudgment interest at 10% on the principal damages amount of $35,832,218.92 (Claude's 55.55% share of the $70 million settlement less the value of the C/V license, plus attorneys' fees). Order Regarding Post-Trial Issues at 5-7.

Claude timely appealed.

ARGUMENT

I. The Superior Court Erred in Holding That the MIPA Indemnifies Plaintiffs for Damages Arising from Their Own Independent Post-Transaction Business Decisions.

A. Question Presented

Whether the MIPA's indemnification provision solely encompasses damages attributable to pre-Transaction conduct and the reasonable and expected continuation of that conduct, or whether it additionally encompasses damages attributable to Plaintiffs' post-Transaction conduct. Claude preserved this issue at A610.

B. Scope of Review

This Court "review[s] questions of law, including contract interpretation, *de novo*." *Urdan v. WR Cap. P'rs, LLC*, 244 A.3d 668, 674 (Del. 2020).

C. Merits of Argument

The MIPA's indemnification provision covers "any Damages suffered by [VOI] as a result of, or in connection with, the Patent Litigation" with DePuy. A1013. This case turns on the scope of that provision.

Under Claude's interpretation, the indemnification provision covers damages based on conduct occurring before the Transaction as well as the reasonable and expected continuation of pre-Transaction conduct. For example, if VOI entered into a sale agreement before the Transaction and carried it out thereafter, and those sales were found to infringe DePuy's patents issued prior to the Transaction, Plaintiffs could obtain indemnification for corresponding damages.

Plaintiffs, by contrast, construe this provision to cover damages attributable to Plaintiffs' *own* post-Transaction business decisions. Of note, after the Transaction, Plaintiffs controlled VOI and began (i) selling C/V plates, an entirely new product line that did not exist at the time of the Transaction, and (ii) intentionally infringing the '728 Patent, which did not exist at the time of the Transaction. When VOI ultimately settled the patent litigation, a significant component of the settlement was attributable to those post-Transaction actions, including the enhanced threat of trebled damages ($180 million) and contempt caused by VOI's dump of C/V products. Plaintiffs insist that even though they undertook those infringing actions, Claude must indemnify them for the corresponding components of the settlement.

The MIPA's indemnification provision is not a blank check for the indemnitee to commit new acts of infringement. Plaintiffs' interpretation contradicts well-settled canons of contract interpretation and would render the MIPA nonsensical. The Superior Court's decision adopting Plaintiffs' interpretation should be reversed.

1. By Its Terms, The Indemnification Agreement Does Not Cover Damages Arising from Plaintiffs' Post-Transaction Business Decisions.

Indemnity provisions are construed "strictly against the indemnitee," and cover liability only that the indemnitor "specifically assume[s]." *Alcoa*, 2016 WL 521193, at *7. Here, Claude did not "specifically assume" the obligation to compensate Plaintiffs for their independent post-Transaction business decisions.

The indemnification agreement covers damages "*as a result of, or in connection with*," the "Patent Litigation." A1013. This language requires a "meaningful linkage" between the damages and the patent litigation. *Cf. Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1257 (Del. 2008) (construing "arising out of" to "require some meaningful linkage between the two conditions imposed in the contract"). Thus, if DePuy had added, say, a defamation or tortious-interference-of-business claim after Plaintiffs made disparaging statements about DePuy's patents, the "as a result of, or in connection with" language would not encompass the resulting damages—contrary to Plaintiffs' insistence otherwise at trial. A443-44.

DePuy's claims triggered by Plaintiffs' independent post-Transaction business decisions are no different. At the time of the MIPA, no meaningful linkage existed between the patent litigation and hypothetical damages arising from Plaintiffs' future decisions. Those post-Transaction decisions sever the chain of connection between the patent litigation, as it stood at the time of contracting, and the portions of the final settlement attributable to those decisions. DePuy's complaint as of 2019 accused VOI's Swiss, Elite, and CBLO plates of infringing the '921 Patent, but it did not accuse—and could not have accused—the NXT plates of infringing the '728 Patent. A1178-80, 1716. Neither could it have mentioned the C/V plates, for which VOI later had to pay DePuy extra to negotiate a release of liability. A1117-18, 2036-52. Damages arising from these new post-Transaction decisions by Plaintiffs

are therefore not indemnifiable. *See RSUI Indem. Co. v. Sempris, LLC*, 2014 WL 4407717, at *7 (Del. Super. Ct. Sept. 3, 2014) (holding that a lawsuit was not "related to" certain previous lawsuits for purposes of coverage because it involved different facts and claims); *In re Fuqua Indus., Inc. S'holder Litig.*, 1997 WL 257460, at *5-7 (Del. Ch. May 13, 1997) (release of claims that "arise … in connection" with acquisition did not cover claims related to post-acquisition conduct).

Delaware courts considering similar fact patterns have rejected indemnification. In *Alcoa*, for example, the Superior Court addressed the circumstances under which an indemnification agreement will be construed to require "an indemnitor to assume contractual liability undertaken by its indemnitee." 2016 WL 521193, at *8 (citation omitted). Recognizing Delaware law's reluctance to "permit enforcement of broad or ambiguous indemnity provisions," the court concluded that such a provision covers the indemnitee's own liability only if it contains an "unequivocal undertaking" that "clearly and unambiguously express[es] such an intention" through "specific language that clearly manifests such an intent." *Id.* at *7-8 (alteration and citation omitted). Similarly, in *State v. Interstate Amiesite Corp.*, 297 A.2d 41 (Del. 1972), this Court held that indemnification agreements—no matter how broadly worded—will not cover damages arising from the indemnitee's own negligence unless the agreement is "crystal clear" and "sufficiently unequivocal" regarding the inclusion of such damages. *Id.* at 44.

Delaware courts have subsequently held that indemnification agreements purporting to include the indemnitee's negligence must expressly mention or otherwise "focus attention on negligence of the indemnitee." *Rizzo v. John E. Healy & Sons, Inc.*, 1990 WL 18378, at *2 (Del. Super. Ct. Feb. 16, 1990), *aff'd sub nom. Joseph Rizzo & Sons Constr. Co. v. Sky Climber, Inc.*, 633 A.2d 370 (Del. 1993) (TABLE). This rule of interpretation reflects an obvious premise: the default allocation of liability is that each party bears responsibility for its own actions, so anyone wishing otherwise must say so clearly beforehand.

In this case, that rule applies with greater force than in *Alcoa* and *Amiesite*. Plaintiffs seek indemnification for a settlement inflated by their own *willful* infringement of a patent that had not even been applied for at the time of the Transaction and their sale of products created only after the Transaction. The patent litigation's jury verdict, as well as the consent judgment stipulated pursuant to the settlement, contained a finding that VOI and Fidelio willfully infringed the '728 Patent. A1111-14, 1126. That finding is attributable solely to Plaintiffs because Sellers could not have infringed a non-existent patent. To the extent Plaintiffs' self-serving interpretation of the agreement is enforceable at all—which, as explained below, *see infra* Part II, it is not—it should require language at least as clear and unequivocal as what the courts demanded in *Alcoa* and *Amiesite*. Here, no such language exists. The provision ties damages to the patent litigation but contains

nothing approaching a "crystal clear" or "unequivocal" statement that additional litigation exposure caused by Plaintiffs' unilateral post-Transaction business decisions is indemnifiable. Had Plaintiffs wished to cover liabilities from their future infringing conduct, they could have inserted language to encompass, for example, damages from claims "whether or not such claims are based on Buyer's independent conduct." Plaintiffs' "failure … to so require is fatal to [their] argument." *Amiesite*, 297 A.2d at 44.

The Superior Court's contrary reasoning was incorrect. The Superior Court emphasized that the indemnification agreement defines "Patent Litigation" to cover "related or derivative claims" and covers "unknown," "unasserted," "contingent," and "unaccrued" losses. Post-Trial Op. at 21, 23-24. Yet these generic descriptors in no way—much less "clearly" and "unequivocally"—suggest that Claude promised to indemnify Plaintiffs for their own post-Transaction liabilities. Those words are readily understood as protecting Plaintiffs from contingent and unanticipated harms arising from VOI's pre-Transaction misconduct. For example, if, unbeknownst to Buyers, the pre-Transaction VOI had engaged in infringing sales that were discovered post-Transaction and precipitated new "related or derivative" claims, those claims would be indemnifiable—even if, at the Transaction, those losses were unknown and unasserted. By contrast, damages arising from Plaintiffs'

future business decisions were not merely "unknown" or "unasserted," but *nonexistent* at the time of the Transaction.

The Superior Court's reasoning that the MIPA refers to the patent litigation as "pending," and hence "ongoing and subject to change," Post-Trial Op. at 25, suffers from a similar flaw. It may be that the parties understood that the litigation was "ongoing and subject to change" in the sense that DePuy might amend its damages theories relating to its existing accusations and that the court's resolution of those accusations would come later. But the word "pending" does not imply, much less clearly and unequivocally provide, that Plaintiffs could make entirely *new* business decisions to commit *new* infringements and shift responsibility to Claude.[3]

2. Plaintiffs' Interpretation Would Contradict the Logic of the Transaction.

"[T]he interpretation of indemnification provisions cannot contradict the … logic of the transaction." *Alcoa*, 2016 WL 521193, at *7; *see Manti Hldgs., LLC v. Authentix Acq. Co.*, 261 A.3d 1199, 1211 (Del. 2021) ("[I]nterpretations that are commercially unreasonable or that produce absurd results must be rejected.").

The Court should reject Plaintiffs' interpretation because it would produce an extreme moral-hazard concern. According to Plaintiffs, Sellers agreed to an

[3] The Superior Court's reliance on testimony about "typical[]" indemnification agreements, Post-Trial Op. at 23-24 n.156, does not alter the legal conclusion that its interpretation of the indemnification agreement here was overbroad.

arrangement whereby Plaintiffs have a strategic incentive to infringe DePuy's patents at Sellers' expense. Plaintiffs could first reap profits upfront through infringing sales. If Plaintiffs subsequently lost the patent litigation, not to worry—Sellers would pay the judgment. And if Plaintiffs ultimately settled the case, Sellers would pay the settlement while Plaintiffs keep the upside.

To be sure, the MIPA designated Patrick as the "Sellers' Representative," empowering him to act as Sellers' "exclusive agent and attorney in fact." A1007. But he acted in that capacity *only* "in respect of [the MIPA]" and "the defense of the Patent Litigation." A1004, 1007. Regarding VOI's *business operations*, Patrick—as VOI's terminable at-will CEO—answered to Buyers and their board. A1045. Buyers could replace him at any time with a CEO who would wantonly inflate Claude's damages, if Patrick resisted such directions—with Claude having no recourse. The decisions that Patrick made in that second capacity—such as the decision to approve NXT plate sales, even after DePuy applied for and obtained a new patent covering those plates—were beyond Sellers' control, even though they would inevitably affect the patent litigation by giving DePuy more legal ammunition.

Plaintiffs' interpretation of the MIPA effectively asked the Superior Court to impute to the sophisticated parties here an intent to embrace a commercially nonsensical scenario: Sellers' litigation exposure would be left to the mercy of

Plaintiffs, who could freely profit from willful infringements and then ask Sellers to foot the bill. *See Southland Corp. v. Emerald Oil Co.*, 789 F.2d 1441, 1443 (9th Cir. 1986) ("A contract will not be construed so as to place one party at the mercy of another."); *accord Iowa Fuel & Mins., Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991). That interpretation cannot be correct. No rational businessperson would agree to an arrangement where a counterparty had the incentive to intentionally inflate his damages.

Under Claude's interpretation, these absurdities go away. Sellers are responsible for damages from their own conduct and the reasonable and expected continuation thereof. When Plaintiffs make fresh business decisions—such as infringing a new patent or developing new products—they cannot saddle Sellers with those costs.

3. The Court Should Clarify That C/V and NXT-Related Damages Are Not Indemnifiable, and Remand.

If the Court agrees with Claude's interpretation, it should remand for further proceedings.[4] To assist the Superior Court on remand, the Court should clarify that two categories of damages are unrecoverable.

[4] Claude would argue on remand that Plaintiffs did not meet their burden of computing damages under the correct contractual interpretation. Mem. Op. at 20 ("Plaintiffs, as the indemnitees, must prove their damages.").

Damages attributable to C/V Plates. After the Transaction, Plaintiffs developed a brand-new product line—the C/V plates. A2063-64. Because the indemnification provision did not "clearly" and "unequivocally" contemplate such development, the component of the settlement arising from Plaintiffs' C/V sales is not indemnifiable.

That component is substantial. Following the jury verdict, Plaintiffs unleashed a fire sale of approximately 30,000 C/V plates, precipitating DePuy's motion for a temporary restraining order and contempt proceedings. The district court minced no words in chastising this behavior: "[VOI] ha[d] no respect for the jury verdict and sought to evade the effect of the requested permanent injunction." A2014. These circumstances gave massive leverage to DePuy, who referred repeatedly to the contempt proceedings in its negotiations with VOI until the parties arrived at the $70 million figure.

The Superior Court concluded that because it "rejected Claude's proffered temporal limitation on Section 8.2(a)," "the mere fact VOI developed and sold C/V after the Transaction closed does not mean they fall outside Claude's indemnification obligation." Post-Trial Op. at 33. As explained above, the Superior Court's interpretation of the MIPA was incorrect. Under a correct interpretation—which covers pre-Transaction conduct and the reasonable continuation thereof—Claude is

not liable for damages attributable to products that did not even exist and of which he had no knowledge when the MIPA was signed.

Damages attributable to the '728 Patent. At the time of the Transaction, NXT Plates were not accused of infringement. But after the Transaction, DePuy applied for and obtained a new patent—the '728 Patent. It then alleged that NXT sales post-dating the issuance of the '728 Patent infringed that patent. A1515-17. These NXT sales featured prominently in DePuy's damages presentation during the patent litigation, and the jury returned a verdict finding that VOI and Fidelio willfully infringed the '728 Patent. A1098-102, 1110-15. VOI and Fidelio stipulated to the same finding in the consent judgment. A1126. Thus, a substantial portion of the jury award—and, by extension, the settlement—was attributable to the infringing NXT sales, which Plaintiffs chose to make.

The Superior Court held that sales infringing the '728 Patent were indemnifiable, offering two rationales. First, the Superior Court relied on its broad interpretation of the MIPA, Post-Trial Op. at 22-25, which, as explained above, is incorrect.

Second, the Superior Court reasoned that even under Claude's interpretation of the MIPA, "[b]oth the NXT plates and '728 Patent related to the pre-Transaction Patent Litigation" because the '728 Patent was a "continuation" of a pre-existing patent and hence a "reasonable continuation of the pre-Transaction Patent

Litigation" insofar as the "NXT plates were anticipated pre-Transaction." Post-Trial Op. at 43-45. That reasoning was illogical. Indemnification does not turn on whether a *patent* was a "reasonable continuation of the pre-Transaction Patent Litigation," or even on whether a technology was "anticipated," but instead on whether *the accused conduct* was the reasonable and expected continuation of pre-Transaction *conduct*. Here, the legality of the NXT plates could have been challenged only after DePuy filed for and obtained the '728 Patent. *Plaintiffs* then chose to keep selling NXT plates despite the new patent. Plaintiffs' choice was not a reasonable and expected continuation of the *pre*-Transaction VOI's conduct, which occurred when there was no patent for the NXT to infringe.

The same is true of C/V plates. As already explained, damages attributable to C/V plates are unrecoverable because these products came into existence only after the Transaction. They are unrecoverable for another reason: C/V plates, like NXT plates, were accused of infringing the '728 Patent. DePuy argued throughout trial, during the enhancement hearing, and in its contempt motion that C/V plates specifically infringed the '728 Patent. A1759-60, 1773-76, 2036. Given these accusations, Plaintiffs' infringement of the '728 Patent via C/V sales had to be priced into the $70 million settlement fee, as Plaintiffs themselves conceded. A678 ("[T]here was no realistic way to settle the Patent Litigation without ensuring peace as to Compresiv/Versiv."). Claude should not be required to cover Plaintiffs' cynical

decision to willfully infringe the ’728 Patent in hopes that Claude would pick up the tab.

II. The Superior Court Erred in Concluding That the MIPA Can Be Read as a Matter of Public Policy to Indemnify Post-Transaction Willful Conduct by Indemnitees.

A. Question Presented

Whether an indemnification provision that covers post-agreement willful patent infringements is enforceable. Claude preserved this issue at A205-08, 617-21.

B. Scope of Review

The Supreme Court reviews "questions that hinge on public policy grounds … *de novo*." *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674, 685 (Del. 2024).

C. Merits of Argument

As explained above, the Court should hold that the MIPA's indemnification provision, by its terms, does not cover damages attributable to Plaintiffs' independent post-Transaction business decisions. The Superior Court's limitless construction of the provision was error for an additional reason: the provision, so construed, is unenforceable as against public policy because it would incentivize willful patent infringement.

To be clear, Claude does not dispute that parties can contract to indemnify for damages arising from *past* misconduct. Such agreements create no public policy concern because they do not incentivize misconduct. Instead, Claude contends that indemnification agreements cannot cover *future* willful infringement. *See, e.g.*, *State Farm Fire & Cas. Co. v. Hackendorn*, 605 A.2d 3, 13 (Del. Super. Ct. 1991) (providing coverage for future misconduct leads to "reduction in inhibition of

potential misconduct"), *abrogated on other grounds by USAA Cas. Ins. Co. v. Carr*, 225 A.3d 357 (Del. 2020); 8 Williston on Contracts § 19:20, Westlaw (4th ed. Database updated May 2025) (contracts indemnifying intentional or willful misconduct "encourage wrongdoing").

The freedom of contract in Delaware has always coexisted with the fundamental principle that "it is against the public policy of this State to permit its courts to enforce an illegal contract prohibited by law." *Geronta Funding v. Brighthouse Life Ins. Co.*, 284 A.3d 47, 61 (Del. 2022) (citation omitted). A contract conscripting one party to finance another party's willful misconduct is the quintessential example of an illegal contract. The leading Delaware case is *James*, which held that "[a] contract to relieve a party from its intentional or willful acts is invariably held to be unenforceable as being against clear public policy." 472 A.2d at 38 (citing 15 Williston on Contracts § 1750A (3d ed.)). *James* voided an indemnification agreement even after determining that the agreement included "unambiguous language" to indemnify "for injuries or death solely and proximately caused by or arising out of the negligence of [indemnitee]." *Id.* at 37.

Under *James*, the MIPA, as interpreted by Plaintiffs, is void. Federal patent law "seeks to foster and reward invention," *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979), in large part via "the deterrent effect that the patent laws have on would-be infringers," *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d

1464, 1470 (Fed. Cir. 1990). Yet Plaintiffs' interpretation would reduce to zero any deterrent effect on post-Transaction infringement because Sellers would cover all of Plaintiffs' liabilities. Even worse, Plaintiffs seek indemnification for infringement that the jury found to be *willful*, which requires "egregious cases of misconduct beyond typical infringement." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 110 (2016). A contract that effectively underwrites the indemnitee's egregious invasion of federally protected rights cannot stand under *James*. *Cf. In re TransPerfect Glob., Inc.*, 2023 WL 5017248, at *3 (Del. Ch. Aug. 7, 2023) (affirming that contractual indemnification is unavailable for willful violations of federal securities law); *Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70, 73 (2d Cir. 1982) (holding an indemnification clause void as against "a strong federal public policy against discrimination by reason of sex"); *Pro. Beauty Supply, Inc. v. Nat'l Beauty Supply, Inc.*, 594 F.2d 1179, 1187 (8th Cir. 1979) (similar, for federal antitrust law), *abrogated on other grounds by Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

The Superior Court did not engage with the reasoning in *James* and instead dismissed it as a case that "has not gained traction." Post-Trial Op. at 41. Contrary to the Superior Court's characterization, *James* has been cited favorably by many Delaware cases. *See, e.g.*, *Alcoa*, 2016 WL 521193, at *7; *Lovett v. Pietlock*, 2011 WL 2086642, at *4 n.24 (Del. Super. Ct. Apr. 26, 2011), *aff'd*, 32 A.3d 988 (Del.

2011) (TABLE); *Laws v. Ayre Leasing, Inc.*, 1995 WL 465334, at *2 (Del. Super. Ct. July 31, 1995). Moreover, patent law borrows its willfulness standard from intentional torts, *see Halo*, 579 U.S. at 105 (citing Restatement (Second) of Torts § 8A (1965); Prosser and Keeton on Law of Torts § 34 (5th ed. 1984))—and Delaware caselaw overwhelmingly confirms that indemnification for an indemnitee's future intentional torts is not permitted. *See, e.g.*, *J. A. Jones Constr. Co. v. City of Dover*, 372 A.2d 540, 545 (Del. Super. Ct. 1977) ("Even if a contract purports to give a general exoneration from 'damages,' it will not protect a party from a claim involving its own fraud or bad faith." (citation omitted)); *Abry P'rs V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1064 (Del. Ch. 2006) (holding a stock purchase agreement "invalid under the public policy of this State" to the extent it "limit[ed] the Seller's exposure for its own conscious participation in the communication of lies to the Buyer"); *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 592-93 (Del. Ch. 2023) (similar). Critically, Delaware's legislature itself has formulated this policy by voiding exculpatory clauses in construction contracts, as many other states have done. *See* 6 *Del. C.* § 2704.

James's rule is universally followed outside Delaware. *See, e.g.*, *Jacksonville State Bank v. Barnwell*, 481 So.2d 863, 867 (Ala. 1985); *Davis v. Commonwealth Edison Co.*, 336 N.E.2d 881, 885 (Ill. 1975); *Constable v. Northglenn, LLC*, 248 P.3d 714, 716 (Colo. 2011); *Holmes v. Clear Channel Outdoor, Inc.*, 644 S.E.2d 311, 314

(Ga. Ct. App. 2007); *Zachry Constr. Corp. v. Port of Houston Auth. of Harris Cnty.*, 449 S.W.3d 98, 116-18 (Tex. 2014); *Laeroc Waikiki Parkside, LLC v. K.S.K. (Oahu) Ltd. P'ship*, 166 P.3d 961, 984 (Haw. 2007). Even for the lower standard of gross negligence or recklessness, "the vast majority of decisions state or hold that such agreements [releasing liability for future gross negligence] generally are void on the ground that public policy precludes enforcement of a release that would shelter *aggravated misconduct*." *City of Santa Barbara v. Superior Ct.*, 161 P.3d 1095, 1103 (Cal. 2007) (collecting cases).

The Superior Court swam against this tide primarily by relying on *CNX Resources Corp. v. CONSOL Energy Inc.*, 2024 WL 4929171 (Del. Super. Ct. Nov. 8, 2024). But the agreement in *CNX* sought only to allocate past liabilities, not to insulate the indemnitee against future liabilities; it therefore did not raise the public policy concerns that drove *James* and scores of other cases. *Id.* at *6. Moreover, *CNX* implicated unique corporate interests, irrelevant to this case, about the freedom to restructure because the indemnitor was a spinoff company of the parent indemnitee. The court accordingly cautioned against "frustrat[ing] spinoff transactions by preventing corporations from fully separating the liabilities associated with multiple product lines." *Id.* No comparable considerations are present here.

The other cases cited in passing by the Superior Court concern insurance contracts. This Court has recognized the "well-established common law principle that an insured should not be allowed to profit, by way of indemnity, from the consequences of his own wrongdoing"—the exact principle that forecloses Plaintiffs' position here. *USAA Cas. Ins. Co. v. Carr*, 225 A.3d 357, 362 (Del. 2020) (citation omitted). The insurance cases cited by the Superior Court held that damages were insurable when that common law principle was *not* implicated. *Whalen v. On-Deck, Inc.*, 514 A.2d 1072 (Del. 1986), held only that "there is no evidence of public policy in this State against" insurance covering punitive damages, in a case where "there existed no evidence of intentional or willful conduct by [insured]." *Id.* at 1073-74. The public policy analysis in *RSUI Indemnity Co. v. Murdock*, 248 A.3d 887 (Del. 2021), turned on the statutory interpretation of 8 *Del. C.* § 145, whose structure evinced a clear legislative intent to permit broad insurability for a board of directors. *Id.* at 903. And *Sycamore Partners Management, L.P. v. Endurance American Insurance Co.*, 2021 WL 761639 (Del. Super. Ct. Feb. 26, 2021), contemplated a public policy against insurance for restitution or disgorgement, neither of which is necessarily predicated on willful misconduct. *Id.* at *11. Those cases therefore provide no support to Plaintiffs.

The Court should hold that the MIPA, if construed to require indemnification for Plaintiffs' post-Transaction willful infringement, is unenforceable, and remand

for the Superior Court to decide whether such willful misconduct exacerbated the settlement. *See* Post-Trial Op. at 40 n.247 (declining to reach that issue). Alternatively, the Court should adopt Claude's reading of the MIPA to avoid the unenforceable interpretation. *See Walsh v. Schlecht*, 429 U.S. 401, 408 (1977) ("[C]ontracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable.").

III. The Superior Court Erred in Concluding That Plaintiffs Were Precluded from Raising a Duty of Good Faith and Fair Dealing Claim as a Matter of Law.

A. Question Presented

Whether Plaintiffs violated the implied covenant of good faith and fair dealing by continuing to sell infringing products, including (among other things) via the post-verdict fire sale. Claude preserved this issue at A131, 164-65, 291.

B. Scope of Review

This Court "reviews *de novo* the Superior Court's decision to grant summary judgment," viewing the evidence in the light most favorable to the non-moving party. *Bailey v. City of Wilm.*, 766 A.2d 477, 479 (Del. 2001). The duty of good faith and fair dealing is a question of law reviewed *de novo*. *See Oxbow Carbon & Mins. Hldgs., Inc. v. Crestview-Oxbow Acq., LLC*, 202 A.3d 482, 502-03 (Del. 2019).

C. Merits of the Argument

If—contrary to the arguments above—Claude must indemnify Plaintiffs for their post-Transaction business decisions, then Plaintiffs should at least have been required to make those decisions in good faith. Claude argued below that Plaintiffs breached that duty of good faith, thus excusing Claude's indemnification obligation. The Superior Court rejected Claude's good-faith defense as a matter of law, deeming it foreclosed by the contract's express terms. Mem. Op. at 24. That decision, too, was wrong.

The duty of good faith inheres in every contract, including one between sophisticated parties. *Dieckman v. Regency GP LP*, 155 A.3d 358, 367 (Del. 2017). A party violates that duty by "act[ing] arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected." *Baldwin v. New Wood Res. LLC*, 283 A.3d 1099, 1118 (Del. 2022) (citation omitted). The duty becomes most salient "when a party to the contract is given discretion to act as to a certain subject and … the discretion has been used in a way that is impliedly proscribed by the contract's express terms." *Oxbow Carbon*, 202 A.3d at 504 n.93.

In *Baldwin*, for example, an indemnification provision in an LLC agreement allowed a manager to be indemnified for certain litigation expenses if the LLC determined that he acted in good faith. *Baldwin*, 283 A.3d at 1103. The LLC agreement, however, was silent on the LLC's obligations in making that determination. The Court held that the LLC had an implied duty to make that determination in good faith. *Id.* at 1118. Despite the absence of an expressly stated good-faith obligation, the Court found it "obvious" that the parties intended such a requirement. *Id.* at 1119.

This is a quintessential case in which the duty of good faith attaches. According to Plaintiffs, Sellers' indemnification obligation covered Plaintiffs' post-Transaction business decisions. Yet the MIPA afforded Plaintiffs with unfettered discretion in making those decisions. Just as it was "obvious" in *Baldwin*

that the parties intended for the indemnitor to make threshold determinations about indemnifiability in good faith, it is equally obvious here that the parties intended for Plaintiffs to operate the post-Transaction VOI's business in good faith rather than wantonly inflating Sellers' damages. *See Mitchell v. Peterson*, 422 N.E. 2d 1026, 1033-34 (Ill. App. Ct. 1981) (implicit in indemnification agreement is "the understanding that the indemnitor is not liable for needless expenses capriciously amassed by the indemnitee").

There was, moreover, abundant evidence that Plaintiffs had breached the duty of good faith. The Florida jury considered such evidence, A1098-102, and found that VOI and Fidelio willfully infringed—a type of "egregious … misconduct." *Halo*, 579 U.S. at 110. Egregious misconduct readily qualifies as "arbitrar[y] or unreasonabl[e]" conduct. *Baldwin*, 283 A.3d at 1118. Plaintiffs' misbehavior following the verdict was even worse: they unleashed a fire sale of infringing products that invited direct criticism from the patent court, heightened the risk of trebled damages, and precipitated contempt proceedings. These actions destroyed VOI's leverage and resulted in an inflated settlement that Plaintiffs now argue is Claude's responsibility. A1117-18, 1142-43, 1626, 2014.

Yet the Superior Court granted summary judgment to Plaintiffs on Claude's good-faith defense and counterclaim. The Superior Court did not question Claude's showing that Plaintiffs had acted in bad faith. Instead, the Superior Court theorized

that no good-faith claim was available because there was no "contractual gap such that the implied covenant applies." Mem. Op. at 24.

The Superior Court erred by "focusing too narrowly on whether the express disclosure provision displaced the implied covenant." *Dieckman*, 155 A.3d at 367. It should have inquired whether "some aspects of the deal are so obvious to the participants that they never think, or see no need, to address them." *Id.* at 368 (citation omitted). Here, as already explained, it was obvious that the parties did not intend for Plaintiffs to profit from willful misconduct at Sellers' expense.

The Superior Court further reasoned that "[u]nlike *Baldwin*, which hinged on the interpretation of the indemnification provision in question, the MIPA here is not silent and expressly outlines Defendants' indemnification obligation." Mem. Op. at 25. But *Baldwin* is indistinguishable from this case. In *Baldwin*, the agreement was silent on the indemnitor's obligations in determining the indemnitee's standard of conduct, so the Court held that it must be made in good faith. Here, the agreement is silent on Plaintiffs' post-Transaction business decisions, so the Court should hold that they must be made in good faith.

The Court should reverse the Superior Court's dismissal of Claude's good-faith defense and counterclaim, and remand for a new trial.

IV. The Superior Court Erred by Granting an Award of Prejudgment Interest Which Provided a Windfall.

A. Question Presented

Whether Plaintiffs should be awarded prejudgment interest in addition to the actual interest accrued on the loan used for financing the settlement. Claude preserved this issue at A926.

B. Scope of Review

This Court reviews *de novo* the Superior Court's interpretation of Delaware law on whether prejudgment interest is available. *Chrysler Corp. (Del.) v. Chaplake Hldgs., Ltd.*, 822 A.2d 1024, 1037 (Del. 2003).

C. Merits of the Argument

Plaintiffs did not pay the settlement from their own pockets. Instead, Plaintiffs obtained a loan. As a result, Plaintiffs did not lose the use of their funds between the time of the settlement payment and the time of the Superior Court's judgment. Although Plaintiffs paid interest on that loan, Plaintiffs were indemnified for that interest: Claude does not challenge the portion of the judgment treating that loan interest as indemnifiable. Nonetheless, the Superior Court also awarded prejudgment interest to Plaintiffs. That ruling was wrong. The effect of the Superior Court's ruling is that Plaintiffs received the time value of the same dollars twice, resulting in an impermissible windfall. And Claude was forced to disgorge the time value of the same dollars twice, resulting in an unfair penalty.

Prejudgment interest is awarded "as a matter of right," *see Moskowitz v. Mayor & Council of Wilm.*, 391 A.2d 209, 210 (Del. 1978), but it "is not an unqualified right in Delaware," *Lamourine v. Mazda Motor of American, Inc.*, 2007 WL 3379328, at *1 (Del. Super. Ct. May 29, 2007), *aff'd*, 979 A.2d 1111 (Del. 2009) (TABLE). "Prejudgment interest serves two purposes: first, it compensates the plaintiff for the loss of the use of his or her money; and, second, it forces the defendant to relinquish any benefit that it has received by retaining the plaintiff's money in the interim." *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482, 486 (Del. 2011). Here, prejudgment interest serves neither purpose, and the Superior Court's decision to award it should be reversed as a matter of law.

As to the first purpose, compensating a plaintiff for "the loss of the use of his or her money", *id.*, can occur only when the plaintiff has, in fact, lost the use of his or her money—that is, when plaintiffs are "deprived of their own funds." *Deane v. Maginn*, 2024 WL 3043968, at *2 (Del. Ch. June 18, 2024). Absent such deprivation, prejudgment interest is improper because it leads to double counting. In *Deane*, for example, the prevailing party was awarded rescissory damages in a securities usurpation case. *Id.* Because these damages already reflected the securities' value at the time of trial and not at the time of usurpation, they served the purpose of making the defendant "disgorg[e] the appreciation in value of the shares he wrongfully purchased." *Id.* The plaintiffs were not deprived of their own funds,

so "[a]dding pre-judgment interest on top risk[ed] double counting." *Id.*; *accord LG Elecs. Inc. v. Invention Inv. Fund I, L.P.*, 2025 WL 1545444, at *4 (Del. Super. Ct. May 15, 2025) ("[P]rejudgment interest is inappropriate when the prevailing party has not been deprived of any funds." (citation and internal quotation marks omitted)).[5]

Here, too, prejudgment interest was improper because it did not "compensate[] the plaintiff for the loss of the use of his or her money." *Brandywine*, 34 A.3d at 486. Because Plaintiffs borrowed money to pay the settlement, and Claude compensated Plaintiffs for that loan, an additional award of prejudgment interest would result in a windfall. To illustrate this point, suppose Plaintiffs had to pay the $70 million settlement fee out of pocket, rather than financing it with a loan. Plaintiffs would not be able to invest the $70 million and earn interest on it. To put Plaintiffs back in the position they would have occupied absent the breach, they should receive the $70 million, plus the interest they would have earned on the $70 million. Here, however, that rationale does not apply because Plaintiffs paid the settlement with borrowed money—and was indemnified for the interest on that loan.

[5] Further illustrating that prejudgment interest should not lead to windfalls, the statutory default rate set in 6 *Del. C.* § 2301(a) serves only as a benchmark; courts can reduce that rate or apply a variable rate to avoid overcompensating the injured party. *See Wright v. Phillips*, 2020 WL 3410544, at *1 (Del. Ch. June 22, 2020); *McGlothlin v. Petrunich Oral & Maxillofacial Surgery*, 2023 WL 5747520, at *9 (Del. Super. Ct. Sept. 6, 2023).

Because Plaintiffs were not deprived of funds, they *did* have the $70 million to invest. Awarding prejudgment interest in these circumstances is double counting: Plaintiffs would get both interest on the $70 million *on the hypothesis that it could not invest that amount*, and interest on the $70 million that *it actually could invest*.

For parallel reasons, prejudgment interest here would not serve the second goal of forcing Claude to "relinquish any benefit" from "retaining the plaintiff's money," *Brandywine*, 34 A.3d at 486. Instead, it would cause Claude to relinquish the time value of money twice. Suppose Claude had immediately indemnified Plaintiffs for his share of the settlement payment and thereby complied (according to Plaintiffs) with his contractual obligation. True, Claude would not have had use of those funds between the time the payment was allegedly due and the final judgment. But Claude also would not have had to compensate Plaintiffs for the interest on their loan because no loan would ever have been needed. By compensating Plaintiffs for loan interest, Claude has already been stripped of the time value of money. Just as prejudgment interest rewards Plaintiffs the time value of money twice, it also forces Claude to disgorge the time value of money twice.

The Superior Court dismissed Claude's argument, referring only to "the uncontroverted trial record as to Plaintiffs' lost use of capital." Order Regarding Post-Trial Issues at 5. The corresponding citation leads to vague and unsubstantiated statements made by Fidelio's officer during trial that the loan "t[ook] up kind of our

capacity" and tied up capital that could have been "invest[ed] into other opportunities or, you know, new acquisitions or what have you." A415. But if Plaintiffs lost business opportunities, Plaintiffs presented no evidence that the measure of damages would bear any relationship to the prejudgment interest they sought. Moreover, other than these off-the-cuff remarks, Plaintiffs never substantiated or quantified these speculative harms about foregone investment opportunities or even explained what those opportunities were, and certainly did not properly claim them as a category of damages. No law supports the proposition that such imaginative losses warrant a prejudgment interest award where the party suffered no actual deprivation of funds.

Brandywine, on which the Superior Court relied, bears little resemblance to this case. There, a roofing contractor's negligent work caused significant rain damage to an automobile dealership, forcing it to close for seven months. 34 A.3d at 483. After the dealership sued, the jury awarded damages in property damage, lost car sales, and lost service sales. *Id.* at 484. The Court also awarded two types of interest expenses: interest "due to the deterioration of its financial status" and interest on "a loan to restore capital that was impaired by costs associated with construction." *Id.* at 485-86. Crucially, in that case, there was no claim that those loans restored the dealership to the position it would have occupied had the torts not occurred. After all, the dealership was still closed and stuck with a rain-damaged

property. The loans merely allowed the dealership to stay afloat while it suffered *separate* lost-sales and property damages. The Court therefore held that the loan interest was "not prejudgment interest," but instead "an element of damages." *Id.* at 486. That is nothing like this case, where Claude's alleged breach was the failure to pay money to Plaintiffs and Plaintiffs received a loan for that same amount.

While no Delaware case mirrors the parties' circumstances here, the Second Circuit in a closely analogous case reached the sensible conclusion that a party who covered its loss with a loan cannot obtain double recovery by getting both the loan interest and prejudgment interest. *See Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co.*, 697 F.2d 481 (2d Cir. 1983). There, Bulk Oil entered into a contract to sell oil to Sun Oil and financed the transaction by borrowing almost all costs from Chase. *Id.* at 482. After Sun refused to pay, Bulk had to pay monthly interest to Chase. The Second Circuit held: "[Because] we have ruled that Sun must reimburse Bulk for Bulk's monthly payments … Bulk is in the position it would have been in had Sun paid Bulk in performance of the contract. An award of statutory interest to Bulk on that part … of the contract price which Bulk would have used to pay off the loan would be a windfall." *Id.* at 485-86 (footnote omitted). The Second Circuit so concluded despite the governing statute's mandatory language that "[i]nterest shall be recovered." *Id.* at 486 n.12 (quoting N.Y. C.P.L.R. § 5001). This Court should adopt similar reasoning here.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the judgment be reversed and the case remanded for further proceedings.

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