IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ACCELERANT TWISTER, LLC, and ACCELERANT HOLDING, LLC, Plaintiffs, v. MARJO, LLC and JOHN T. SULLIVAN, Defendants/Counter-Plaintiffs, v. ACCELERANT TWISTER, LLC, ACCELERANT HOLDING, LLC, ACCELERANT PARTNERS, LLC, MICHAEL BOROM, GRANT SCHUSTER, and ALAN ELLMAN, Counter-Defendants.	CONSOLIDATED C.A. No. 2023-0887-LWW

MEMORANDUM OPINION

Date Submitted: July 16, 2026
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WILL, Vice Chancellor

This post-trial decision resolves a dispute among the co-founders of Accelerant Twister, LLC, a company formed to design, build, and commercialize an automated cannabis cone-rolling machine. In 2019, engineer John T. Sullivan—acting through his entity, Marjo, LLC—joined with Michael Borom, Grant Schuster, and Alan Ellman to bring Sullivan's machine concept to market. Marjo licensed its intellectual property and agreed to provide consulting services to Twister in exchange for milestone payments and a 15% non-dilutable membership interest.

Early optimism soon gave way to engineering setbacks, mounting capital needs, and regret over Marjo's anti-dilution protection. In 2021, Borom, Schuster, and Ellman formed a new entity—Accelerant Holding, LLC—into which every Twister member except Marjo exchanged its equity. From then on, the three founders raised capital at the Holding level by touting Twister's machines and business model. They used those funds both to lend money back to Twister at 25% interest and to develop new product lines inside Holding. Twister later terminated the license agreement and refused to pay Marjo the $1 million minimum payment. This litigation followed.

The parties have asserted numerous contract, governance, and tort claims against one another. After trial, neither side emerges unscathed.

On the contract and governance claims, Marjo largely prevails. The license agreement is valid and enforceable, and Twister breached it by failing to pay Marjo

the final $1 million milestone. Marjo is entitled to $1 million in damages plus contractual interest and the return of the early prototype, demonstration unit, and original drawings. Marjo's related demand for Twister's commercial machines, along with the patent-ownership portion of Twister and Holding's declaratory judgment claim, is dismissed for lack of subject matter jurisdiction. Under Twister's limited liability company agreement, the managers validly approved the July 2021 unit exchange in which Holding acquired 83.7% of Twister. Yet Twister entered into a 25% revolving credit agreement and an intercompany services agreement with Holding without the required member vote. For their part, Marjo and Sullivan breached the agreement's confidentiality provision by forwarding internal company information to third parties, warranting nominal damages.

On the fiduciary duty claims, the outcome is likewise mixed. Acting as a conflicted majority of Twister's board of managers, Borom, Schuster, and Ellman breached their duty of loyalty—aided and abetted by Holding—by charging Twister an unfair 25% interest rate under the revolving credit agreement and by usurping Twister's capital-raising opportunities to build separate product lines in Holding. Because an entity-level recovery would return most of the funds to Holding and the breaching parties, Marjo is awarded direct, pro rata damages of $43,142.46 for the interest overcharge and $462,000 for the usurped opportunities. By contrast,

Twister's guaranty of Holding's credit line was fair, and Twister and Holding's reciprocal fiduciary duty claim against Sullivan fails.

Finally, the parties' peripheral claims and fee-shifting requests are rejected. Twister and Holding's conversion claim over software source code is preempted by the federal Copyright Act. And Marjo's claim for breach of a consulting agreement is defeated by the contract's plain terms. Each side will bear its own fees and costs.

I. BACKGROUND

Unless otherwise noted, the following facts were stipulated to by the parties or proven by a preponderance of the evidence at trial.[1]

A. The Cone-Rolling Machine

John T. Sullivan is a commercial equipment inventor and designer with a background in electrical engineering.[2] He is the managing member of Marjo, LLC, a Maryland limited liability company he formed.[3]

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[1] *See* Joint Pre-trial Stipulation and Order (Dkt. 294) ("PTO"). Trial occurred over three days, during which nine fact witnesses and four expert witnesses testified live. *See* Trial Tr. Vols. I-III (Dkts. 326-28). Trial testimony is cited as "[Name] Tr. __." The trial record contains 1,033 joint exhibits and 18 deposition transcripts. Exhibits are cited by the numbers provided on the parties' joint exhibit list as "JX __," unless otherwise defined. *See* PTO Ex. A (Trial Exs. List) (Dkt. 294); Notice of Lodging of Dep. Trs. (Dkt. 306); Suppl. Notice of Lodging (Dkt. 314); Suppl. Notice of Lodging (Dkt. 334). Deposition transcripts are cited as "[Name] Dep. __."

[2] JX 825; PTO ¶ 54.

[3] JX 825; PTO ¶¶ 53-54.

In February 2019, Sullivan contacted Grant Schuster, who then worked for cannabis company Curio Wellness.[4] Sullivan was exploring opportunities involving automation devices in the cannabis market.[5] On February 21, Sullivan met with Schuster, who told him that Curio was interested in a machine to automate the process of rolling marijuana cigarettes, which he called "pre-rolls" or "cones."[6] Although Sullivan had not yet developed any pre-roll automation machines, he agreed to consider the idea.[7]

After meeting with Sullivan, Schuster contacted his uncle, Alan Ellman, about a potential business venture in cone-rolling automation.[8] Ellman had technology expertise and access to investors.[9] Schuster and Ellman brought in a third partner, Michael Borom, who had business and marketing experience (together with Schuster and Ellman, the "Founders").[10]

In late March 2019, Sullivan gave Schuster preliminary drawings and a $95,000 quote to develop a cone-rolling machine, which Sullivan described as

[4] JX 8; Schuster Tr. 9-10; Sullivan Tr. 278; PTO ¶ 79.

[5] PTO ¶¶ 54, 79.

[6] *Id.* ¶¶ 79-80.

[7] Schuster Dep. 17, 20; PTO ¶ 80.

[8] Schuster Tr. 12; PTO ¶ 81.

[9] Ellman Tr. 117, 143.

[10] Schuster Tr. 12; Borom Tr. 441-42, 445-47; Sullivan Tr. 274; PTO ¶ 81.

"patent pending."[11] In early April, Schuster reported to Sullivan that "[t]he consensus was this is an interesting opportunity," and that the Founders would like "to have a dialogue after [Sullivan] file[d] the provisional patent so we are all talking from the same basis of understanding of the invention."[12] The Founders offered to provide "a unique business model to scale and maximize return."[13] Later that month, the parties executed a non-disclosure agreement so that Sullivan could provide his design concepts.[14]

On July 23, 2019, Sullivan filed a provisional patent application with the United States Patent and Trademark Office ("USPTO") for his cone-rolling design known as U.S. Provisional Patent Application No. 62/922,056, entitled "Automatic Cone Loading, Weighing and Twisting System" (the "Provisional Patent Application").[15] Six days later, Sullivan's counsel sent a copy of the Provisional Patent Application to Borom.[16]

On July 30, 2019, the Founders (with Borom acting through his entity Accelerant Partners, LLC), Sullivan, and Marjo executed a letter of intent ("LOI").[17]

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[11] JX 16; PTO ¶ 82.

[12] JX 23.

[13] *Id.*

[14] JX 29; PTO ¶ 83.

[15] JX 58; JX 759 at 1.

[16] JX 58.

[17] JX 64 ("LOI"); PTO ¶ 84.

Under the LOI, the Founders promised to give Sullivan and Marjo a 15% non-dilutable equity interest (plus a 5% dilutable interest) in a newly formed entity ("Newco") upon its formation in exchange for an exclusive assignment of Sullivan and Marjo's cone-rolling machine designs.[18] The equity was not conditioned on development costs falling within a certain budget or on the machine meeting any performance benchmarks.[19] The LOI also contemplated that a third-party software developer would be hired to develop the electro-mechanical control system software, and a third-party hardware designer would be hired to develop a prototype.[20] The Founders could terminate the LOI if they determined, in their sole discretion, that the unit production costs quoted by the vendors were unacceptable.[21]

B. Twister's Formation

In August 2019, Sullivan sought out a software developer and hardware designer to build the cone-rolling machine. He considered two companies—Missouri Tooling and Automation ("MTA") and PLC Paramedics, Inc. ("PLC")—and entered into a non-disclosure agreement with each.[22] Matthew Hess, PLC's

[18] LOI § (4)(a)-(b).

[19] *Id.*

[20] *Id.* § (6); *see also id.* at Recitals.

[21] *Id.* § (3).

[22] PTO ¶¶ 85-86.

founder, executed an agreement on August 14, 2019.[23] MTA employee Bob Archer executed an agreement on August 19, 2019.[24]

On September 3, 2019, the Founders and Sullivan formed a Delaware limited liability company called Accelerant Manufacturing, LLC—later renamed Accelerant Twister, LLC ("Twister")—to receive an exclusive license to use Marjo's designs, intellectual property, and know-how to develop, manufacture, and sell cannabis cone-rolling machines.[25] Two days after that, PLC and MTA submitted their respective quotes.[26] Four days later, on September 9, Borom, Schuster, Ellman, and Sullivan executed Twister's initial Operating Agreement (the "First LLC Agreement").[27] At this point, Sullivan and the three Founders identified themselves as Twister's four managers.[28]

The Founders never interviewed or considered inventors other than Sullivan to design the cone-rolling machine.[29] Nor did they ask a third-party expert, such as an engineer, to review Sullivan's designs before executing the First LLC

[23] *Id.* ¶¶ 61, 86.

[24] *Id.* ¶¶ 64, 86.

[25] JX 100 ("First LLC Agreement"); PTO ¶ 88.

[26] PTO ¶ 87.

[27] First LLC Agreement 1, 30.

[28] *Id.*

[29] Borom Tr. 502.

Agreement.[30] After forming Twister, the Twister Board hired a third party to conduct a patent search regarding other cone-rolling machines in the marketplace. The search revealed nothing that would prevent Twister from pursuing patent protection of Sullivan's designs.[31]

Under the First LLC Agreement, Sullivan received equity units equal to 20% of Twister's equity.[32] Consistent with the LOI, Sullivan's equity consisted of a 15% membership interest that was protected from dilution ("Dilution Protected Units") and a 5% membership interest that was not protected from dilution.[33] None of the Founders received Dilution Protected Units. Each Founder contributed cash to Twister; Sullivan did not.[34] As in the LOI, Sullivan's equity was not contingent on performance metrics or development costs.[35] The First LLC Agreement also contained no representations by Sullivan or Marjo regarding Sullivan's expertise, experience, cone-rolling design, prototype development costs, or production capabilities.[36]

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[30] *Id.*

[31] *Id.* at 502-03; JX 109; JX 111.

[32] First LLC Agreement §§ 3.1-3.2, sched. A.

[33] *Id.* §§ 3.1, 3.6(d), sched. A.

[34] *Id.* § 3.2, sched. A; PTO ¶¶ 90-91; Schuster Tr. 88-89.

[35] First LLC Agreement § 3.1, sched. A.

[36] *See generally id.*

A month after entering into the First LLC Agreement, Twister moved forward with PLC. On October 2, 2019, Twister executed a $124,200 contract for PLC to provide the electrical design, programming, and mechanical assembly services to build a prototype cone-rolling machine (the "PLC Contract").[37] The PLC Contract provided that the parties understood the machine was "a prototype" and "some things may not work as designed and may need to be modified or redesigned."[38] Even though custom software and schematics created by PLC were owned by Twister, the PLC Contract required PLC and its subcontractors to assign any improvements to the patent-pending invention to Marjo and Sullivan.[39] PLC—working alongside its subcontractor, engineer Matthew Kelly of Cutting Edge Automation—then began its work.[40]

C. The Consulting Agreement, License Agreement, and Second LLC Agreement

While the prototype was developed, the Founders sought to formalize Twister's relationship with Sullivan and Marjo through several agreements.[41] Ellman wanted these agreements to "explain[] the potential of the model and the

[37] PTO ¶ 89; JX 125 ("PLC Contract") 1, 7, 11, 14.

[38] PLC Contract 7.

[39] *Id.* at 12-13.

[40] *Id.*; JX 141.

[41] JXs 169-70.

business case" to Sullivan, predicting that the venture "could have an enterprise value of $72 million."[42] For Borom, it was important to formalize the relationship with Sullivan sooner rather than later, as he feared the Founders would be left with "no leverage" once the prototype was finished.[43]

1. The Consulting Agreement

On February 3, 2020, Marjo and Twister signed a consulting agreement with an effective date of September 1, 2019 (the "Consulting Agreement").[44] Under the Consulting Agreement, Marjo would provide services reasonably requested by Twister and mutually agreed to for the development and completion of a prototype cannabis cone-rolling machine.[45] After the prototype was completed, Marjo would provide any follow-on services requested by Twister that Marjo agreed to perform, including inventions, product roadmaps, and patent filings.[46]

Twister also agreed to pay Marjo hourly consulting fees of $200, as well as sales commissions and "milestone compensation."[47] The milestone compensation

[42] JX 168 at 1.

[43] JX 180 at 1 (Borom writing to Schuster on January 4, 2020: "Just want to get this thing done as the prototype is getting close to being done and then we have no leverage.").

[44] PTO ¶ 92; JX 206 ("Consulting Agreement"); *see also* JX 210 at 2-13.

[45] Consulting Agreement § 2.1.

[46] *Id.* §§ 1.4-1.7, 2.1(a)-(d).

[47] *Id.* §§ 2.2(a), 2.3-2.4.

consisted of lump-sum payments in varying amounts contingent on the completion of set milestones in the development and production process.[48]

The Consulting Agreement expired after two years—on September 1, 2021—unless terminated beforehand under specified circumstances.[49] Twister could unilaterally terminate the Consulting Agreement on 30 days' written notice if it exited the cone-filling business because the machine failed to meet production and cost targets.[50] Upon expiration or termination, for any reason, Marjo was entitled to payment of all base compensation and milestone compensation earned and to reimbursement of all approved expenses incurred.[51]

2. The License Agreement

Around this same time, Twister and Marjo also entered into a License of Intellectual Property, Trade Secrets and Know-How Agreement effective February 2, 2020 ("License Agreement").[52]

The License Agreement granted Twister a worldwide, perpetual, exclusive, royalty-free license to use Marjo's "Patent-Related Technology"—defined as "all technology covered or claimed by" the provisional or formal patent filings,

[48] *Id.* § 2.3.

[49] *Id.* §§ 4.1-4.2.

[50] *Id.* § 4.2(f).

[51] *Id.* §§ 2.5(b), 4.3(a).

[52] JX 201 ("License Agreement"); PTO ¶ 95.

"including without limitation its related Know-How and Trade Secrets"—for the cannabis cone-rolling process.[53] In exchange, the agreement provided that Marjo would receive Dilution Protected Units and common units in Twister, fees earned under the Consulting Agreement, and aggregate payments of at least $1,000,000 before December 31, 2022, through member distributions or cash payments.[54]

Under the License Agreement, Marjo represented and warranted that Sullivan had "properly assigned all Inventor's rights in the Patent Application/Patent to [Marjo]," that Marjo was the sole owner of all rights, title, and interest in the patent application and patent, that Marjo had the full power and authority to grant the license, and that Marjo had filed the Provisional Patent Application with the USPTO.[55] Though Sullivan never executed a written assignment transferring the Provisional Patent Application to Marjo, he orally agreed with Marjo—of which he and his spouse were the sole members—that Marjo could use and license the patent rights.[56] The License Agreement also required Twister to prosecute and maintain the patent applications at its own cost, and required each party to "provide the other

[53] License Agreement, Recitals, art. II, § 1.6.

[54] *Id.* §§ 5.1-5.3.

[55] *Id.* §§ 3.1-3.3, 6.4.

[56] Sullivan Tr. 340-41; PTO ¶¶ 53-54.

Party with copies of all filings and relevant documentation and an opportunity to comment thereon prior to their submission."[57]

Upon termination of the License Agreement for any reason (including for an uncured material breach upon 30 days' written notice), "any and all payment obligations of [Twister]" immediately became due "and payable with interest at the rate of 18% per annum on the balance due" if Twister failed to cure within 15 days of written notice of a late payment.[58] Twister was also required to return to Marjo "all automatic cone machines, equipment or machinery (including without limitation any tooling, fixtures, software or drawings) created by Licensor or [Twister], or its affiliates, consultants, [and] contractors and provided to [Twister]."[59] This obligation also applied if Twister failed to obtain at least four customer orders for "machines built using the Patent-Related Technology" within six months of the first prototype's release.[60]

The License Agreement prohibited the disclosure of confidential information to third parties during the term of the agreement and for three years after its termination, and required that trade secrets be kept confidential indefinitely.[61] It

[57] License Agreement § 4.1.

[58] *Id.* §§ 6.11(b), (d).

[59] *Id. §*§ 6.11(d), (f).

[60] *Id.*

[61] *Id.* §§ 1.1-1.2, 1.7, 4.11.

prohibited Twister and its managers, founders, officers, and affiliated entities from competing in the "sale, licensing or renting of Cannabis cone rolling equipment" (other than through Twister or a wholly owned subsidiary) during its term and for three years after termination.[62]

3. The Second LLC Agreement

The parties also executed an Amended and Restated Limited Liability Company Operating Agreement effective February 7, 2020 ("Second LLC Agreement") to allow for the issuance of preferred and common equity units to outside investors.[63] The Second LLC Agreement stated that Twister's purpose was to engage in business activities related to automation and data tracking in the "cannabis and hemp space," including cone-rolling equipment.[64] Each member represented that it had conducted its own review of Twister's business and prospects and could bear the financial risk of an investment in Twister.[65]

Under the Second LLC Agreement, Marjo held Dilution Protected Units equal to 15% of Twister's common units, plus additional common units that totaled

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[62] *Id.* § 4.9.

[63] JX 209 ("Second LLC Agreement"); Ellman Dep. 74; PTO ¶ 96.

[64] Second LLC Agreement, Recitals ("WHEREAS, the purpose of the Company is to engage in business activities related to automation and production data accumulation and tracking in the cannabis and hemp space, including but not limited to automation of cannabis cone filling and production and all activities and services related thereto, and to take any other action not prohibited under the Act or other applicable law . . . .").

[65] *Id.* §§ 4.02(d)-(g).

19.51% of the common units.[66] The agreement contemplated that Twister would be managed by a five-member Board of Managers (the "Board")—initially consisting of Borom, Ellman, Schuster, Sullivan, and a designee of the preferred unitholders—which generally acted by majority vote.[67] It also eliminated fiduciary duties for members, managers, and officers, except that each Board member remained subject to traditional fiduciary duties "while acting in such capacity."[68]

The Second LLC Agreement included provisions that required certain actions to be approved by voting members holding at least 90% of the issued and outstanding voting units, including entering into any agreement or arrangement with a manager, member, or affiliate by which they would "receive compensation of any kind."[69] Section 10.04(a) authorized the Board to enter into an incorporation transaction involving the "restructuring of all or substantially all the assets or Units of the Company into a Corporate Entity," provided that each member received equity securities in the new entity with "substantially equivalent economic, governance, priority and other rights and privileges."[70] Section 11.01 prohibited members from

[66] *Id.* §§ 3.03-3.04, sched. A.

[67] *Id.* §§ 8.01-8.02, 8.05(c); *id.* at 58.

[68] *Id.* §§ 14.02(a)-(c).

[69] *Id.* §§ 4.06(b), 4.07(a), 8.10(i), (iii)-(v).

[70] *Id.* § 10.04(a).

disclosing or using Twister's confidential information for personal or commercial advantage.[71]

D. Prototypical Issues

As the parties were negotiating these agreements, the Founders used a copy of the Provisional Patent Application filed by Sullivan to solicit outside investors.[72] In a January 2020 private placement memorandum, Twister touted Sullivan's provisional patent filing and the production as a service (PaaS) model to raise $1.24 million from preferred investors, while warning that the machine's parts or design could be "improperly built and the output of the device [might] not meet [Twister's] expectations resulting in potential losses or additional capital requirements."[73]

On March 18, 2020, Borom sent investors an update on the prototype.[74] He stated that the "prototype [wa]s on track with all but a few final tweaks of the hardware assembled, the PLC programming [wa]s underway," and that prototype testing would begin "in the next 2 weeks."[75] He noted that Sullivan "continue[d] to tweak the design and there w[ould] be some changes between the prototype . . . and

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[71] *Id.* § 11.01(a).

[72] JX 210 at 1.

[73] *Id.* at 57, 62, 72, 74; Second LLC Agreement, sched. A at 57.

[74] JX 241 at 1.

[75] *Id.*

the test version."[76] The next month, Twister's patent counsel, Benjamin Urcia, filed a formal patent application with the USPTO converting Sullivan's July 2019 Provisional Patent Application. That application resulted in U.S. Patent No. 11,937,627 (the "'627 Patent"), which the USPTO issued in March 2024.[77]

On July 30, 2020, Borom told investors that "many fixes and improvements" had been made to the prototype "addressing many issues that would normally be considered post-prototype."[78] By this point, the Founders had contributed an additional $150,000 in capital to "fund development costs beyond what was anticipated originally."[79] Borom also claimed that the machine "(i) [wa]s working great, (ii) [wa]s running at about 700-730 [cones per hour] . . . with a bit more software tuning to go over the weekend, (iii) me[t] all of [their] criteria . . . , and (iv) [wa]s ready to go to beta next week."[80]

Meanwhile, the Founders had grown frustrated with the mounting development costs. On July 31 and August 2, 2020, Borom told Sullivan that—apart from finishing a specific component—Twister would no longer authorize or pay him

[76] *Id.*

[77] *Id.* at 2; *see also* JX 759 at 1 (U.S. Patent No. 11,937,627, issued Mar. 26, 2024).

[78] JX 427 at 2.

[79] *Id.* at 2, 6.

[80] *Id.* at 4.

to provide consulting services without prior approval.[81] Borom explained to Sullivan that his output was inconsistent with what Sullivan had represented, given the costs to date.[82] Borom feared that Twister would go out of business.[83]

On September 17, 2020, Sullivan and Urcia filed three additional provisional patent applications with the USPTO covering improvements to the cone-rolling design, and sent copies of the filings to Twister that same day rather than in advance.[84] Later that month, on September 28, the prototype (referred to as "PRO Beta") was installed at Curio's facility in Maryland for beta testing.[85] Borom reported positive early results to investors, but the machine experienced mechanical issues in late 2020—including vibrations that caused inconsistent weights, difficulties feeding cannabis into the cones, and imperfect twists.[86]

[81] JX 359; JX 363; Borom Tr. 507-08.

[82] Borom Tr. 467; *see also* Sullivan Tr. 295-96.

[83] Borom Tr. 507.

[84] JX 380; Sullivan Tr. 383-88.

[85] JX 427 at 1, 6 (email dated Nov. 24, 2020, attaching Nov. 17, 2020 investor letter); PTO ¶ 101.

[86] JX 427 at 1, 6; JX 929; JX 936; JX 942; JX 945; Schuster Tr. 14-22; Ellman Tr. 124-25.

E. Holding's Formation

On October 17, 2020, PLC sent Borom a quote to build "the first production ready" cone-rolling machine for $176,600.[87] Borom forwarded Ellman and Schuster a copy of the quote with the message: "Time to figure out plan B."[88]

In November 2020, to release the remainder of $1.24 million raised from preferred investors, Borom executed a certification to Twister's escrow agent stating that the "prototype machine [wa]s operating in all material respects in a manner that support[ed] the business plan."[89]

Borom testified that, around this time, Twister needed additional capital to fund the continued development of the machine and was concerned that Marjo's Dilution Protected Units would impede a second capital raise.[90] But the Founders never attempted a second capital raise in Twister, and there is no credible evidence that any prospective investor declined to invest due to Marjo's Dilution Protected Units.[91]

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[87] JX 408 at 1, 8-10.

[88] *Id.* at 1.

[89] JX 818 (Escrow Certification); *see also* JX 210 § 4(c); JX 427 at 1, 7.

[90] Schuster Tr. 78; Ellman Tr. 127; Borom Tr. 485-87.

[91] Schuster Tr. 79-80; Ellman Tr. 144-50; Schinderle Tr. 242-43; *see also* Ellman Dep. 55, 182.

On November 23, 2020, Ellman sent an email to Schuster and Borom that proposed changing Sullivan's "non-dil[u]tion" units "to a royalty," explaining that because Twister had "spent the resources to refine the design," a 3% royalty "ma[de] more sense, subject to the patent not getting rejected."[92] The next day, Borom told investors that Twister had "always anticipated possibly needing to" invest more funds "to complete the development and reach production" of the cone-rolling machine.[93]

On January 6, 2021, the Founders—Borom, Schuster, and Ellman—formed a new Delaware limited liability company called Accelerant Holding, LLC ("Holding"), of which they were managers and members.[94] Sullivan had no role. The Founders executed a limited liability company agreement to govern Holding.[95] That agreement listed $400,882 in capital contributions by the Founders (and another minor member), which reflected their prior contributions to Twister.[96] At the time of its formation, Holding lacked capital or assets.[97]

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[92] JX 425.

[93] JX 427 at 1, 6.

[94] JX 443; JX 444 ("Holding LLC Agreement") §§ 2.01(a), 8.02, sched. A; Borom Dep. 98.

[95] *See generally* Holding LLC Agreement; PTO ¶ 104.

[96] Holding LLC Agreement, sched. A at 55.

[97] Schuster Tr. 88-89; Ellman Tr. 153-54; Borom Tr. 510-11.

On January 8 and 9, 2021, the Founders told Sullivan that they wished to restructure Twister by having each member transfer its Twister equity to Holding in exchange for Holding equity.[98] In response to written questions from Sullivan on January 9, Ellman represented that Holding planned to develop "separate applications for the [c]annabis space," that Holding could not "compete outside of [Twister] in the twister space," and that "[a]ll contracts in [Twister] remain[ed] intact – consulting, license, etc. (this includes the $1M to Marjo)."[99]

On January 15, 2021, after a Twister Board meeting, Ellman emailed Sullivan a memorandum from Twister's corporate counsel, Robert Schwartz (the "Schwartz Memo"). The Schwartz Memo stated that the purpose of Twister's "restructuring" was to allow the members of Holding to participate in "future cannabis-related service and products" distinct from the "sale, licensing or renting of [c]annabis cone rolling equipment."[100] If Sullivan elected to move Marjo's units to Holding, Marjo's equity interest in Holding would not include the anti-dilution protection or the 90% protective provisions (which were reduced to a 67% threshold in Holding) that Marjo

[98] JX 448; JX 449; JX 452.

[99] JX 449 at 1-2; JX 452 at 1.

[100] JX 459 at 1-2, 4*; see also* JX 460; Schuster Tr. 89; PTO ¶ 105.

had under the Second LLC Agreement.[101] Marjo was the only member of Twister asked to forfeit existing contractual rights to join Holding.[102]

If Sullivan declined the exchange, the Schwartz Memo stated that the restructuring would not violate any of Sullivan or Marjo's agreements with Twister and that Holding and its other subsidiaries would not operate in the cannabis cone-rolling business.[103] It affirmed that Sullivan would "receiv[e] every penny of the economic benefits he [wa]s entitled to under the current agreements," and that "any intercompany contracts and transactions between Twister and the other affiliated entities [could not] extract economic value from Twister."[104]

On January 21, 2021, Sullivan confirmed that Marjo would not exchange its Twister equity units for Holding equity.[105]

F. Holding's Capital Raises and Product Development

Meanwhile, in February 2021, Curio asked Twister to remove the PRO Beta prototype from its facility due to dissatisfaction with the machine's performance.[106] After moving the machine to a newly leased facility in Maryland, the Founders

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[101] JX 459 at 4; Holding LLC Agreement §§ 3.01-3.03, 8.10; Second LLC Agreement §§ 3.04, 8.10; Schuster Tr. 93.

[102] JX 459 at 4; Ellman Dep. 180; Schuster Tr. 93.

[103] JX 459 at 4-5.

[104] *Id.* at 5.

[105] JX 463.

[106] PTO ¶ 102; Schuster Tr. 27; Ellman Tr. 122-23.

pursued two parallel paths. First, they worked with engineer Matthew Kelly to modify the prototype's programming and cone-loading mechanism (until abandoning those efforts in July 2021). Second, they engaged Bob Archer of MTA to design new cone-rolling machines (the "PRO2" and "PRO4") in exchange for options in Holding.[107]

To fund these efforts, the Founders began marketing a 2021 Pre-Series A Convertible Notes financing through Holding, using materials that featured Twister's name, business model, intellectual property, pending patents, and prior capital raises.[108]

In January 2021, for example, the Founders created a marketing document stating that "Accelerant Holding[] ('Accelerant') provides cannabis automation equipment at no cost to customers in exchange for a long term per unit contract" and "owns Accelerant Manufacturing [Twister], a PaaS pre-roll machine, The PRO."[109] It also asserted that the "joint machine" was "patent pending," referring to Sullivan and Marjo's licensed intellectual property.[110] In other words, the Founders began to characterize Twister as Holding's wholly owned subsidiary and to market Holding

[107] Schuster Tr. 27-28; Ellman Tr. 123-25, 133-34; JX 498; JX 556 at 13.

[108] JX 493 at 2, 12, 15, 18-19; JX 494 at 17; JX 497 at 5; JX 503 at 3, 7, 11, 18-19.

[109] JX 461 at 1; *see also* Ellman Tr. 153.

[110] JX 461 at 1.

as operating in the cone-rolling PaaS business. In reality, Holding and Twister had no legal relationship at the time.[111]

During an investor pitch in May 2021, Schuster represented that Twister was seeking to raise $1 million in convertible notes, though the actual term sheet and notes were for Holding.[112] In June, Schuster and Borom again represented during an investor webinar that Twister was seeking to raise $1 million in convertible notes to put the new cone-rolling machines in the field, even though the convertible notes would be issued by Holding.[113]

On July 9, 2021, Schuster—signing on behalf of Holding and Twister—executed an Intercompany Services Agreement, which inaccurately represented that Holding was already the majority member of Twister.[114] The agreement provided that Holding would "design, engineer, manufacture, assemble, test, repair, maintain and generally produce and supply equipment" ordered by Twister, and that Holding would invoice Twister for expenses incurred in providing services without mark-up.[115] Such services were limited to the production of equipment and did not include

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[111] *See* PTO ¶¶ 104, 110; JX 443.

[112] JX 497 at 1, 3, 5; JX 500 (June 13, 2021 email from Schuster to prospective investors attaching term sheet and purchase agreement); Schuster Dep. 136.

[113] JX 503 at 1, 3, 7, 11, 18-19; JX 500 at 1-5; Schuster Dep. 136.

[114] PTO ¶¶ 77, 107; JX 556 ("Intercompany Services Agreement") 3-7.

[115] Intercompany Services Agreement §§ 1, 3.

investor relations, fundraising, marketing, accounting, or bookkeeping.[116] The Intercompany Services Agreement was never submitted to Twister's members for a 90% vote under the Second LLC Agreement.[117]

One week later, on July 16, Schuster admitted by email to an investor that Holding allowed the Founders "to operate with less onerous restrictions insisted upon by" Sullivan in Twister.[118]

G. The July 2021 Board Meeting

Twister's Board met on July 27, 2021.[119] At the meeting, the Founders, acting in their Board member capacities, approved three resolutions. The resolutions (1) permitted the transfer of their common units—and the preferred investors' common units and warrants—in Twister to Holding, (2) changed Twister's name from Accelerant Manufacturing, LLC to Accelerant Twister, LLC, and (3) approved a Revolving Credit Agreement under which Twister would borrow funds from Holding at a 25% annual interest rate.[120] The meeting minutes, which were drafted by counsel and not circulated until months later, state that these resolutions passed

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[116] *Id.* § 1.

[117] *See* Second LLC Agreement § 8.10(i); PTO ¶ 107.

[118] JX 524 (Schuster email dated July 16, 2021).

[119] PTO ¶ 109.

[120] *Id.* ¶ 110; Schuster Tr. 107-09; Ellman Tr. 161-63; JX 528; JX 529.

"unanimously," but only the approval of the name change was unanimous.[121] Sullivan objected to both the unit transfer to Holding and the 25% Revolving Credit Agreement.[122]

As a result of the resolutions and unit exchange, Holding became the majority member of Twister (owning 83.7% of Twister's equity, with Marjo holding the remaining 16.3%).[123] The Founders served as managers of both Twister and Holding. For both entities, Borom served as lead managing member and Chairman, and Schuster served as Chief Executive Officer.[124] On July 30, 2021, Schuster executed the Revolving Credit Agreement on behalf of Twister and Holding, the borrower and the lender respectively.[125]

Holding's 2021 Pre-Series A Convertible Notes financing ultimately raised over $1.7 million, at an 8% interest rate.[126] Pursuant to the Revolving Credit

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[121] JX 528; Ellman Tr. 160-61; Sullivan Tr. 311-12.

[122] Sullivan Tr. 311-12; Sullivan Dep. 336-37; JXs 515-16; JX 522; JX 605; *see also* Ellman Dep. 228 (stating he was unable to recall whether Sullivan voted in favor). Schuster testified that the votes were unanimous. *See* Schuster Tr. 46-48, 101-02. Sullivan's testimony is credible and supported by his contemporaneous objections. Schuster's testimony, supported only by the belatedly prepared minutes (which misidentify Sullivan as "Mr. Archer" in describing his refusal to exchange his dilution-protected units), was not. JX 528 at 2.

[123] Schuster Tr. 97; Ellman Tr. 117; Kirby Tr. 187; PTO ¶ 110; JX 804 (Expert Report of David Anderson) ("Anderson Report") 12, 17.

[124] Schuster Tr. 42; JX 494 at 17; JX 529 at 3.

[125] JX 529 ("Revolving Credit Agreement") 1, 3; *see also* JX 556 at 8, 10.

[126] JX 760.

Agreement, Holding loaned a portion of the raised capital to Twister to fund operations and charged Twister 25% interest.[127] Between August 31, 2021 and December 31, 2022, Holding charged Twister interest totaling $394,094.94.[128] Holding's actual interest expense to third-party lenders for those funds was $129,417.29—a spread of $264,677.65.[129]

H. Twister's Termination of the License Agreement

In January 2022, Twister notified Marjo that the Consulting Agreement had expired by its terms on September 1, 2021.[130] Twister's counsel privately reminded the Founders that the License Agreement—including Twister's obligation to pay Marjo $1 million before December 31, 2022—remained in effect.[131] In February 2022, Borom's business partner, Michael Kirby, became the Chief Financial Officer of both Twister and Holding.[132] Holding continued to hold itself out as a company marketing, selling, and installing cone-rolling machines.[133]

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[127] Revolving Credit Agreement §§ 1-2.

[128] *See* Anderson Report 21; JX 820 (native) (Accelerant Manufacturing LLC general ledger).

[129] Anderson Report 21.

[130] PTO ¶ 118; Consulting Agreement § 4.1.

[131] JX 563 at 1; *see also* License Agreement § 5.2.

[132] Kirby Tr. 171.

[133] *Id.* at 185.

By May 2022, Holding had issued a private placement memorandum claiming that it secured the rights to the cone-rolling machines and the revenue they generated, that the technology of the machines was based on Sullivan's patent filings, and that Holding's valuation was forecast at $61.89 million.[134] Separately, on May 27, 2022, Sullivan's patent counsel filed Registration No. TXU002318563 with the U.S. Copyright Office, registering Sullivan as a copyright claimant and author of PLC's source code.[135]

In the spring of 2022, CFG Bank issued an expression of interest to Twister regarding a $6 million line of credit to finance cone-rolling machines.[136] But in June, Holding caused the $6.516 million line of credit to be issued in Holding's name, with Twister serving as guarantor and pledging its assets as collateral.[137] The Twister Board approved the CFG Bank guaranty by a 3-1 vote of the Founders, with Sullivan voting against it.[138]

Kirby then prepared an intercompany expense policy for Holding that allocated 90% of certain shared business expenses to Twister.[139] Rather than seek

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[134] JX 721 at 20, 22.

[135] PTO ¶ 122.

[136] *Id.* ¶ 111; JX 619 at 1-3.

[137] PTO ¶ 111; JX 669 at 1-2.

[138] JX 669 at 1.

[139] JX 746 (native); JX 809 at 29, 32; Kirby Tr. 180-81.

the approval of the Twister Board, Kirby unilaterally decided what expenses to allocate to each entity.[140] The expenses included rent, insurance, marketing, and salaries paid to officers of both entities, including Schuster and Ellman.[141]

On June 23, 2022, Sullivan and Marjo's counsel sent a draft complaint to the Founders and Kirby, alerting them that Sullivan and Marjo intended to sue unless they were compensated for their losses.[142] Up to that point, the Founders had intended for Twister to pay Marjo the $1 million due before December 31, 2022 under Section 5.2 of the License Agreement and had been accruing $41,666.67 per month on its books toward that obligation.[143] After receiving Sullivan and Marjo's demand, the Founders decided not to pay the $1 million and later reversed the accrual on Twister's books.[144]

On October 17, 2022, Twister sent Marjo a notice of material breach of the License Agreement.[145] The notice stated that Sullivan and Marjo had breached the agreement by filing provisional patent applications in September 2020, December 2021, and January 2022 concerning improvements to the cone-rolling design without

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[140] Kirby Tr. 173-74, 186; *see* Anderson Tr. 654-55.

[141] JX 809 at 27, 29.

[142] JX 684; PTO ¶ 124.

[143] Schuster Tr. 113; JX 452 at 1; License Agreement § 5.2; JX 733 at 1.

[144] Schuster Tr. 113; JX 733 at 1-2.

[145] JX 717 at 1-3; PTO ¶ 125.

providing advance copies to Twister.[146] On November 21, 2022, Twister sent Marjo a notice purporting to terminate the License Agreement.[147] It stated that Sullivan and Marjo had failed to cure the alleged breaches—though Marjo's counsel sent certified mail receipts showing that the September 2020 provisional applications were sent to Borom—and noted that Twister never elected to pursue them within 60 days.[148]

Holding continued to employ Twister's intellectual property related to the cone-rolling machines throughout 2022.[149] It used the capital raised through Twister's cone-rolling machine to create other products and revenue streams, such as a grinder and paper cones that were owned by Holding.[150] Holding also contracted directly with third parties to provide cannabis cone-rolling machines.[151] By the end of 2022, the Founders had marketed these efforts to potential investors and raised an additional $1,208,238 through the sale of Holding common units.[152]

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[146] JX 717 at 1-3; PTO ¶ 125.

[147] JX 727; PTO ¶ 127.

[148] JX 727; PTO ¶ 127.

[149] JX 642 at 9; JX 721 at 20; JX 732 at 13; Sullivan Tr. 320-21.

[150] JX 840; JX 721; JX 732 at 15; Borom Tr. 491-92, 523; JX 886.

[151] JX 642.

[152] JX 760 (native); see also JX 721; JX 732.

On December 15, 2022, Marjo and Sullivan formally demanded that Twister remit compensation owed under the License Agreement.[153] They wrote that Holding and Twister must cease and desist from engaging in any enterprise or business that operates or competes in either (1) the market for the sale, licensing, or renting of cannabis cone-rolling equipment or (2) the market for CBD oil extraction and harvesting equipment.[154] They also requested that Twister return to Marjo the automatic cone machines, equipment, and machinery.[155]

In response to the demand, Twister did not alter its business, pay Marjo $1 million, or return any equipment.[156]

I. Procedural History

On October 17, 2022, Twister and Holding filed a lawsuit in the United States District Court for the District of Delaware against Marjo and Sullivan for breach of contract, conversion, and breach of fiduciary duty.[157] On December 19, 2022, Marjo and Sullivan filed counterclaims against Twister, Holding, Accelerant Partners, and the Founders in that action.[158] The federal action was voluntarily dismissed in

[153] JX 902; PTO ¶ 128.

[154] JX 902.

[155] *Id.*

[156] *See* Schuster Tr. 111-13; Ellman Tr. 164; Sullivan Tr. 320-21; Borom Tr. 541.

[157] PTO ¶ 2.

[158] *Id.* ¶ 3.

August 2023.[159] The dismissal followed the federal court questioning whether it had subject matter jurisdiction.[160]

Twister and Holding filed this action against Marjo and Sullivan on August 29, 2023.[161] Marjo and Sullivan filed a separate action against Twister, Holding, Accelerant Partners, and the Founders on August 31.[162] The actions were consolidated on January 4, 2024.[163] Marjo and Sullivan's operative third amended complaint was filed in March 2026.[164]

A three-day trial was held beginning on April 6, 2026 to resolve the remaining claims, including Marjo and Sullivan's counterclaims.[165] After post-trial briefing concluded on June 19, 2026, I heard post-trial argument on July 16, 2026, and took the matter under advisement.[166]

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[159] *Id.* ¶¶ 4-5.

[160] *Id.* ¶ 4.

[161] Dkt. 1; PTO ¶ 5.

[162] PTO ¶ 6.

[163] Dkt. 26; PTO ¶ 11.

[164] Third Am. Verified Pet. (Dkt. 285); PTO ¶ 46.

[165] Dkt. 321.

[166] Pls.' Opening Post-trial Br. (Dkt. 335); Defs.' Opening Post-trial Br. (Dkt. 333); Pls.' Answering Post-trial Br. (Dkt. 343); Defs.' Answering Post-trial Br. (Dkt. 342); Dkt. 347; Post-trial Hr'g Tr. (Dkt. 350).

II. ANALYSIS

Six claims and six counterclaims proceeded to trial.[167] Twister and Holding tried claims against Marjo and Sullivan for breach of the License Agreement and the Second LLC Agreement, for conversion regarding the PLC source code, for three declaratory judgments, and for breach of fiduciary duty.[168] Sullivan and Marjo tried counterclaims against Twister, Holding, Accelerant Partners, and the Founders for breaches of the License Agreement, Consulting Agreement, and the Second LLC Agreement; for breach of fiduciary duty and aiding and abetting breaches of fiduciary duty; and for a declaratory judgment.[169] The proponents bear the burden of proving the elements of their claims by a preponderance of the evidence.[170]

My analysis proceeds in five parts. First, I address the claims and counterclaims pertaining to the License Agreement and intellectual property disputes. Second, I address the claims and counterclaims pertaining to the Second

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[167] Several claims and counterclaims were disposed of before trial. On March 4, 2024, I granted the defendants' partial motion to dismiss Counts VI (unjust enrichment) and VII (common law fraud). On February 27, 2026, I granted the counter-plaintiffs leave to file their Third Amended Verified Petition conditioned upon the withdrawal of Counterclaims I (misappropriation of trade secrets) and IV (breach of the April 2019 non-disclosure agreement) as a dismissal with prejudice. *See* PTO ¶¶ 13, 43.

[168] PTO ¶¶ 5-13, 130-39.

[169] *Id.* ¶¶ 14-21, 140-52.

[170] *See Taylor v. State*, 2000 WL 313501, at *2 n.11 (Del. Feb. 23, 2000) ("[T]o establish something by a preponderance of the evidence means to prove that something is more likely so than not so.").

LLC Agreement and structural reorganization of Twister and Holding. Third, I address the fiduciary duty and aiding and abetting disputes. Fourth, I address the parties' peripheral disputes concerning the PLC source code and Consulting Agreement. Finally, I address requests for attorneys' fees.

A. License Agreement and Intellectual Property Disputes

The parties' primary contractual disputes center on the validity, performance, and termination of the License Agreement.

Twister and Holding contend, as a threshold matter, that the License Agreement is "void ab initio" for lack of consideration or "actual fraud."[171] Alternatively, they assert that Marjo materially breached the License Agreement by misrepresenting that Sullivan had formally assigned the patent application or patent to Marjo in writing and by failing to provide Twister with advance copies of Sullivan's subsequent patent filings.[172] Based on the alleged breaches of Sections 4.1 and 4.6, Twister claims it validly terminated the License Agreement in November 2022.[173] Twister and Holding also seek declaratory judgments that Holding's

[171] Pls.' Opening Post-trial Br. 38-46; Pls.' Answering Post-trial Br. 5-13; *see also* PTO ¶ 130.

[172] Pls.' Opening Post-trial Br. 42-53; Pls.' Answering Post-trial Br. 10-19; see also PTO ¶¶ 125, 131-32.

[173] Pls.' Opening Post-trial Br. 46-50; Pls.' Answering Post-trial Br. 8-14; PTO ¶¶ 125, 127.

operations do not violate the License Agreement's non-compete covenant and that Twister's current cone-rolling machines do not use Marjo's intellectual property.[174]

Marjo and Sullivan dispute each of these contentions and assert a mirror-image claim for breach of the License Agreement against Twister. They contend that the License Agreement is a valid contract supported by consideration, that any technical missteps regarding a written assignment or advance notice of patent filings were immaterial, and that Twister wrongfully terminated the License Agreement as a pretext to avoid paying Marjo the $1 million due.[175] Marjo seeks the $1 million minimum payment plus interest, the return of all cone-rolling machines and equipment, relief for Twister's and Holding's breaches of the non-compete provision, and damages for the alleged post-termination misuse of confidential information.[176]

As explained below, the License Agreement is valid and enforceable. Although Marjo committed two technical breaches of the agreement, neither was material or caused compensable harm and Twister is entitled to nominal damages. Because Marjo did not materially breach the License Agreement, Twister's termination was wrongful and accelerated Twister's obligation to pay Marjo the $1

[174] Pls.' Opening Post-trial Br. 65-74; Pls.' Answering Post-trial Br. 71-74; PTO ¶¶ 136-37.

[175] Defs.' Opening Post-trial Br. 57-70; Defs.' Answering Post-trial Br. 6-28; PTO ¶ 140.

[176] Defs.' Opening Post-trial Br. 51-57, 71; Defs.' Answering Post-trial Br. 24-28; PTO ¶¶ 128, 147.

million minimum payment plus interest and to return the original prototype, demonstration unit, and original CAD drawings. Twister also breached the License Agreement's non-compete covenant through Holding's PaaS operations, though Marjo proved only nominal damages on that theory and failed to prove any actionable misuse of confidential information. Finally, this court lacks subject matter jurisdiction under 28 U.S.C. § 1338(a) to adjudicate whether the PRO2 and PRO4 machines infringe Sullivan's patent.

1. Whether Marjo Breached the License Agreement

Twister and Holding assert claims against Marjo and Sullivan relating to the License Agreement, to which Marjo and Twister are the contracting parties.[177] Their arguments have three facets. First, they claim that the License Agreement—along with the Dilution Protected Units issued to Marjo—is void for lack of consideration or "actual fraud."[178] Second, they claim that Marjo breached Sections 3.1, 3.2, and 6.4 of the License Agreement by misrepresenting that Sullivan had formally assigned his July 2019 Provisional Patent Application to Marjo.[179] Third, they claim

[177] PTO ¶ 130; *see also* License Agreement 1, 13 (naming Marjo as "Licensor" and Accelerant Manufacturing, LLC (Twister) as "Accelerant").

[178] Pls.' Opening Post-trial Br. 38-46; Pls.' Answering Post-trial Br. 5-13; PTO ¶¶ 130, 153.

[179] Pls.' Opening Post-trial Br. 42-45; Pls.' Answering Post-trial Br. 2, 5; PTO ¶ 131; *see also* License Agreement § 1.5 (defining "Patent Application/Patent" to include the Provisional Patent Application, its continuations, and "any patent issuing therefrom").

that Marjo breached Sections 4.1 and 4.6 of the License Agreement by failing to give Twister advance copies of Sullivan's subsequent provisional patent filings.[180]

a. Whether the License Agreement Is Enforceable

Twister and Holding first contend that Twister's License Agreement with Marjo is void for lack of consideration.[181] Under Delaware law, "a valid contract exists when (1) the parties intended that the contract would bind them, (2) the terms of the contract are sufficiently definite, and (3) the parties exchange legal consideration."[182] Consideration is something a party gives, promises, or agrees to refrain from doing in return for the other party's promise.[183] Delaware courts limit their inquiry to whether consideration existed at the time of contract formation, not whether it was fair or adequate.[184] The failure to meet a party's commercial expectations does not establish that an agreement lacked consideration.[185]

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[180] Pls.' Opening Post-trial Br. 46-53; Pls.' Answering Post-trial Br. 8-13; PTO ¶¶ 125, 132.

[181] Pls.' Opening Post-trial Br. 41, 45; Pls.' Answering Post-trial Br. 2-3, 5-13.

[182] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

[183] *First Mortg. Co. of Pa. v. Fed. Leasing Corp.*, 456 A.2d 794, 795-96 (Del. 1982) ("[C]onsideration for a contract can consist of either a benefit to the promiser or a detriment to the promisee.").

[184] *See Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 764 (Del. 2022) ("[W]e limit our inquiry into consideration to its existence and not whether it is fair or adequate." (quoting *Osborn*, 991 A.2d at 1159)); *see also James v. Nat'l Fin., LLC*, 132 A.3d 799, 813 (Del. Ch. 2016) ("[T]he adequacy or fairness of the consideration that adduces a promise or a transfer is not alone grounds for a court to refuse to enforce a promise or to give effect to a transfer." (quoting *Ryan v. Weiner*, 610 A.2d 1377, 1380-81 (Del. Ch. 1992))).

[185] *See N. Am. Fire Ultimate Hldgs., LP v. Doorly*, 2026 WL 274647, at *3 n.15 (Del. Feb. 3, 2026) ("It does not aid the purchaser to show that the stock did not fulfill his or her

Relying on corporate case law applying 8 *Del. C.* § 152, Twister and Holding argue that issuing Marjo's 15% non-dilutable equity in exchange for Sullivan's representations about his cone-rolling design, expertise, and know-how constituted "actual fraud" because the design was "illusory" and failed to perform as expected.[186] Even assuming that corporate doctrine applies to a Delaware limited liability company, the argument fails on the merits.[187]

This is not a situation where equity was issued for phantom consideration. Twister bargained for and received an exclusive license to Sullivan's cone-rolling designs and know-how and used that intellectual property to build the prototype and PRO machines. Twister and Holding touted Sullivan's provisional patent filings in their private placement memoranda to raise millions of dollars from outside investors.[188] At trial, Twister and Holding tried to minimize the value of Sullivan's

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expectations, or was not as valuable as the purchaser thought . . . ." (quoting 17 Williston on Contracts § 51:18 (4th ed.))).

[186] Pls.' Opening Post-trial Br. 45-46 (citing *Diamond State Brewery, Inc. v. De La Rigaudiere*, 17 A.2d 313, 317-18 (Del. Ch. 1941)); PTO ¶¶ 130, 153.

[187] In making this assumption for the sake of analysis, I do not hold that the doctrine applies in the alternative entity context. It also bears noting that Twister and Holding's common law fraud claims were dismissed with prejudice before trial as non-viable. *See* Order Granting Defs.' Mot. to Dismiss Counts VI and VII of the Complaint (Dkt. 38); PTO ¶ 13; JX 757 (Mar. 4, 2024 Hr'g Tr.) 45-48.

[188] PTO ¶¶ 75, 95, 111; License Agreement art. II; JX 210 at 57, 72, 74; JX 289; JX 638; Schuster Tr. 57, 73; Ellman Tr. 169; Sullivan Tr. 320-21; Borom Tr. 476; *see also* Post-trial Hr'g Tr. 15-16.

contributions.[189] But their technical expert acknowledged that the prototype was based on Sullivan's designs, that the PRO machine was partially based on them, and that both machines partially assisted in developing the PRO2 and PRO4.[190]

Nor can Twister and Holding claim the absence of consideration simply because commercializing the prototype was more difficult and costly than the Founders originally hoped. "[C]onsideration is measured at the time of formation and is not reevaluated at the time of enforcement."[191] When Twister entered into the License Agreement, the Founders knew they were licensing early-stage, provisional designs. The PLC Contract, for example, warned that "this is a prototype machine and some things may not work as designed and may need to be modified or redesigned."[192] Twister's January 2020 private placement memorandum likewise disclosed the risk that the machine's parts or design might be "improperly built and the output of the device [might] not meet the Company's expectations resulting in potential losses or additional capital requirements."[193]

Twister and Holding also assert that the License Agreement lacked consideration because Sullivan never formally assigned the technology rights for his

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[189] *See* Ellman Tr. 123-24; Pls.' Opening Post-trial Br. 57, 68, 74.

[190] Babinsky Tr. 636-37; *see also* Hess Tr. 582, 584-86.

[191] *Doorly*, 2026 WL 274647, at *3.

[192] PLC Contract 7; *see also* PTO ¶ 89; Ellman Tr. 142; Borom Tr. 504; Hess Tr. 580-81.

[193] JX 210 at 62; *see also* Schuster Tr. 60; Second LLC Agreement § 4.02(d)-(g).

designs to Marjo in writing.[194] Under 35 U.S.C. § 261, patents and patent applications "shall be assignable in law by an instrument in writing."[195] According to Twister and Holding, Sullivan's failure to execute a written assignment left Marjo without legal title to the patent application when it entered the License Agreement, resulting in a failure of consideration.[196]

This argument conflates record legal title under federal patent law with equitable ownership and the practical reality of the parties' transaction.[197] Sullivan—who owned Marjo with his spouse and served as its sole managing member—testified that he agreed to assign his patent rights to the entity and authorized it to license his patent designs to Twister.[198] Sullivan orchestrated and signed the License Agreement on Marjo's behalf.[199] Twister exclusively used Sullivan's designs to build its machines and raise capital, and none of Sullivan,

[194] Pls.' Opening Post-trial Br. 41-42, 45; Sullivan Tr. 340-41, 356-57.

[195] 35 U.S.C. § 261.

[196] Pls.' Opening Post-trial Br. 41-45; Pls.' Answering Post-trial Br. 2-3.

[197] *See Arachnid, Inc. v. Merit Indus., Inc.*, 939 F.2d 1574, 1580-81 (Fed. Cir. 1991) (distinguishing an agreement to assign from "a present assignment of an existing invention, effective to transfer all legal and equitable rights therein").

[198] Sullivan Tr. 340-41; PTO ¶¶ 53-54.

[199] Sullivan Tr. 381.

Marjo, or any third party ever asserted an adverse claim that interfered with Twister's use.[200]

The cases on which Twister and Holding rely are inapposite because the licensees in those cases were deprived of the rights they bargained for.[201] In *Aqua Flame, Inc. v. Imperial Fountains, Inc.*, the inventor had previously assigned his entire interest in the patent to a third-party bank as security for a loan and never reacquired it, leaving neither the inventor nor the corporate licensor with any interest to convey.[202] And in *Kent Jewelry Corp. v. Kiefer*, the inventor's assignment of patent rights to his brother—the licensor—was void under Allied military law governing occupied Germany, meaning the licensee never acquired valid rights to the invention.[203] Here, by contrast, Twister received the full benefit of its bargain: the exclusive use of Sullivan's cone-rolling designs and know-how, as well as a right of first refusal over new patentable inventions under Section 4.6.[204]

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[200] *Id.* at 340-41; Borom Tr. 532-33; Hess Tr. 582, 584.

[201] Pls.' Opening Post-trial Br. 44-45 (citing *Aqua Flame, Inc. v. Imperial Fountains, Inc.*, 463 F. Supp. 736 (N.D. Tex. 1979); *Kent Jewelry Corp. v. Kiefer*, 119 N.Y.S.2d 242 (Sup. Ct. N.Y. Cnty. 1952)).

[202] *Aqua Flame*, 463 F. Supp. at 738; *see* Pls.' Opening Post-trial Br. 44-45.

[203] *Kent Jewelry*, 119 N.Y.S.2d at 251.

[204] License Agreement art. II, §§ 1.2, 4.6.

The License Agreement conferred on Twister valuable rights and promises. It was supported by consideration and is a valid, enforceable contract.[205]

b. IP Ownership and Assignment Breaches

Twister and Holding alternatively argue that even if a valid contract was formed, Twister could rescind or terminate the License Agreement because Marjo materially breached it in two respects.[206] "[A]lthough a material breach excuses performance of a contract, a nonmaterial—or de minimis—breach will not allow the non-breaching party to avoid its obligations under the contract."[207] A breach is material if it "defeats the essential purpose of the contract or makes it impossible for the other party to perform."[208]

Although Marjo committed two technical breaches of the License Agreement, neither was material or caused Twister any compensable harm.

The first alleged breach concerns Marjo's contractual representations regarding IP ownership and assignment.[209] Under Sections 3.1, 3.2, and 6.4 of the License Agreement, Marjo represented and warranted that Sullivan "ha[d] properly

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[205] *See First Mortg.*, 456 A.2d at 795-96.

[206] PTO ¶¶ 154, 177; Pls.' Opening Post-trial Br. 46, 50.

[207] *DeMarie v. Neff*, 2005 WL 89403, at *4 (Del. Ch. Jan. 12, 2005).

[208] *eCommerce Indus., Inc. v. MWA Intel., Inc.*, 2013 WL 5621678, at *13 (Del. Ch. Sept. 30, 2013).

[209] License Agreement §§ 3.1-3.2, 6.4; PTO ¶ 131.

assigned all Inventor's rights in the Patent Application/Patent to Licensor," that Marjo was the "sole owner of all right, title and interest" in the Patent Application/Patent, that it had "full power and authority" to grant the license, and that these statements were accurate in all material respects as of the agreement's February 2, 2020 effective date.[210] The assignment representation in Section 3.1 was technically inaccurate—and thus breached—because Sullivan had not executed a formal written assignment to Marjo before February 2, 2020.[211]

Despite Sullivan's failure to execute a written assignment to Marjo, the breach was immaterial.[212] For largely the same reasons that the lack of a written assignment did not deprive the License Agreement of consideration, it did not deprive Twister of the core benefit of its bargain.[213] Sullivan was the sole managing member of Marjo, executed the License Agreement on Marjo's behalf, and intended to convey the rights to Twister. Twister received the benefit of its bargained-for exclusive license.[214]

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[210] PTO ¶ 131; License Agreement §§ 3.1-3.2, 6.4; Pls.' Opening Post-trial Br. 17, 41.

[211] PTO ¶ 73; Sullivan Tr. 341, 356-57; Urcia Tr. 555.

[212] *See eCommerce Indus.*, 2013 WL 5621678, at *13.

[213] *See supra* Section II.A.1.a; Sullivan Tr. 340-41; Borom Tr. 532-33; Hess Tr. 582, 584.

[214] PTO ¶¶ 53-54, 95; Sullivan Tr. 340, 366.

The record shows that Sullivan never assigned or licensed his rights to anyone else.[215] Neither Sullivan nor Marjo prevented Twister from using the designs, and no adverse third-party claim was advanced.[216] Even Borom—who negotiated the License Agreement on Twister's behalf—knew that Sullivan was listed as the inventor and applicant on the USPTO filings, but did not ask Sullivan to produce a written assignment before Twister entered the agreement.[217] The lack of a formal written assignment between Sullivan and Marjo did not constitute a material breach and does not support rescission or termination of the License Agreement.[218]

Twister and Holding have also not shown that Sullivan's failure to execute a written assignment to Marjo caused any damages.[219] Twister was not prevented from exercising its exclusive rights under the License Agreement.[220] Regardless, any "unexcused failure to perform a contract is a legal wrong," and "[a]n action will

[215] PTO ¶ 53; Sullivan Tr. 340-41, 358-59; Urcia Tr. 555.

[216] Sullivan Tr. 340-41, 358-59; Borom Tr. 532-33; Urcia Tr. 554-55.

[217] JX 284; Sullivan Tr. 359; Borom Tr. 502, 532; Wechsler Tr. 560.

[218] Borom Tr. 532-33; Hess Tr. 582, 584; Babinsky Tr. 636-37.

[219] Sullivan Tr. 340-41; Borom Tr. 532-33; *see* Post-trial Hr'g Tr. 12; Defs.' Answering Post-trial Br. 21.

[220] Sullivan Tr. 340-41; Borom Tr. 532-33; *see* Post-trial Hr'g Tr. 12; Defs.' Answering Post-trial Br. 21.

therefore lie for the breach although it causes no injury."[221] Twister is entitled to nominal damages.[222]

c. Advance Notice of Patent Filings

Twister and Holding challenge Marjo's failure to provide advance notice of the provisional and continuation-in-part patent filings submitted in September 2020, December 2021, and January 2022.[223] Under Section 4.1 of the License Agreement, each party was required to "provide the other Party with copies of all filings and relevant documentation and an opportunity to comment thereon prior to their submission."[224] Sullivan supplied the September 2020 applications to Twister on the day he mailed them to the USPTO, and patent counsel's office (in error) sent the January 2022 applications to Borom on the day they were filed.[225] By failing to provide copies before submission, Marjo breached Section 4.1.[226]

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[221] *Cygnus Opportunity Fund, LLC v. Wash. Prime Grp., LLC*, 302 A.3d 430, 454 (Del. Ch. 2023) (quoting 24 Williston on Contracts § 64:9 (4th ed. 2007)).

[222] *See Ivize of Milwaukee, LLC v. Compex Litig. Support, LLC*, 2009 WL 1111179, at *12 (Del. Ch. Apr. 27, 2009) ("Even if compensatory damages cannot be or have not been demonstrated, the breach of a contractual obligation often warrants an award of nominal damages.").

[223] PTO ¶¶ 125, 132; Pls.' Opening Post-trial Br. 47-48.

[224] License Agreement § 4.1.

[225] Sullivan Tr. 345, 383-84, 390-91; JX 380; JX 578.

[226] License Agreement § 4.1; Sullivan Tr. 345, 383-84, 390-91.

That breach was immaterial.[227] Although Section 4.1 of the License Agreement required Marjo to give Twister advance copies of patent filings and an opportunity to comment, the License Agreement did not require Marjo to adopt Twister's comments or obtain Twister's consent before filing patent-related documents.[228] To the contrary, Section 4.1 provides only that "*Accelerant* shall not submit any filings or other relevant documentation with the USPTO without *Licensor's* prior written consent."[229] Section 4.1 even permitted Marjo, if dissatisfied with Twister's approach, to assume control of patent prosecution upon written notice.[230]

Given that Twister held no veto power over the content of Marjo's USPTO submissions, Marjo's failure to provide advance copies did not defeat the fundamental purpose of the License Agreement.[231] Twister and Holding insist that advance review would have allowed Borom to flag his contribution of the "icicle" component, which he testified was included in Sullivan's 2021 filing.[232] But Borom

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[227] *See BioLife Sols., Inc. v. Endocare, Inc.*, 838 A.2d 268, 278, 281-82 (Del. Ch. 2003) (holding that "the failure to timely deliver patent files was not a material breach of the Agreement").

[228] License Agreement § 4.1.

[229] *Id.* (emphasis added).

[230] *Id.*

[231] *Id.*; *BioLife Sols.*, 838 A.2d at 278, 281-82.

[232] Pls.' Answering Post-trial Br. 10-11; Borom Tr. 482-83.

received the September 2020 filings the day Sullivan mailed them, forwarded them to Twister's corporate counsel in December 2020 "seeking some legal guidance," and raised no concerns.[233] Instead, Twister continued to accept the benefits of the License Agreement for more than two years before sending a notice of breach on October 17, 2022.[234]

Twister and Holding also failed to prove any cognizable damages resulting from Marjo's untimely notifications.[235] As noted, Twister had no contractual right to compel Sullivan to alter the patent filings.[236] And, at trial, Borom was unable to identify any financial harm that the September 2020 or January 2022 filings caused Twister.[237] Having proven technical breaches of the assignment and advance-notice provisions, but no resulting compensable loss, Twister is entitled to nominal damages of $1 for this breach.[238]

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[233] PTO ¶ 125; JX 380; JX 439; JX 517 at 9; Schuster Tr. 71-72; Sullivan Tr. 345; Borom Tr. 482-83, 538-39.

[234] PTO ¶¶ 101, 124-25; JX 380; Sullivan Tr. 345; Schuster Tr. 111-12; Ellman Tr. 143, 164; Babinsky Tr. 636.

[235] Borom Tr. 540; *see* Pls.' Answering Post-trial Br. 11 (arguing that damages from the breach "would be difficult to quantify").

[236] License Agreement § 4.1.

[237] Borom Tr. 540; *see* Pls.' Answering Post-trial Br. 11 (arguing that damages from the breach "would be difficult to quantify").

[238] PTO ¶¶ 131-32; *see Ivize*, 2009 WL 1111179, at *12.

2. Marjo's Claims Under the License Agreement

I turn next to Marjo's counterclaims alleging that Twister breached the License Agreement by (1) improperly terminating the contract, (2) withholding the required $1 million minimum payment, (3) refusing to return cone-rolling machinery and equipment, (4) violating restrictive covenants, and (5) continuing to use Marjo's confidential information post-termination.[239] Twister and Holding's competing request for a declaratory judgment regarding the non-compete covenant overlaps with Marjo's claims and is addressed alongside them.[240]

a. Wrongful Termination

Twister relies on Marjo's asserted breaches of Sections 4.1 and 4.6 to justify terminating the License Agreement for cause on November 21, 2022.[241] Section 6.11(b) permits termination for cause only if the other party "breaches any material term or condition of this Agreement and fails to cure such breach within thirty (30) days following receipt of written notice from the other Party."[242] As established above, Marjo's failure to provide advance copies of its USPTO filings (and the lack of a formal written assignment under Section 3.1) was an immaterial breach that caused Twister no prejudice and did not deprive Twister of the benefit of its

[239] PTO ¶¶ 140, 147; Defs.' Opening Post-trial Br. 51, 64-74.

[240] *See* PTO ¶¶ 136-37.

[241] *Id.* ¶¶ 125, 127; Pls.' Opening Post-trial Br. 46-47.

[242] License Agreement § 6.11(b).

bargain.[243] Twister therefore lacked grounds to terminate the License Agreement under Section 6.11(b).[244]

Twister's continued performance for years after receiving the September 2020 filings further forecloses its asserted right to terminate.[245] A "nonbreaching party may not, on the one hand, preserve or accept the benefits of a contract, while on the other hand, assert that contract is void and unenforceable."[246] Twister received copies of the September 2020 filings the day Sullivan mailed them to the USPTO.[247] And Borom already knew when Twister entered into the License Agreement in February 2020 that Sullivan, rather than Marjo, was listed as the inventor and applicant on the patent filings.[248] Yet Twister kept performing under the License Agreement and accepting its benefits—building machines from Sullivan's designs, raising capital, and accruing the $1 million payment it owed Marjo.[249]

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[243] *See supra* Sections II.A.1.b-c; *DeMarie*, 2005 WL 89403, at *4.

[244] License Agreement § 6.11(b); *see* Borom Tr. 540.

[245] Schuster Tr. 111-13; Sullivan Tr. 345; *DeMarie*, 2005 WL 89403, at *5.

[246] *DeMarie*, 2005 WL 89403, at *5; *see also Post Hldgs., Inc. v. NPE Seller Rep LLC*, 2018 WL 5429833, at *5 (Del. Ch. Oct. 29, 2018) ("[A] party may not refuse to perform its contractual obligations after a material breach while simultaneously retaining the benefits of a contract.").

[247] Sullivan Tr. 345; JX 380; JX 727 at 3-7.

[248] Borom Tr. 502, 532-33.

[249] PTO ¶¶ 75, 111, 124, 127; License Agreement §§ 5.2, 6.11(d); JX 289; JX 638; JX 563; JX 728; JX 733; Schuster Tr. 57, 73, 111, 113; Ellman Tr. 164, 169; Borom Tr. 476, 523-33; Hess Tr. 582, 584; Babinsky Tr. 636-37; *see VMware, Inc. v. Wood*, 2023 WL 3477871, at *9 (Del. Ch. May 16, 2023) (holding that "[h]aving accepted the benefits of the

Only after Sullivan threatened litigation in June 2022—with the December 31, 2022 deadline for the $1 million payment approaching—did Twister send a notice of breach on October 17, 2022.[250] Twister's proffered reasons for terminating the License Agreement "for cause" were pretextual.[251] Schuster admitted at trial that only after Sullivan "became contentious and threatened litigation" in June 2022 did the Founders hire counsel to "review if Mr. Sullivan actually delivered on his license or violated it in some kind."[252] Twister's accounting records likewise reflect that, "[p]er instructions received on 10/9/2022," "all legal expenses [were] applied against th[e] John S. Accrual"—more than a week before Twister sent its October 17 notice of breach and purported 30-day opportunity to cure.[253]

Twister and Holding alternatively argue that the missing written assignment rendered the License Agreement voidable for misrepresentation.[254] That theory requires a material or fraudulent misrepresentation that induced reasonable

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[contract]," the defendant could not "now claim it is unenforceable due to a lack of consideration").

[250] PTO ¶¶ 101, 124-25; JX 380; Sullivan Tr. 345; Schuster Tr. 111-12; Ellman Tr. 143, 164; Babinsky Tr. 636.

[251] PTO ¶¶ 124-25, 127; Schuster Tr. 111-12; JX 733; *see* Defs.' Opening Post-trial Br. 67 n.261.

[252] PTO ¶ 124; Schuster Tr. 111-12.

[253] PTO ¶¶ 125, 127; JX 733 at 1; Defs.' Opening Post-trial Br. 67 n.261.

[254] Pls.' Opening Post-trial Br. 46 (citing *Martin v. Med-Dev Corp.*, 2015 WL 6472597 (Del. Ch. Oct. 27, 2015)).

reliance.[255] As explained above, however, the representation was not material to the transaction, and Borom knew Sullivan was the named inventor and applicant.[256] There is no evidence that the missing written assignment induced Twister to enter the agreement or deprived it of the licensed technology.[257]

Finally, Twister and Holding argue that even if Twister terminated the License Agreement, the acceleration and equipment-return provisions in Section 6.11(d) apply only when Marjo terminates the License Agreement for non-payment, not when Twister terminates.[258] That reading is foreclosed by the plain text of the contract. Under Delaware law, courts read a contract as a whole and give "each provision and term effect, so as not to render any part of the contract mere surplusage."[259] Section 6.11(d) provides that "if this Agreement terminates for failure to pay the fees set forth in Article V . . . , *or for any other reason*, then upon the effective date of termination of this Agreement . . . any and all payment

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[255] *Martin*, 2015 WL 6472597, at *12 ("For a transaction to be voidable, a plaintiff must show: '(1) that there was a misrepresentation; (2) that the misrepresentation was either fraudulent or material; (3) that the misrepresentation induced the recipient to enter into the contract; and (4) that the recipient's reliance on the misrepresentation was reasonable.'" (quoting *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361-62 (Del. Super. 1990))).

[256] Borom Tr. 502, 532-33.

[257] Sullivan Tr. 340-41; Borom Tr. 532-33; *Martin*, 2015 WL 6472597, at *12.

[258] Pls.' Opening Post-trial Br. 56; Pls.' Answering Post-trial Br. 14-15.

[259] *Osborn*, 991 A.2d at 1159 ("We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage." (quoting *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010))).

obligations of Accelerant will immediately become due and payable" and "the provisions of Section 6.11(f)" relating to the delivery of equipment "shall also apply."[260] Limiting Section 6.11(d) to terminations by Marjo for non-payment would render the unqualified phrase "or for any other reason" superfluous.[261]

Because Section 6.11(d) is unambiguous, Twister and Holding's reliance on December 2019 negotiation drafts and emails is unavailing.[262] "If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity."[263] Twister's wrongful termination of the License Agreement on November 21, 2022 therefore imposed the post-termination consequences of Section 6.11(d).

b. Minimum Payment and Interest

By wrongfully terminating the License Agreement on November 21, 2022, Twister triggered Section 6.11(d) and accelerated its obligation to pay Marjo the $1 million minimum payment under Section 5.2.[264] Section 5.2 required Twister to "make aggregate payments to [Marjo] of at least $1,000,000 . . . before December 31, 2022"—an obligation that Twister accrued on its books and that its managers

[260] License Agreement § 6.11(d); *see id.* § 6.11(f).

[261] *Id.* § 6.11(d); *Osborn*, 991 A.2d at 1159.

[262] *See* Pls.' Answering Post-trial Br. 16-17; License Agreement § 6.5 (integration clause).

[263] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

[264] PTO ¶ 127; License Agreement §§ 5.2, 6.11(d); JX 728.

intended to pay until Sullivan threatened litigation in June 2022.[265] Marjo is entitled to judgment in the principal amount of $1 million.

Section 6.11(d) also provides for interest "at the rate of 18% per annum on the balance due," which attaches "following written notice by Licensor of late payment and failure to cure within 15 days of the notice."[266] On December 15, 2022, Marjo and Sullivan, through counsel, demanded in writing that Twister pay the compensation due under the License Agreement.[267] Twister failed to cure within 15 days or before the December 31, 2022 payment deadline.[268] Marjo seeks interest from January 1, 2023, and I award it from that date.[269]

Section 6.11(d) specifies a fixed contractual rate of "18% per annum" without providing for compounding; simple prejudgment interest best effectuates the parties' agreement.[270] At 18% per annum on the $1 million principal balance, simple interest accrues at $180,000 per year, or $493.15 per day from January 1, 2023 through the

[265] PTO ¶¶ 124, 127; License Agreement §§ 5.2, 6.11(d); JX 563 at 1; JX 728; JX 733 at 1; Schuster Tr. 111, 113; Ellman Tr. 164.

[266] License Agreement § 6.11(d); Defs.' Opening Post-trial Br. 53.

[267] PTO ¶ 128; JX 902; Defs.' Opening Post-trial Br. 56-57.

[268] PTO ¶ 154; Schuster Tr. 112; Defs.' Opening Post-trial Br. 57.

[269] Defs.' Opening Post-trial Br. 54, 71 n.271.

[270] License Agreement § 6.11(d); *see also Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 817 A.2d 160, 173 (Del. 2002) (recognizing discretion to award simple or compound interest).

date of judgment.[271] The implementing order must state the total accrued prejudgment interest and provide for post-judgment interest at the contractual rate on the full judgment until satisfied.[272]

c. Return of Equipment and Machinery

Marjo next seeks an order under Section 6.11(f) of the License Agreement compelling Twister to surrender all cone-rolling machines in its possession.[273] Under Section 6.11(d), if the License Agreement is terminated "for any other reason," the post-termination obligations set forth in Section 6.11(f) apply.[274] Section 6.11(f), in turn, requires Twister to return to Marjo "all automatic cone machines, equipment or machinery (including without limitation any tooling, fixtures, software or drawings) created by Licensor or Accelerant . . . and provided to Accelerant (including the demonstration unit estimated to be delivered in early

[271] License Agreement § 6.11(d). $1,000,000 x 18% = $180,000 per year; $180,000 ÷ 365 = $493.1506849 per day.

[272] *See NGL Energy P'rs LP v. LCT Cap., LLC*, 319 A.3d 335, 345 (Del. 2024); 6 *Del. C.* § 2301(a).

[273] PTO ¶ 195; Defs.' Opening Post-trial Br. 71.

[274] License Agreement § 6.11(d).

2020)" that were "built using the Patent-Related Technology."[275] Given that Twister terminated the License Agreement, Section 6.11(f) was implicated.[276]

i. *Beta Prototypes and CAD Drawings*

The first-phase machine that became the PRO Beta unit delivered to Curio was "essentially [Sullivan]'s design," and Twister and Holding's technical expert agreed that the beta prototype was based on Sullivan's designs.[277] Twister and Holding contend that the PRO "no longer exists in any form such that it could be returned" because Twister later "wrote off" the machines.[278] But an accounting write-off does not establish that the physical equipment, components, or drawings were destroyed.[279] Twister must return to Marjo the original prototype built by PLC, the demonstration unit identified in Section 6.11(f), and the original CAD drawings "created by Licensor or Accelerant . . . and provided to Accelerant" to the extent

[275] *Id.* § 6.11(f); *see id.* § 1.6 (defining "Patent-Related Technology" as "all technology covered or claimed by the provisional or formal Patent Application/Patent, including without limitation its related Know-How and Trade Secrets").

[276] PTO ¶ 127; License Agreement §§ 6.11(d), (f).

[277] PTO ¶¶ 89, 101; Ellman Tr. 115, 120, 123; Borom Tr. 465; Hess Tr. 582; Babinsky Tr. 636.

[278] Pls.' Opening Post-trial Br. 57; *see* Schuster Tr. 38-39.

[279] *See* Schuster Tr. 38-39.

those items or their components remain in Twister's or Holding's possession, custody, or control.[280]

ii. *PRO2 and PRO4*

Marjo also asks that I order the return of Twister's newer PRO2 and PRO4 models under Section 6.11(f).[281] It asserts that Section 6.11(f) requires Twister to return all cone-rolling equipment, regardless of whether that equipment uses Patent-Related Technology.[282] But read in context with the opening clause of Section 6.11(f), the operative question is whether the machines were built using the Patent Application/Patent or the Patent-Related Technology that Marjo licensed to Twister.[283] Since I previously dismissed Sullivan and Marjo's trade-secret and non-disclosure agreement counterclaims—and, at trial, they identified no confidential know-how that Twister used[284]—the only remaining question is whether the PRO2 and PRO4 use technology covered by Sullivan's '627 Patent.[285]

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[280] License Agreement § 6.11(f); *see also* PTO ¶¶ 89, 101-02, 127; JX 728; Ellman Tr. 115, 123, 143; Borom Tr. 465, 505; Hess Tr. 582.

[281] Defs.' Opening Post-trial Br. 71; PTO ¶ 155(b).

[282] Defs.' Answering Post-trial Br. 27-28.

[283] License Agreement art. II, §§ 1.4-1.6, 6.11(f); *see* Pls.' Opening Post-trial Br. 57.

[284] *See infra* Section II.A.2.e.

[285] PTO ¶ 43; Sullivan Tr. 436.

Under 28 U.S.C. § 1338(a), this court lacks subject matter jurisdiction to decide that question.[286] As the United States Supreme Court explained in *Gunn v. Minton*, a state-law claim "arises under" federal patent law when a federal patent issue is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress."[287] All four requirements are met here.

First, the patent issue is necessarily raised and actually disputed.[288] I cannot determine whether Twister must return the PRO2 and PRO4 to Marjo under Section 6.11(f) without conducting a claim construction and infringement analysis of the '627 Patent.[289] And the parties dispute whether the PRO2 and PRO4 exploit the patented technology.[290]

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[286] *See* 28 U.S.C. § 1338(a) ("No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents . . . ."); *Gunn v. Minton*, 568 U.S. 251, 257 (2013) (explaining that, for claims arising under federal patent law, "Congress has not only provided for federal jurisdiction but also eliminated state jurisdiction").

[287] 568 U.S. at 258.

[288] *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 809-10 (1988) (explaining that a patent issue is "necessarily raised" when "patent law is a necessary element of one of the well-pleaded claims"); *see also* PTO ¶ 155(b); Pls.' Opening Post-trial Br. 57; *Gunn*, 568 U.S. at 259.

[289] License Agreement §§ 1.6, 6.11(f); *see* PTO ¶ 155(b); Pls.' Opening Post-trial Br. 57; *see Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) (explaining that an infringement analysis first construes the asserted claims and then compares them to the accused device), *aff'd*, 517 U.S. 370 (1996); 28 U.S.C. § 1338(a); *see also Gunn*, 568 U.S. at 258.

[290] JX 916 ¶¶ 1, 24, 27; Sullivan Tr. 337-38, 418, 420; Pls.' Opening Post-trial Br. 57. Sullivan and Marjo told the federal court that they "do not contend the '627 Patent is

Second, the issue is substantial and belongs in federal court.[291] Unlike a purely "backward-looking" and "hypothetical" inquiry, adjudicating whether Twister's ongoing commercial machines practice the '627 Patent requires an infringement determination that carries a risk of inconsistent judgments.[292] The parties' own conduct confirms that federal court is the proper forum.[293] On January 16, 2026, Twister and Holding filed an action in the United States District Court for the District of Delaware seeking a declaratory judgment that the PRO2 and PRO4 do not infringe the '627 Patent.[294]

Accordingly, Marjo's request for an order compelling the return of the PRO2 and PRO4 machines—along with Twister and Holding's parallel claim seeking a declaratory judgment that Twister's current cone-rolling machines do not use

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infringed." Pls.' Answering Post-trial Br. Ex. D ¶ 3. But they continue to seek return of the PRO2 and PRO4 in this action. Defs.' Answering Post-trial Br. 27-28.

[291] *See Jang v. Bos. Sci. Corp.*, 767 F.3d 1334, 1337-38 (Fed. Cir. 2014) (holding that the resolution of a contract-based claim implicated substantial patent issues where it required resolving questions of infringement under ongoing royalty obligations); *Warsaw Orthopedic, Inc. v. Sasso*, 977 F.3d 1224, 1229 (Fed. Cir. 2020) (concluding that "the federal-state judicial balance would not be disrupted by the district court's exercise of declaratory jurisdiction," but affirming its abstention in favor of a parallel state-court contract action).

[292] *Jang*, 767 F.3d at 1337-38.

[293] Pls.' Answering Post-trial Br. 72 & Ex. D ¶¶ 3, 5.

[294] JX 916 ¶¶ 1, 18, 27-28; Defs.' Opening Post-trial Br. 84; Pls.' Answering Post-trial Br. 72 & Ex. D ¶ 3.

Marjo's patented technology[295]—is dismissed without prejudice for lack of subject matter jurisdiction.[296]

d. The Non-Compete Covenant

Marjo next claims that Twister breached Section 4.9 of the License Agreement because Holding commercialized cone-rolling machinery under a PaaS model during the restricted period.[297] In Section 4.9, Twister agreed, on behalf of itself and its "officers, directors, managers, founders, agents, etc. and any affiliated entities," that during the term of the License Agreement "and for three (3) years thereafter," none of them would "be engaged with any enterprise or business that operates or competes in either (a) the market for the sale, licensing or renting of Cannabis cone rolling equipment" other than through Twister or a wholly owned subsidiary of

[295] Twister and Holding also sought a declaration that their current machines do not use Marjo's or Sullivan's "trade secrets" or "know-how." PTO ¶ 137; Pls.' Opening Post-trial Br. 68-69. Having dismissed Sullivan and Marjo's trade-secret and non-disclosure agreement counterclaims with prejudice (*infra* notes 320-321), and rejecting Marjo's Section 4.11 claim below (*infra* Section II.A.2.e), no live controversy remains as to trade secrets or know-how. *See Gannett Co. v. Bd. of Managers of the Del. Crim. Just. Info. Sys.*, 840 A.2d 1232, 1237 (Del. 2003) ("In order for a court to exercise declaratory judgment jurisdiction, there must be an 'actual controversy.'"). I decline to issue a separate declaration on those subjects. *See infra* Section II.A.2.e.

[296] *See* 28 U.S.C. § 1338(a).

[297] PTO ¶ 147; Defs.' Opening Post-trial Br. 55-56.

Twister.[298] Because Twister terminated the License Agreement on November 21, 2022, the restricted period ran through November 21, 2025.[299]

Holding is an affiliated entity of Twister, and it engaged in the cone-rolling equipment market during this restricted period.[300] Under the PaaS model, the company placed a cone-rolling machine with a customer at no up-front cost and collected a fee for each unit the machine produced.[301] Borom likened this arrangement to acting "kind of like a landlord" under three-year contracts.[302] Holding's investor materials state that Holding "provides cannabis automation equipment at no cost to customers in exchange for a long term per unit contract."[303] They likewise explain that "[t]he technology of this machine and process has been registered with the [USPTO]."[304] At trial, Schuster agreed that Holding contracts directly with customers for cone-rolling machine subscriptions and collects their

[298] License Agreement § 4.9; Defs.' Opening Post-trial Br. 55.

[299] PTO ¶¶ 127, 158; JX 728.

[300] PTO ¶¶ 52, 108; JX 916 ¶ 3; Borom Tr. 522.

[301] JX 461; Borom Tr. 446.

[302] Borom Tr. 447-48.

[303] JX 461; Ellman Tr. 153; Borom Tr. 521-22.

[304] JX 638 at 21; Sullivan Tr. 320-21; *see also* JX 461 at 1 ("Our joint machine is Patent Pending . . . .").

payments, and Kirby agreed that Holding is in the business of marketing, selling, and installing the machines.[305]

Twister and Holding maintain that Holding does not compete with Twister because Twister owns the machines and Holding collects the revenue on Twister's behalf at no mark-up, and because the PaaS contracts are styled as "subscriptions" rather than leases.[306] That response misconstrues Section 4.9.[307] The covenant does not ask whether Holding competes with Twister.[308] It bars any affiliated entity from being "engaged with any enterprise or business that operates or competes in" the market for the sale, licensing, or renting of cone-rolling equipment.[309] Placing cone-rolling machines with customers in exchange for recurring per-unit fees is akin to renting or licensing equipment, and Holding operates in that market whether it keeps the revenue or remits it to Twister.[310]

The covenant's reference to engagement "through Accelerant or a wholly-owned subsidiary thereof" does not aid Twister and Holding.[311] Holding is neither Twister nor a wholly owned subsidiary of Twister; it is Twister's parent company, in

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[305] PTO ¶ 59; Schuster Tr. 92; Kirby Tr. 185.

[306] PTO ¶ 157(b); Schuster Tr. 39-40, 58; Pls.' Opening Post-trial Br. 55-56.

[307] License Agreement § 4.9.

[308] *Id.*

[309] *Id.*

[310] *Id.*; PTO ¶ 59; Schuster Tr. 92; Kirby Tr. 185.

[311] License Agreement § 4.9.

which Marjo holds no interest.[312] Indeed, when the Founders were planning the Holding restructuring, Twister's corporate counsel wrote in the Schwartz Memo that Section 4.9 required them to ensure "only Twister (and its wholly-owned Canadian subsidiary) operate in this area; none of the other entities (in which Sullivan would hold no ownership interests) can enter that aspect of the market."[313]

At the same time, Marjo did not prove compensable damages caused by the breach of Section 4.9.[314] It offered no evidence of lost profits or other standalone harm flowing from Holding's PaaS business—apart from the diversion of Twister's opportunities, which is resolved below.[315] Its post-trial briefing also does not press the pre-trial request for a three-year extension of the covenant from the date of this decision, and the restricted period expired on November 21, 2025.[316] Marjo is therefore entitled to nominal damages for Twister's breach of Section 4.9.[317]

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[312] *Id.*; PTO ¶ 108; Schuster Tr. 92.

[313] JX 459 at 5; *see also* PTO ¶ 105; Schuster Tr. 89, 92.

[314] PTO ¶ 195; Defs.' Opening Post-trial Br. 55-56, 71; Defs.' Answering Post-trial Br. 25.

[315] *See infra* Section II.C.4.

[316] License Agreement § 4.9; *see* PTO ¶¶ 127, 195; Defs.' Opening Post-trial Br. 55-56, 71; Defs.' Answering Post-trial Br. 25.

[317] *See LaPoint v. AmerisourceBergen Corp.*, 2007 WL 2565709, at *9 (Del. Ch. Sept. 4, 2007) (explaining that when damages cannot be estimated with reasonable certainty, "the Court may still award nominal damages"), *aff'd*, 956 A.2d 642 (Del. 2008).

Because Twister breached Section 4.9 through Holding's PaaS operations, Twister and Holding's parallel claim for a declaration to the contrary fails.[318]

e. The Use of Confidential Information

Finally, Marjo asserts that Twister breached Section 4.11 of the License Agreement by continuing to exploit Marjo's confidential business information and intellectual property following termination.[319] This claim is procedurally barred and unsupported by the record.

On the eve of trial, Sullivan and Marjo moved to amend their petition to withdraw counterclaims for misappropriation of trade secrets and breach of the non-disclosure agreement.[320] My February 27, 2026 order granted that request, conditioned on the withdrawal being with prejudice.[321] Sullivan and Marjo cannot circumvent a dismissal with prejudice by repackaging the claims.[322]

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[318] PTO ¶ 136; License Agreement § 4.9; Schuster Tr. 92.

[319] PTO ¶ 147; License Agreement § 4.11.

[320] PTO ¶¶ 37, 43; *see* Resp'ts' Mot. to Am. Second Am. Verified Pet. (Dkt. 242); Pls.' Opening Post-trial Br. 51-52.

[321] Order Granting in Part Resp'ts' Mot. to Amend Second Am. Verified Pet. (Dkt. 279) (holding that the claims could be withdrawn with prejudice due to the prejudice to the petitioners, or the request would be denied if the respondents wished for a withdrawal without prejudice); *see* PTO ¶¶ 36-37, 43.

[322] *See GB-SP Hldgs., LLC v. Walker*, 2024 WL 4799490, at *24 (Del. Ch. Nov. 15, 2024) (holding that the law-of-the-case doctrine barred a plaintiff from resurrecting in post-trial briefing a claim previously dismissed with prejudice).

This claim also fails for lack of proof.[323] Sullivan and Marjo did not identify the specific "confidential business information" allegedly misused, relying instead on vague assertions regarding Sullivan's "engineering training, experience, knowledge and know-how."[324] At trial, when asked to point to a single instance of improper use or disclosure of his intellectual property after the License Agreement was signed, Sullivan identified none, answering, "[i]t's still pending."[325] The information he identified consisted largely of public patent applications.[326] Section 1.1 of the License Agreement also excludes from "Confidential Information" any information that is or becomes publicly available or was already in the receiving party's possession, and Article II granted Twister broad rights authorizing it to engage contractors such as MTA during the term of the license.[327]

Accordingly, Marjo's claim under Section 4.11 fails.

B. LLC Agreement and Structural Reorganization Claims

Turning from the License Agreement to the Second LLC Agreement, the parties seek declaratory and contractual relief regarding (1) the validity of the

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[323] JX 876 (Supp. Resp. to Interrog. No. 12); Sullivan Tr. 415-16, 436; Pls.' Opening Post-trial Br. 52.

[324] JX 876 (Supp. Resp. to Interrog. No. 12); Sullivan Tr. 415-16, 436; Pls.' Opening Post-trial Br. 52.

[325] Sullivan Tr. 436.

[326] *Id.* at 415-16.

[327] License Agreement §§ 1.1, 1.4, art. II; Pls.' Opening Post-trial Br. 17, 53.

Founders' July 2021 transfer of Twister units to Holding, (2) the approval required for subsequent intercompany agreements between Twister and Holding, and (3) Sullivan's disclosures of confidential information.[328]

First, Twister and Holding seek a declaration that the July 2021 unit exchange required only majority Board approval under Sections 8.05 and 10.01(a) of the Second LLC Agreement.[329] Second, Marjo and Sullivan contend that the unit transfer, the 25% Revolving Credit Agreement, and the Intercompany Services Agreement each required 90% voting member approval.[330] Finally, Twister and Holding assert that Marjo and Sullivan breached Section 11.01(a) of the Second LLC Agreement by disclosing Twister's confidential information in patent filings and to prospective litigation funders.[331]

1. The Transfer of Twister Units to Holding

The first dispute—raised in Twister and Holding's declaratory judgment claim and Marjo's corresponding declaratory judgment counterclaims—concerns the authorization required for Twister's majority members to exchange their Twister

[328] PTO ¶¶ 133, 135, 150, 152.

[329] *Id.* ¶¶ 135, 180; Pls.' Opening Post-trial Br. 65-66.

[330] PTO ¶¶ 150, 152, 200; Defs.' Opening Post-trial Br. 46-49; Defs.' Answering Post-trial Br. 33-38.

[331] PTO ¶ 133; Pls.' Opening Post-trial Br. 58-62.

units for equity in Holding.[332] Twister and Holding insist that the exchange required only a Board majority vote under Section 8.05 and Article X of the Second LLC Agreement. Marjo, however, contends that the transfer constituted "compensation" to an "Affiliate" requiring 90% Voting Member approval under Section 8.10(i).[333]

In July 2021, each member of Twister other than Marjo transferred its Twister Common Units to Holding in exchange for corresponding interests in Holding.[334] Borom, Ellman, and Schuster, acting as three of Twister's four managers, approved the transfer at the July 27, 2021 Board meeting over Sullivan's objection.[335] After the exchange, Holding held 83.7% of Twister and Marjo held 16.3%.[336]

Section 10.01(a) permits a transfer of units with the Board's prior written consent, and Section 10.04(a) similarly authorizes the Board to direct a restructuring of units into a new entity.[337] Under Section 8.05, the Board may act by a majority of the Managers.[338] Thus, the July 27 vote was sufficient.

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[332] PTO ¶¶ 9, 18, 20, 135, 150, 152.

[333] *Id.* ¶¶ 55, 108, 135, 150, 152; Pls.' Opening Post-trial Br. 65-66; Defs.' Answering Post-trial Br. 33.

[334] PTO ¶¶ 55, 108, 135, 150, 152; Pls.' Opening Post-trial Br. 65-66; Defs.' Answering Post-trial Br. 33.

[335] PTO ¶¶ 109-10; Schuster Tr. 46; Sullivan Tr. 311.

[336] Anderson Tr. 647-48, 691.

[337] Second LLC Agreement §§ 10.01(a), 10.04(a).

[338] *Id.* §§ 8.04(a), 8.05, 10.01(a); PTO ¶ 135; Pls.' Opening Post-trial Br. 65-66.

A 90% member vote under Section 8.10(i) was not required.[339] Section 8.10(i) is a general provision governing company agreements or arrangements in which managers, members, or their affiliates receive compensation.[340] Article X specifically governs member transfers and restructurings of units.[341] Under settled principles of contract interpretation, the specific provision controls over the general one.[342]

Twister and Holding are entitled to a declaration that the July 2021 unit exchange was validly approved by the Board.[343] Marjo's parallel counterclaims fail to the extent they challenge that transfer.

2. The Revolving Credit Agreement

Although the formation of Holding and the July 2021 unit exchange were contractually permissible and authorized by the Board, the financing terms the

[339] Second LLC Agreement §§ 8.05, 8.10, 10.01(a); *see DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) ("[W]here specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one").

[340] Second LLC Agreement § 8.10(i).

[341] *Id.* §§ 10.01(a), 10.04(a).

[342] *DCV Hldgs.*, 889 A.2d at 961.

[343] Second LLC Agreement §§ 8.04(a), 8.05, 10.01(a); PTO ¶ 135; Pls.' Opening Post-trial Br. 65-66.

Founders established between Holding and Twister violated express contractual limits in the Second LLC Agreement.[344]

Section 8.10(i) requires the approval of "Voting Members owning at least ninety percent" of Twister's voting units before Twister may "enter into any agreement or arrangement with any of the Managers, Members or any of their respective Affiliates pursuant to which any Manager, Member or any of such Affiliates is to receive compensation of any kind."[345] On July 30, 2021, Schuster signed the Revolving Credit Agreement on behalf of both Holding, as lender, and Twister, as borrower, under which Holding would lend Twister funds at a 25% annual interest rate.[346] Holding, which was controlled by the Founders and held 83.7% of Twister's equity, was an "Affiliate" under the Second LLC Agreement.[347] And charging interest at 25% on a loan from an Affiliate is "compensation of any kind" to that Affiliate.[348]

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[344] Second LLC Agreement §§ 8.05, 8.10(i), 10.01(a); PTO ¶¶ 110, 150; *see supra* Section II.B.1.

[345] Second LLC Agreement § 8.10(i); *see* PTO ¶¶ 99-100.

[346] PTO ¶¶ 78, 110; JX 529; Schuster Tr. 49-50.

[347] Second LLC Agreement § 1.01 (defining "Affiliate" as "any other Person who, directly or indirectly . . . controls, is controlled by, or is under common control with, such Person"); PTO ¶¶ 52, 108, 110.

[348] Second LLC Agreement § 8.10(i); *see also Deputy v. du Pont*, 308 U.S. 488, 498 (1940) (explaining that interest is a form of compensation); Anderson Report 21.

Marjo held at least 15% (post-July 2021 exchange, 16.3%) of Twister's voting units, meaning that the Revolving Credit Agreement required Marjo's approval to reach the 90% threshold.[349] Marjo did not approve it.[350] Rather, Sullivan never voted for the Revolving Credit Agreement and objected to the 25% loan.[351] The Revolving Credit Agreement therefore violated Section 8.10(i).[352]

Marjo may recover only once for this conduct—either under the Second LLC Agreement or for breach of fiduciary duty.[353] I address the appropriate remedy below in connection with the fiduciary duty claim.[354]

3. The Intercompany Services Agreement

The same contractual constraint applies to the Intercompany Services Agreement, which Schuster signed on behalf of both Twister and Holding on July 9, 2021.[355] Under that agreement, Holding agreed to "design, engineer, manufacture, assemble, test, repair, maintain and generally produce and supply equipment ordered

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[349] Second LLC Agreement § 8.10(i). Anderson Tr. 647-48 (describing the 83.7% to 16.3% ownership split); Pls.' Opening Post-trial Br. 65.

[350] PTO ¶ 110; Sullivan Tr. 312, 316; *see* Pls.' Opening Post-trial Br. 81 n.6 (arguing that "the Twister Board (Sullivan and SE&B) approved the Revolving Credit Agreement").

[351] Sullivan Tr. 312, 316.

[352] Second LLC Agreement § 8.10(i).

[353] *See Garfield v. Allen*, 277 A.3d 296, 360 (Del. Ch. 2022) ("[A] plaintiff can recover only a single judgment, and a plaintiff cannot recover duplicative remedies.").

[354] *See infra* Section II.C.2.b.

[355] PTO ¶¶ 77, 107; Intercompany Services Agreement 1, 5.

by [Twister]," and Twister agreed to pay Holding "all expenses incurred by the Service Provider in providing the services, without mark-up."[356] Because Holding is an Affiliate of the Founders, entering into an agreement to pay those service fees triggered the 90% voting threshold under Section 8.10(i).[357]

The record does not establish what standalone fees Twister paid under the Intercompany Services Agreement.[358] The agreement called for reimbursement of Holding's costs without mark-up, and the only mark-up Sullivan and Marjo proved was the 25% interest Holding charged on its loans to Twister.[359] I address that overcharge below.[360] Beyond that, Marjo is entitled to a declaration that Twister entered the Intercompany Services Agreement without the approval Section 8.10(i) requires.[361]

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[356] Intercompany Services Agreement §§ 1, 3; Schuster Tr. 40, 43; Anderson Tr. 687 (reading the agreement's fee provision as reproduced in JX 804).

[357] Second LLC Agreement § 8.10(i); *see* PTO ¶ 100. *Compare* Defs.' Opening Post-trial Br. 46-49, *with* Pls.' Answering Post-trial Br. 25 (arguing that the payments under the Intercompany Services Agreement "are reimbursements for services provided to Twister at-cost and without mark-up").

[358] Anderson Tr. 687, 690; Anderson Report 36.

[359] Anderson Tr. 687, 690.

[360] *See infra* Section II.C.2.b.

[361] Second LLC Agreement § 8.10(i); PTO ¶¶ 107, 150, 200.

4. The Confidentiality Clause

The remaining portion of Twister and Holding's claim for breach of the Second LLC Agreement arises under Section 11.01(a), which provides:

> Each Member acknowledges that during the term of this Agreement, such Member will have access to and become acquainted with trade secrets, proprietary information and confidential information belonging to the Company . . . [N]o Member shall, directly or indirectly, disclose or use (other than solely for the purposes of such Member in monitoring and analyzing his or its investment in the Company or performing his duties as a Manager, Officer, employee, consultant or other service provider of the Company) at any time, including, without limitation, use for personal, commercial or proprietary advantage or profit . . . any Confidential Information of which such Member is or becomes aware.[362]

Twister and Holding assert two breaches of this provision: (1) that Marjo (through Sullivan) publicly disclosed Twister's confidential information by filing provisional patent applications without advance notice; and (2) that Sullivan shared internal company information with outsiders in early 2022 to solicit hostile litigation funding.[363]

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[362] Second LLC Agreement § 11.01(a).

[363] PTO ¶ 133; Pls.' Opening Post-trial Br. 58-62; Pls.' Answering Post-trial Br. 67. Though the pretrial order names Sullivan individually on this claim, both sides' post-trial briefs address the liability of Marjo (the record Member of Twister) for Sullivan's conduct as its managing member. *See* PTO ¶ 133; Pls.' Opening Post-trial Br. 58; Pls.' Answering Post-trial Br. 67; Defs.' Opening Post-trial Br. 79; Defs.' Answering Post-trial Br. 28-30.

The patent-related disclosures do not establish a breach of Section 11.01(a).[364] The License Agreement expressly authorized Marjo and Sullivan to file and prosecute patent applications.[365] Section 4.6 gave Twister 60 days after Marjo presented a new provisional application, in a form that could be filed with the USPTO, to either "assume responsibility for filing a patent" or "waive the right to do so."[366] If Twister did not assume responsibility, then Marjo held "exclusive rights to the said inventions without any limitations or loss of intellectual property rights to file a patent on its own."[367]

Moreover, the PLC Contract provided that "[a]ny improvements made to Marjo's/John Sullivan's patent pending invention made by [PLC] or their subcontractors to the twister invention shall be signed over to Marjo/John Sullivan free and clear of all rights, title and interest," confirming Marjo's right to authorize those disclosures.[368] Marjo's contemporaneous delivery of the September 2020 provisional applications technically breached the advance-notice timing requirement of Section 4.1 of the License Agreement.[369] But the act of disclosing Sullivan's

[364] License Agreement §§ 4.1, 4.6; PTO ¶ 89; JX 125 at 13; JX 380; Sullivan Tr. 345.

[365] License Agreement §§ 4.1, 4.6.

[366] *Id.* § 4.6.

[367] *Id.*

[368] PTO ¶ 89; JX 125; Defs.' Opening Post-trial Br. 69 & nn.267-68.

[369] *See supra* Section II.A.1.c.

cone-roller improvements to the USPTO in patent applications was contemplated by the License Agreement.[370] Those disclosures did not constitute an unauthorized misuse of Twister's confidential information under Section 11.01(a) of the Second LLC Agreement.[371]

Marjo did, however, breach Section 11.01(a) when Sullivan—acting as its managing member—disclosed Twister's financial and operational information to outsiders in early 2022 to solicit prospective litigation funders.[372] Sullivan emailed Twister's lease rates, machine deployment figures, projected profit and revenue, and a projected 36x exit multiple to a third party on February 3, 2022, forwarded Twister's internal management report to a friend on February 4, 2022, and sent similar emails to other outside contacts in February and April 2022.[373]

Sullivan and Marjo contend that these communications fell within Section 11.01(a)'s allowance for use "for the purposes of such Member in monitoring and analyzing his or its investment in the Company."[374] That argument is unpersuasive. Disseminating proprietary financial and operational data to third parties while

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[370] License Agreement §§ 4.1, 4.6; PLC Contract 13; Sullivan Tr. 345.

[371] PTO ¶ 89; PLC Contract 13; *see* Defs.' Opening Post-trial Br. 69 & nn.267-68.

[372] PTO ¶ 133; *see* Pls.' Opening Post-trial Br. 58; Defs.' Answering Post-trial Br. 28-30.

[373] JX 601; JX 603; JX 604; JX 617; Sullivan Tr. 430-33; *see* Defs.' Answering Post-trial Br. 30.

[374] Second LLC Agreement § 11.01(a); *see* Defs.' Answering Post-trial Br. 29-30.

soliciting funding for a hostile lawsuit to "take the company back" from his co-managers goes well beyond monitoring an investment.[375] None of the exceptions in Section 11.01(c) apply.

Nevertheless, Twister has not shown that the breach caused any compensable loss.[376] None of the recipients of Sullivan's outreach provided funding, and there is no evidence that Twister lost a customer, suffered a competitive disadvantage in the marketplace, or lost enterprise value because outside contacts read Sullivan's emails. Twister and Holding's asserted reputational harm is abstract, and complaints of litigation burden are not damages caused by the recipients' review of the materials.[377] Consequently, Twister's recovery on this portion of its claim for breach of the Second LLC Agreement warrants only nominal damages of $1.[378]

C. Fiduciary Duty Claims

Both sides assert claims for breach of fiduciary duty.[379] Marjo and Sullivan contend that the Founders breached their fiduciary duties as members of Twister's Board by standing on both sides of conflicted transactions with Holding—including

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[375] JX 601; JX 603; JX 604; JX 617; Sullivan Tr. 430-33, 437; *see* Second LLC Agreement § 11.01(a), (c).

[376] Pls.' Opening Post-trial Br. 58-59; Defs.' Answering Post-trial Br. 30; Sullivan Tr. 430-37.

[377] Pls.' Opening Post-trial Br. 58-59; Defs.' Answering Post-trial Br. 30.

[378] *See Ivize*, 2009 WL 1111179, at *12 (awarding $1 in nominal damages when a party proved contract breach but failed to establish compensatory damages).

[379] PTO ¶¶ 138, 149.

the 25% Revolving Credit Agreement and the CFG Bank guaranty—and by diverting Twister's capital-raising opportunities to Holding to fund new business lines from which Marjo was excluded.[380] They also allege that Holding aided and abetted those breaches.[381] Conversely, Twister and Holding contend that Sullivan breached his fiduciary duties by soliciting third-party litigation funding, registering the PLC source code in his own name, and voting against financing proposals at Twister Board meetings.[382]

I first consider the scope of the managers' fiduciary duties under the Second LLC Agreement, then address the parties' claims.

1. Contractual Displacement and Scope of Fiduciary Duties

"A claim for breach of fiduciary duty requires proof of two elements: (1) that a fiduciary duty existed and (2) that the defendant breached that duty."[383] Unless an LLC agreement plainly and unambiguously provides otherwise, LLC managers owe traditional fiduciary duties of loyalty and care to the company and its members.[384]

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[380] PTO ¶ 149; Defs.' Opening Post-trial Br. 28-49.

[381] PTO ¶ 151; Defs.' Opening Post-trial Br. 49-50.

[382] PTO ¶ 138; Pls.' Opening Post-trial Br. 74-77.

[383] *Beard Rsch., Inc. v. Kates*, 8 A.3d 573, 601 (Del. Ch. 2010), *aff'd sub nom. ASDI, Inc. v. Beard Rsch., Inc.*, 11 A.3d 749 (Del. 2010).

[384] *William Penn P'ship v. Saliba*, 13 A.3d 749, 756 (Del. 2011) (recognizing the parties' agreement that "managers of a Delaware limited liability company owe traditional fiduciary duties of loyalty and care to the members of the LLC, unless the parties expressly modify or eliminate those duties in the operating agreement"); *see also Feeley v. NHAOCG, LLC*, 62 A.3d 649, 661-62, 664 (Del. Ch. 2012); 6 *Del. C.* §§ 18-1101(c), 18-1104.

To start, I must determine the extent to which the Second LLC Agreement eliminated the fiduciary duties of Twister's managers.[385]

Section 14.02(a) of the Second LLC Agreement provides that, "[e]xcept as set forth in Section 14.02(c)," the agreement "is not intended to, and does not, create or impose any fiduciary duty on any Covered Person," and replaces any duties "otherwise existing at law or in equity."[386] A "Covered Person" is defined broadly to include "(i) each Member, (ii) each officer, director, shareholder, partner, member, controlling Affiliate, employee, agent or representative of each Member, and each of their controlling Affiliates, and (iii) each Manager, Officer, employee, agent or representative of the Company."[387] Section 14.02(b) similarly permits a Covered Person, when making a decision authorized by the Second LLC Agreement, to "consider only such interests and factors as such Covered Person desires, including its own interests."[388]

Both provisions are made subject to Section 14.02(c):

> Notwithstanding the provisions of Sections 14.02(a) and 14.02(b), each member of the Board shall, while acting in such capacity, be subject to the rules of law and equity relating to fiduciary duties as provided for in

[385] *See* Second LLC Agreement § 14.02; 6 *Del. C.* §§ 18-1101(c), 18-1104; Pls.' Opening Post-trial Br. 71-73; Defs.' Opening Post-trial Br. 28-31.

[386] Second LLC Agreement § 14.02(a).

[387] *Id.* § 14.01(a); *see also id.* § 1.01.

[388] *Id.* § 14.02(b).

> Section 18-1104 of the Delaware Limited Liability Company Act.[389]

Read together, these provisions make fiduciary duties turn on the capacity in which a person acts.[390] Sections 14.02(a) and (b) displace the default fiduciary duties otherwise owed by Covered Persons, including Holding in its capacity as a member and the individual managers when acting outside their capacity as members of Twister's Board.[391] Section 14.02(c), however, preserves traditional fiduciary duties whenever a Board member acts in his or her managerial capacity on the Board.[392]

The formation of Holding and the July 2021 unit exchange, standing alone, did not breach the managers' fiduciary duties.[393] In forming Holding and exchanging their Twister units for interests in Holding, the Founders acted in their capacities as members (or controlling Affiliates of a member)—roles in which they were Covered

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[389] *Id.* § 14.02(c). Twister and Holding also point to the exculpation clause in Section 14.01(b), but that provision applies only to actions taken "in good faith and with the belief that such action or omission is in, or not opposed to, the best interest of the Company," and does not exculpate disloyal self-dealing by Board members acting in bad faith or against Twister's best interests. *Id.* § 14.01(b).

[390] *Osborn*, 991 A.2d at 1159 (explaining that Delaware courts must "give each provision and term effect" (quoting *Kuhn*, 990 A.2d at 396-97)).

[391] Second LLC Agreement § 14.02(a)-(b).

[392] *Id.* § 14.02(c); *cf. Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304, 306 n.3 (Del. 2015) (noting the "greater contractual flexibility given to [alternative] entities under our statutory law").

[393] PTO ¶¶ 52, 103-04, 108-10; Second LLC Agreement §§ 8.05, 10.01(a), 10.04(a), 14.02(a)-(b).

Persons relieved of fiduciary duties under Sections 14.02(a) and (b).[394] And to the extent the Founders acted as Board members at the July 27, 2021 meeting in consenting to the transfers, Sections 8.05, 10.01(a), and 10.04(a) authorized the unit exchange.[395]

The authority to form Holding and exchange Twister units for Holding equity did not, however, permit the Founders to use their Board positions to extract value from Twister for Holding's benefit.[396] When the Founders acted in their capacity as Board members to approve the 25% Revolving Credit Agreement and the CFG Bank guaranty, and used their managerial authority over Twister to direct its financing opportunities and expansion to Holding, they were subject to traditional fiduciary duties under Section 14.02(c).[397]

2. Whether the Revolving Credit Agreement Was Entirely Fair

I turn next to Marjo's claim that the Founders breached their fiduciary duties by causing Twister to undertake the Revolving Credit Agreement. This claim is

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[394] Second LLC Agreement §§ 14.01(a)(i)-(ii), 14.02(a)-(b), sched. A; PTO ¶¶ 52, 55-57, 103, 108; see Pls.' Opening Post-trial Br. 79.

[395] Second LLC Agreement §§ 8.05, 10.01(a), 10.04; Schuster Tr. 107; *see supra* Section II.B.1.

[396] Second LLC Agreement § 14.02(c); *see Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) (explaining that directors serving both a parent and its subsidiary "owe the same duty of good management to both corporations").

[397] Second LLC Agreement § 14.02(c); PTO ¶¶ 109-11, 123; Schuster Tr. 57, 107; Ellman Tr. 161, 163.

derivative because the overcharge harmed Twister directly by extracting excessive interest from the company.[398] Demand on Twister's four-member Board was futile because the three Founders stood on both sides of the transaction.[399]

As a preliminary matter, the Founders contend that Marjo's claim fails because it is impermissibly bootstrapped to its contractual claim under Section 8.10(i) of the Second LLC Agreement.[400] I disagree. The Founders correctly note that "where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim."[401] They overlook that fiduciary duty claims survive where "there exists an independent basis for the

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[398] *See Tooley v. Donaldson, Lufkin & Jenrette, Inc*., 845 A.2d 1031, 1033 (Del. 2004); 6 *Del. C.* §§ 18-1001 to 18-1003.

[399] *See United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1059 (Del. 2021) (explaining that demand is excused as futile where at least half of the board members received a material personal benefit from the alleged misconduct or lack independence). As Twister and Holding note, Marjo—as the record holder of the 16.3% membership interest in Twister—has standing to assert this derivative claim under 6 *Del. C.* §§ 18-1001 and 18-1002. *See* CML V, LLC v. Bax, 28 A.3d 1037, 1045-46 (Del. 2011); Second LLC Agreement, sched. A; Pls.' Answering Post-trial Br. 27.

[400] *See* PTO ¶ 167; Pls.' Opening Post-trial Br. 77-78; Pls.' Answering Post-trial Br. 31-32; Second LLC Agreement §§ 8.10(i), 14.02(c).

[401] *Nemec v. Shrader*, 991 A.2d 1120, 1129 (Del. 2010); *see* PTO ¶ 167.

fiduciary duty claims apart from the contractual claims, even if both are related to the same or similar conduct."[402]

The contract claim turns strictly on whether a 25% interest rate constitutes "compensation of any kind" to an Affiliate requiring a 90% member vote under Section 8.10(i).[403] The fiduciary claim, by contrast, turns on whether the Founders engaged in conflicted self-dealing as Board members by causing Twister to pay excessive interest to Holding.[404]

The business judgment rule protects informed, good-faith business decisions made by disinterested, independent fiduciaries.[405] Where a majority of the board of managers stands on both sides of a transaction or extracts a material benefit to the exclusion and detriment of the minority, the managers bear the burden of demonstrating the transaction's entire fairness.[406] "The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he

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[402] *PT China LLC v. PT Korea LLC*, 2010 WL 761145, at *7 (Del. Ch. Feb. 26, 2010).

[403] Second LLC Agreement § 8.10(i); *see supra* Section II.B.2.

[404] Second LLC Agreement § 14.02(c); *William Penn P'ship*, 13 A.3d at 756; *see* Defs.' Opening Post-trial Br. 38-40; Defs.' Answering Post-trial Br. 44-45.

[405] *See In re Fuqua Indus., Inc. S'holder Litig.*, 1997 WL 257460, at *12 (Del. Ch. May 13, 1997) ("Business decisions by an informed, disinterested, independent board will be respected by this Court.").

[406] *See William Penn P'ship*, 13 A.3d at 756 (applying entire fairness to an LLC transaction in which the managers stood on both sides of the transaction*); see also Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) (explaining that self-dealing occurs when a controlling parent receives a benefit "to the exclusion of, and detriment to, the minority stockholders of the subsidiary").

has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts."[407]

The Founders stood on both sides of the Revolving Credit Agreement through their positions as managers of Twister (the borrower) and their interests in and positions as managers of Holding (the lender).[408] The only member of Twister not also on Holding's side was Marjo, which held no interest in Holding.[409] The entire fairness standard of review applies, and the Founders bear the burden of demonstrating the fairness of the Revolving Credit Agreement.[410]

a. Fair Dealing and Fair Price

"The concept of fairness has two basic aspects: fair dealing and fair price."[411] The Founders must prove that the Revolving Credit Agreement was the product of fair dealing and carried fair economic terms—specifically, a fair interest rate. They have demonstrated neither.[412]

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[407] *Weinberger*, 457 A.2d at 710.

[408] PTO ¶¶ 51-52, 78, 104; Schuster Tr. 107.

[409] PTO ¶ 108; Sullivan Tr. 321.

[410] *William Penn P'ship*, 13 A.3d at 756.

[411] *Weinberger*, 457 A.2d at 711; *see also In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 715 (Del. 2023) ("Both aspects of the entire fairness test—fair dealing and fair price—must be satisfied.").

[412] *See* PTO ¶¶ 78, 110; JX 605 at 2; Ellman Tr. 160-61; Sullivan Tr. 315-16.

First, the process was unfair.[413] The Founders negotiated with themselves as Holding's managers and majority owners and as a majority of Twister's Board. No independent representative protected Twister or Marjo.[414] They set the 25% rate themselves, based on their own research into cannabis lending and private equity returns.[415] They did so despite advice in the Schwartz Memo that "intercompany contracts and transactions" between Twister and its affiliates "cannot extract economic value from" Twister.[416]

Neither Ellman nor Borom disclosed to Sullivan or his counsel before the July 27, 2021 Board meeting that Holding would lend money to Twister at 25% interest.[417] At that meeting, the Founders used their conflicted Board majority to push through the Revolving Credit Agreement without seeking Sullivan's vote and over Sullivan's objection.[418] Sullivan never voted for the 25% loan at the July 27, 2021 Board meeting.[419] Sullivan only saw the executed minutes after they were

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[413] *See Weinberger*, 457 A.2d at 711 (explaining that fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained"); *In re BGC P'rs, Inc. Deriv. Litig.*, 2022 WL 3581641, at *18 (Del. Ch. Aug. 19, 2022) (same), *aff'd*, 303 A.3d 337 (Del. 2023) (TABLE).

[414] PTO ¶¶ 52, 78, 109-10; Schuster Tr. 49, 107; Sullivan Tr. 315-16.

[415] Schuster Tr. 49, 107.

[416] JX 459 at 5; Schuster Tr. 91-92; Ellman Tr. 151; Wechsler Tr. 562-63.

[417] Ellman Tr. 151; Sullivan Tr. 312, 316; Wechsler Tr. 562-63.

[418] PTO ¶¶ 52, 78, 109-10; Schuster Tr. 49, 107; Sullivan Tr. 312, 314, 316.

[419] Sullivan Tr. 312, 314-16; JX 605 at 2; *see supra* Section I.G.

produced in this litigation.[420] And on July 30, 2021, Schuster—who voted for the loan as a manager of Twister while serving as a manager of Holding—signed the agreement on behalf of both the borrower and the lender.[421]

Second, the Founders have not shown that the 25% interest rate was fair to Twister.[422] The plaintiffs' lending expert, Brian Schinderle, attempted to justify the 25% rate with a database of 212 debt transactions and illustrative examples from two third-party cannabis lenders, XS Financial and Trichome Financial, citing portfolio returns of 30% for XS Financial and 27% to 72% for Trichome Financial.[423] That comparison is unpersuasive because third-party loans carry different risk profiles from those of intercompany loans between a parent and its majority-owned subsidiary.[424] Holding's own cost of funds was far lower.[425] It raised convertible

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[420] JX 1026; JX 1027; Schuster Tr. 106; Ellman Tr. 160-61; Sullivan Tr. 311 (testifying that he first saw the July 27, 2021 minutes in discovery).

[421] PTO ¶¶ 52, 78, 110; Revolving Credit Agreement 3; Schuster Tr. 107.

[422] *See Weinberger*, 457 A.2d at 711 (explaining that fair price "relates to the economic and financial considerations of the proposed [transaction], including all relevant factors"); *BGC P'rs*, 2022 WL 3581641, at *29 (explaining that the fair price inquiry examines whether the economic terms of the transaction were substantively fair to the company); *see also* Anderson Tr. 685-86, 689-90.

[423] Schinderle Tr. 230, 233-34.

[424] Anderson Tr. 689-90; *cf. In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2011 WL 227634, at *5 (Del. Ch. Jan. 14, 2011) ("[W]ith the comparable transactions analysis, the transactions must actually be 'comparable' to the transaction at issue.").

[425] Schuster Tr. 56; Anderson Tr. 685, 690; Anderson Report 21.

debt at 8% in 2021, and the CFG Bank line carried a rate of roughly 10.5% to 12%.[426] Sullivan and Marjo's valuation expert, David A. Anderson, opined that a reasonable intercompany rate would have been 7.3% for 2021 and 11.8% for 2022.[427] In effect, the Founders used Holding to borrow money at 8% to 12% and lend it to Twister at 25%, capturing the spread for Holding.[428]

Accordingly, the Founders breached their duty of loyalty to Twister by approving and entering into the 25% Revolving Credit Agreement.[429]

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[426] *See* Schuster Tr. 56; Ellman Tr. 169; Anderson Tr. 685, 690; *but see* Schinderle Tr. 235-36 (estimating that the CFG Bank line, with its fees and holdback, was "closer to a 15 to 16 percent loan overall").

[427] Anderson Tr. 685-86; Anderson Report 37-38.

[428] Anderson Report 21. Sullivan and Marjo also complain of the Intercompany Expense Allocation Policy implemented by Kirby. *See* PTO ¶ 150(4); Defs.' Opening Post-trial Br. 18-19, 39; Defs.' Answering Post-trial Br. 36. The record reflects that operational cost allocations were treated as pass-through reimbursements without mark-up, and Sullivan and Marjo did not prove any specific overcharge apart from the 25% interest rate charged under the Revolving Credit Agreement. *See* PTO ¶¶ 107, 114; JX 746; Schuster Tr. 40; Kirby Tr. 180-81; Fernandes Tr. 197, 199; Anderson Tr. 654-55, 690.

[429] *See* Second LLC Agreement § 14.02(c); *Weinberger*, 457 A.2d at 711.

b. Remedy

This court has discretion to fashion an appropriate remedy.[430] Here, the appropriate remedy is an award of money damages equal to the unfair interest overcharge, paid directly and pro rata to Marjo.[431]

Anderson calculated the intercompany interest overcharge using the companies' general ledgers.[432] Between August 31, 2021 and December 31, 2022, Holding charged Twister $394,094.94 in intercompany interest—separate from the CFG Bank loan.[433] During that same period, Holding's actual interest expense to third-party lenders for those funds was only $129,417.29.[434] The unfair interest overcharge is $264,677.65.[435]

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[430] *See Weinberger*, 457 A.2d at 714 (recognizing the Court of Chancery's broad discretion to "fashion any form of equitable and monetary relief as may be appropriate"); *see also Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 440 (Del. 2000) (explaining that "the powers of the Court of Chancery are very broad in fashioning equitable and monetary relief").

[431] *See Deane v. Maginn*, 2022 WL 16557974, at *29-31 (Del. Ch. Nov. 1, 2022) (ordering that "damages will be distributed pro rata" to specific members of an entity because payment to the entity itself "could lead to further deceit and inequity"), *aff'd*, 338 A.3d 1292 (Del. 2025); *see also In re El Paso Pipeline P'rs, L.P. Deriv. Litig.*, 132 A.3d 67, 75, 123-25 (Del. Ch. 2015) (recognizing that a court may award pro rata recovery on a derivative claim where entity-level recovery would return misappropriated property to the wrongdoers' control or benefit culpable equity holders), *rev'd on other grounds sub nom. El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016).

[432] Anderson Tr. 652-53, 688.

[433] Anderson Report 21; Anderson Tr. 652-53.

[434] Anderson Report 21.

[435] *Id.* $394,094.94 − $129,417.29 = $264,677.65.

Although the overcharge harmed Twister directly, Holding owns 83.7% of Twister.[436] Returning the damages to Twister would therefore return the vast majority of the funds to the Founders.[437] Where fiduciaries extract an unfair benefit through self-dealing, this court may award a direct, pro rata recovery to the minority member to prevent the wrongdoers from benefitting from the recovery.[438]

Through its 16.3% interest in Twister, Marjo bore 16.3% of the unfair interest overcharge.[439] Marjo is therefore entitled to damages of $43,142.46, plus pre- and post-judgment interest at the statutory rate under 6 *Del. C.* § 2301(a), compounded quarterly.[440] Holding is also barred from collecting any unpaid portion of the 25% interest overcharge from Twister.[441]

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[436] Anderson Tr. 647-48, 691; Anderson Report 17, 20.

[437] PTO ¶¶ 51-52, 108; *Deane*, 2022 WL 16557974, at *29-31.

[438] *Deane*, 2022 WL 16557974, at *29-31 (awarding a direct, pro rata recovery to minority LLC members on a derivative breach of loyalty claim where an entity-level recovery would have returned the majority of the funds to the wrongdoers' control); *El Paso Pipeline*, 132 A.3d at 75, 123-25 (recognizing that, in exceptional circumstances, a derivative recovery may be distributed pro rata to prevent wrongdoers from benefitting from an entity-level recovery).

[439] Anderson Tr. 647-48, 688, 691; Anderson Report 10, 21. $264,677.65 × 16.3% = $43,142.45695, rounded to $43,142.46.

[440] *See* 6 *Del. C.* § 2301(a); *Gotham P'rs*, 817 A.2d at 173 (recognizing the Court of Chancery's discretion to award compound interest in fiduciary duty actions); *NGL Energy P'rs*, 319 A.3d at 345; *see also* PTO ¶ 202.

[441] *See Garfield*, 277 A.3d at 329 (recognizing that injunctive relief can prevent enforcement of compensation awards that violated a contractual limitation).

3. Whether the CFG Bank Guaranty Was Entirely Fair

Marjo also challenges the Founders' decision to cause Twister to guarantee Holding's $6.5 million commercial credit line with CFG Bank and pledge Twister's machines as collateral.[442] Because the Founders approved the guaranty in their capacities as members of Twister's Board, traditional fiduciary duties applied under Section 14.02(c).[443] The Founders—who constituted three of Twister's four managers—stood on both sides of the transaction when they caused Twister to guarantee Holding's debt and pledge Twister's machines as collateral for Holding's line of credit.[444] Entire fairness applies, and the Founders bear the burden of proving that the guaranty was entirely fair to Twister.[445]

In June 2022, CFG Bank extended Holding a $6,516,000 asset-backed line of credit, with Twister as guarantor.[446] CFG Bank required Twister—as the entity holding title to those assets—to guarantee the facility and secure it with the cone-rolling machines Twister placed in the field.[447] The Board approved the guaranty by

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[442] PTO ¶¶ 111, 149; Defs.' Opening Post-trial Br. 40; Second LLC Agreement § 14.02(c).

[443] Second LLC Agreement § 14.02(c).

[444] PTO ¶¶ 51-52, 75, 111; JX 666; Schuster Tr. 55-56, 107.

[445] *See Weinberger*, 457 A.2d at 710 (explaining that "where one stands on both sides of a transaction, he has the burden of establishing its entire fairness"); *William Penn P'ship*, 13 A.3d at 756.

[446] PTO ¶¶ 75, 111; JX 666.

[447] Schuster Tr. 55-56.

a vote of three to one over the dissent of Sullivan, who felt that the loan "should have been in Twister['s]" name.[448]

Despite flaws in the process, the CFG Bank guaranty was fair to Twister.[449] The Founders failed to disclose to Sullivan that CFG Bank had first offered the line of credit to Twister.[450] But Sullivan attended the May 16 and June 2, 2022 Board meetings at which the Board considered the financing, and he voted against the guaranty.[451] The economic terms were also fair—and favorable—to Twister.[452] The line carried a floating interest rate of 3.5% above prime (around 12%), falling well below the 25% Holding charged on its own loans to Twister, and Holding absorbed the origination fees without passing them on to Twister.[453] The CFG Bank facility covered only 80% of the cost to manufacture each machine, meaning that Holding funded the required 20% cash down payment for each machine out of its own equity and serviced the principal and interest payments to the bank.[454]

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[448] PTO ¶ 123; JX 669; Schuster Tr. 57; Ellman Tr. 163; Sullivan Tr. 316-17.

[449] *See BGC P'rs*, 2022 WL 3581641, at *18 (explaining that under the unitary entire fairness test, "perfection is not possible, or expected" (quoting *Weinberger*, 457 A.2d at 709 n.7)); *see also Tesla Motors*, 298 A.3d at 700 (same).

[450] Sullivan Tr. 316; *see* JX 619; Schinderle Tr. 255-56 (agreeing that the April 2022 CFG Bank term sheet, although "nonbinding," offered "a line of credit to Accelerant Manufacturing, LLC").

[451] PTO ¶¶ 120, 123; JX 643; JX 669; Sullivan Tr. 317-18.

[452] *See* Schinderle Tr. 236 (opining that "the CFG loan is a favorable loan").

[453] PTO ¶ 110; Schuster Tr. 56; Schinderle Tr. 236.

[454] Schuster Tr. 39, 55-57; Ellman Tr. 156; Kirby Tr. 178.

Meanwhile, the loan proceeds flowed down to Twister to build its machines, Twister retained ownership and title to all of the machines built with the funds, and Twister's revenue rose from $35,000 in 2021 to just over $800,000 in 2022.[455] Considering the benefits Twister received and the contingent liability it assumed, the Founders proved the guaranty was entirely fair despite the disclosure defect.[456]

4. Whether the Founders Usurped Twister's Business Opportunities

Marjo next contends that the Founders breached their duty of loyalty when they diverted Twister's capital-raising opportunities in 2021 and 2022 to Holding and used part of that capital to develop new product lines in Holding from which Marjo was excluded.[457] Twister and Holding provide numerous explanations for why the Founders shifted fundraising to Holding.[458] The weight of the evidence

[455] Schuster Tr. 39, 57; Ellman Tr. 156; Kirby Tr. 178.

[456] To the extent Marjo frames the CFG line of credit as a usurped corporate opportunity, the claim likewise fails. *See* Defs.' Opening Post-trial Br. 34, 40-41; Defs.' Answering Post-trial Br. 39-41; PTO ¶ 150(5)-(6). Twister lacked the standalone financial ability to fund the origination costs, reserve requirements, and 20% equity down payments required to close the facility on its own. This finding concerns Twister's ability to satisfy the requirements of this particular credit facility when it was available. *See Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 154-55 (Del. 1996) (holding that a fiduciary does not usurp a corporate opportunity where the corporation is not "financially able to exploit the opportunity"); JX 619 at 1-2; Schuster Tr. 55-57; Kirby Tr. 178; *see also infra* Section II.C.4. It does not establish that Twister was generally unable to raise equity or convertible debt.

[457] PTO ¶ 149; Defs.' Opening Post-trial Br. 40-44.

[458] PTO ¶ 108; Pls.' Opening Post-trial Br. 26, 79; Pls.' Answering Post-trial Br. 45.

shows that they regretted agreeing to Marjo's Dilution Protected Units in Twister and sought to circumvent them by raising capital in Holding.[459] They did so using Twister's machines, intellectual property, and business model so that the Founders could capture "a hundred percent of the other ideas" while Sullivan "stayed behind in Twister with his 15 percent."[460]

The corporate opportunity doctrine is "a subspecies of the fiduciary duty of loyalty."[461] As the Delaware Supreme Court explained in *Broz v. Cellular Information Systems, Inc.*, a fiduciary may not take a business opportunity for her own if: (1) the company is financially able to exploit the opportunity; (2) the opportunity is within the company's line of business; (3) the company has an interest or expectancy in the opportunity; and (4) by taking the opportunity for her own, the fiduciary will be placed in a position inimical to her fiduciary duties.[462] "No one factor is dispositive and all factors must be taken into account insofar as they are applicable."[463] Twister and Holding argue that *Broz* does not apply to capital

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[459] JX 425; Schuster Tr. 77-78; Borom Tr. 486; *see also* JX 971 (Rebuttal Expert Report of Rebecca L. Greco) ("Greco Rebuttal Report"), 8 ("Mr. Schuster testified that the purpose of creating Holding was, in part, to raise capital in an entity that did not have equity holders with non-dilutive shares.").

[460] Borom Tr. 486; *see also* JX 425; Schuster Tr. 77-78.

[461] *Pers. Touch Hldg. Corp. v. Glaubach*, 2019 WL 937180, at *13 (Del. Ch. Feb. 25, 2019); *see also Guth v. Loft, Inc.*, 5 A.2d 503, 510-11 (Del. 1939).

[462] *Broz*, 673 A.2d at 154-55; *see also Deane*, 2022 WL 16557974, at *14; *Metro Storage Int'l LLC v. Harron*, 275 A.3d 810, 852 (Del. Ch. 2022).

[463] *Broz*, 673 A.2d at 155.

raising.[464] The Court of Chancery has, however, recognized that the corporate opportunity doctrine is "pertinent to an opportunity to obtain financing, and with modest changes, the *Broz* factors translate easily."[465] The central inquiry is whether "the [fiduciary] has appropriated something for himself that, in all fairness, should belong to his [company]."[466]

a. Financial Ability

The first *Broz* factor ordinarily "looks to whether the company had the financial ability to take on the opportunity."[467] For an opportunity to obtain financing, the inquiry focuses on whether the company needed the investment and could have put it to productive use.[468] According to the Founders, Twister was financially distressed and could not raise outside capital because Marjo's Dilution

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[464] Pls.' Answering Post-trial Br. 44.

[465] *Metro Storage*, 275 A.3d at 852 (applying *Broz* to an opportunity to raise equity financing); *see also Deane*, 2022 WL 16557974, at *15 ("Rulings on business opportunity issues are . . . fact-intensive, and '[h]ard and fast rules are not easily crafted.'" (quoting *Metro Storage*, 275 A.3d at 852)); *id.* at *17.

[466] *Equity Corp. v. Milton*, 221 A.2d 494, 497 (Del. 1966); *accord Metro Storage*, 275 A.3d at 852.

[467] *Deane*, 2022 WL 16557974, at *15; *see also Pers. Touch*, 2019 WL 937180, at *14 (noting that courts may consider a balancing standard, temporary insolvency standard, or practical insolvency standard in evaluating financial ability (quoting *Yiannatsis v. Stephanis*, 653 A.2d 275, 279 n.2 (Del. 1995))).

[468] *Metro Storage*, 275 A.3d at 852-53.

Protected Units deterred prospective investors from investing directly in Twister.[469] The trial record does not support that self-serving contention.[470]

First, Twister successfully raised $1,240,000 in its initial preferred-unit offering despite Marjo's Dilution Protected Units, and the Founders admitted that they never even attempted a second capital raise in Twister before shifting all fundraising to Holding in early 2021.[471] Ellman's testimony that the Dilution Protected Units were the reason for Twister's difficulty raising funds was not credible.[472] At his deposition, Ellman testified that he "wasn't raising the capital," that the investors he brought in "don't think that way," and that the one person he could identify who raised the issue of anti-dilution—his sister—invested anyway.[473]

Second, the Founders raised approximately $1.8 million in convertible notes in 2021 and $1.2 million in equity in 2022 for Holding by touting Twister's cone-rolling machine, Twister's PaaS business model, and Twister's operating history.[474] Their solicitation materials blurred the line between the two companies and

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[469] Pls.' Opening Post-trial Br. 26, 79; Pls.' Answering Post-trial Br. 45-47.

[470] *See Deane*, 2022 WL 16557974, at *16 (rejecting a fiduciary's "unsupported and self-serving" characterization of the company's financial inability to pursue an opportunity).

[471] Schuster Tr. 73; Ellman Tr. 126-27; Borom Tr. 484, 510, 517-18.

[472] Ellman Tr. 127.

[473] *Id.* at 146-48 (reading Ellman's deposition testimony into the record).

[474] JX 494 at 17; JX 760; Ellman Tr. 168-69; Schinderle Tr. 258; Anderson Tr. 647.

represented Twister's business and assets as Holding's own.[475] Borom conceded that one investor document "probably should have said Accelerant Holding[] through its 80 percent ownership in Twister does this," but "[i]t d[id] not."[476] The fact that investors funded Holding on the strength of Twister's own machines, intellectual property, and PaaS model demonstrates that Twister could have obtained those capital-raising opportunities directly.

In addition, Holding's May 2022 private placement memorandum similarly described the issuer as formed in September 2019—when Twister, not Holding, was formed.[477] That memorandum also told prospective investors that Holding itself had "Dilution Protected Units"—a statement it copied directly from Twister's earlier offering memorandum—even though Holding had none.[478] The Founders' success in raising $1.2 million for Holding using offering materials stating that the issuer had dilution-protected units undercuts their argument that such units made Twister impossible to fund.[479]

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[475] PTO ¶ 108; JX 461; JX 494 at 17; Sullivan Tr. 304; Borom Tr. 521-22; Anderson Tr. 647; *see also* Hess Tr. 596-97.

[476] JX 461; Borom Tr. 521-22.

[477] PTO ¶¶ 51-52; JX 638 at 8; JX 721 at 8; JX 731 at 10; Borom Tr. 528-29; Anderson Tr. 648-49.

[478] JX 638 at 9; JX 721 at 9; JX 731 at 10; Schinderle Tr. 261-62; Borom Tr. 528-30; Anderson Tr. 648-49.

[479] JX 638 at 9; JX 760; Borom Tr. 530-31.

b. The Remaining *Broz* Factors

The remaining three *Broz* factors similarly weigh in Marjo's favor.[480]

Under the second and third *Broz* factors—whether the opportunity was in Twister's line of business and whether Twister had an interest or expectancy in it—"[f]or purposes of an investment [or financing opportunity], the focus . . . should be on whether the form of investment was suitable for the entity and vice versa" and whether there is a "tie between that [opportunity] and the nature of the [company's] business."[481] Both factors are satisfied.

Holding's 2021 convertible note offering and 2022 equity offering were in Twister's line of business, and both forms of financing suited Twister.[482] Holding raised the capital by marketing Twister's cone-rolling machines and PaaS model, and used the proceeds both to fund Twister's operations and to develop ancillary pre-roll products that the Founders had previously pitched to investors as Twister's own

[480] *See* Pls.' Answering Post-trial Br. 47-49.

[481] *Deane*, 2022 WL 16557974, at *17 (first quoting *Metro Storage*, 275 A.3d at 853, then quoting *SDF Funding LLC v. Fry*, 2022 WL 1511594, at *16 (Del. Ch. May 13, 2022)); *see also Pers. Touch*, 2019 WL 937180, at *16 (explaining that the "line of business" concept "has a flexible meaning, which is to be applied reasonably and sensibly to the facts and circumstances of the particular case," and "latitude should be allowed for development and expansion" (quoting *Guth*, 5 A.2d at 514)).

[482] *See Metro Storage*, 275 A.3d at 853 (explaining that, "[f]or purposes of an investment, the focus of this factor should be on whether the form of investment was suitable for the entity and vice versa").

expansion.[483] Twister also had an interest and expectancy in raising growth capital to manufacture its machines and expand its pre-roll product line.[484]

Finally, under the fourth *Broz* factor, seizing the capital-raising opportunities through Holding placed the Founders in a position inimical to their fiduciary duties to Twister.[485] By raising capital in Holding, where the Founders and exchanging members owned 100% of the equity, rather than Twister, where they owned 83.7%, the Founders pursued self-interested objectives at Twister's expense. They loaned a portion of the raised funds back to Twister at an unfair 25% interest rate under the Revolving Credit Agreement and used the remaining capital to develop separate product lines in Holding rather than Twister, depriving Twister of those growth opportunities.[486]

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In sum, all four *Broz* factors are met. The Founders breached their duty of loyalty by usurping Twister's opportunities to raise capital and using those funds to

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[483] JX 494 at 17; JX 503 at 9-10; Schuster Tr. 56-57; Kirby Tr. 178, 185; Anderson Tr. 647; *see also Metro Storage*, 275 A.3d at 853.

[484] Ellman Tr. 127; Borom Tr. 510; *see Metro Storage*, 275 A.3d at 853-54.

[485] *See Broz*, 673 A.2d at 155, 157; *Deane*, 2022 WL 16557974, at *18-19.

[486] PTO ¶¶ 52, 104, 108, 110; Borom Tr. 486, 522; Anderson Tr. 653; Greco Rebuttal Report, sched. 1b; *see Metro Storage*, 275 A.3d at 854 (noting that the fourth *Broz* factor looks to whether the fiduciary is "depriving [the entity] of an advantage" or obtaining a benefit not shared by the entity).

build competing or adjacent product lines in Holding.[487] "There is no 'safe harbor' for such divided loyalties in Delaware."[488]

c. Remedy

Once a breach of the duty of loyalty is established, "Delaware law dictates that the scope of recovery . . . is not to be determined narrowly," and "uncertainties in awarding damages are generally resolved against the wrongdoer."[489] Though "[s]peculation is an insufficient basis" for an award, "[r]esponsible estimates that lack mathematical certainty are permissible so long as the court has a basis to make a responsible estimate of damages" that is "logically and reasonably related to the harm or injury for which compensation is being awarded."[490] Where a fiduciary usurps a business opportunity, the remedy is designed to "den[y] to the betrayer all benefit and profit" and to compensate for the value of the diverted opportunity.[491]

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[487] *See Broz*, 673 A.2d at 155 ("No one factor is dispositive and all factors must be taken into account insofar as they are applicable."); *Deane*, 2022 WL 16557974, at *19; *Metro Storage*, 275 A.3d at 854-55 (finding all four *Broz* factors satisfied where the fiduciary deprived the companies of an opportunity "by failing to inform . . . about the prospect of obtaining capital").

[488] *Weinberger*, 457 A.2d at 710.

[489] *Deane*, 2022 WL 16557974, at *19-20 (first quoting *Thorpe by Castleman v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996); and then quoting *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 466 (Del. Ch. 2011)); *accord Metro Storage*, 275 A.3d at 859.

[490] *Deane*, 2022 WL 16557974, at *19-20 (first quoting *Pers. Touch*, 2019 WL 937180, at *18; and then quoting *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006)).

[491] *Guth*, 5 A.2d at 510.

Marjo owns 16.3% of Twister, and Holding owns 83.7%.[492] The parties dispute Twister's value relative to the combined business of Twister and Holding, which determines Marjo's loss. To quantify the harm to Marjo from the Founders' diversion of capital-raising opportunities and development of non-Twister product lines inside Holding, both sides proffered expert opinions. Marjo's expert incorrectly assigned no value to Twister. Twister and Holding's expert corrected that error and other flaws in the analysis. I adopt her resulting damages calculation of $462,000.

i. *Anderson's Valuation*

Anderson valued the combined business of Holding and Twister at approximately $66 million using a forward-looking discounted cash flow (DCF) model built from November 2022 management projections.[493] Taking 16.3% of the companies' combined value, he calculated Marjo's damages at $10.756 million.[494] I reject this approach.

Anderson's primary mistake was valuing Twister at $0.[495] When he valued Twister alone, he abandoned the projections and relied on Twister's negative

[492] Anderson Tr. 647-48; JX 652 at 2.

[493] Anderson Tr. 677-78, 680.

[494] *Id*. at 677-78; JX 1033 (Supplemental Expert Report of David A. Anderson) ("Anderson Suppl. Report").

[495] Anderson Tr. 670, 680; Greco Tr. 730-31.

historical results, applying a capitalization-of-earnings method that he admitted he "would not normally use" and an unadjusted net-asset method based on Twister's negative book equity.[496] That approach is inconsistent with the record.

The November 2022 projections covered both Twister and Holding, yet Anderson made no attempt to isolate Twister's share of the projected cash flows.[497] Instead, he allocated 100% of the future cash flows to Holding and none to Twister, even though the projections' revenue line specifies Twister and its machines generated most of the historical revenue.[498] By awarding Marjo 16.3% of the combined business while allowing it to retain its 16.3% equity stake in Twister, Anderson treated Marjo's retained 16.3% interest in Twister as worthless.[499] On cross-examination, Anderson agreed that, "[m]athematically," his model leaves all of the combined value with Holding while conceding that Twister generates revenue.[500]

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[496] Anderson Tr. 670, 680; Greco Tr. 730-31.

[497] Anderson Tr. 680; Greco Tr. 733.

[498] Greco Tr. 733-34; Greco Rebuttal Report, sched. 1b.

[499] Anderson Tr. 678; Greco Tr. 744.

[500] Anderson Tr. 709-10. Anderson also admitted to two input errors that he corrected in his supplemental report. He omitted net capital expenditures and used the wrong after-tax cost of debt, which reduced his damages figure by 1.3%. Anderson Tr. 675, 679; *see generally* Anderson Suppl. Report.

ii. *Greco's Rebuttal*

Twister and Holding's valuation expert, Rebecca Greco, corrected Anderson's analysis to isolate the value of the non-Twister business lines in Holding from Twister's core machine business.[501]

First, Greco applied Anderson's own DCF model and assumptions to Twister, separating Twister's machine revenues and expenses from Holding's grinder and paper-cone revenues and expenses. The resulting analysis valued Twister at almost $51 million under Anderson's first forecast and almost $92 million under his second.[502] Applying Anderson's 75%/25% weighting of those two forecasts, she valued 100% of Twister at $61.173 million and Marjo's 16.3% interest in Twister at $9.971 million.[503] Subtracting Twister's retained value ($9.971 million) reduced Anderson's original damages figure of $10.895 million to approximately $924,000, and similarly reduced his supplemental damages figure of $10.756 million.[504]

Second, Greco questioned Anderson's 16% discount rate for 2022 and later.[505] She explained that a 16% discount rate does not reflect the risk profile of early-stage

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[501] Greco Tr. 749; Greco Rebuttal Report 27-29, sched. 1b.

[502] Greco Tr. 743-44, 753; Greco Rebuttal Report, scheds. 2a-2b, 9.

[503] Greco Tr. 743-44, 749; Greco Rebuttal Report 27, sched. 9.

[504] Greco Tr. 743-44, 749; Greco Rebuttal Report, sched. 9. $10,895,000 − $9,971,000 = $924,000.

[505] Greco Tr. 744-45; Greco Rebuttal Report 28-29.

startups with negative historical earnings whose projections show positive cash flow in the first year and significant growth.[506] Applying a more typical venture-capital discount rate for expansion-stage companies (30.2%) instead reduced the damages calculation to $478,000.[507]

Third, Greco adjusted for omitted depreciation, which reduced Marjo's 16.3% share of the non-Twister value in Holding to $462,000.[508] She reached the same figure when she applied these adjustments to Anderson's original and supplemental reports.[509]

I find Greco's adjustments persuasive and adopt $462,000 as a reasonable estimate of the harm to Marjo resulting from the Founders' diversion of capital-raising opportunities to build non-Twister business lines in Holding.[510] For the same reasons discussed above in connection with the Revolving Credit Agreement, I

[506] Greco Tr. 744-45; Greco Rebuttal Report 27-29.

[507] Greco Tr. 744-45; Greco Rebuttal Report 29.

[508] Greco Tr. 749; Greco Rebuttal Report 29.

[509] Greco Tr. 749.

[510] *See id.*; *see also Deane*, 2022 WL 16557974, at *20; *Pers. Touch*, 2019 WL 937180, at *18-19. Under Anderson's first forecast, Greco's separation of Twister's cone-rolling machine cash flows from Holding's non-Twister cash flows allocates roughly 99% of the combined enterprise value to Twister. Greco Tr. 753-54. That allocation reflects the reality that Twister owned the cone-rolling machines and generated nearly all of the operating revenue, compared to Holding's standalone non-Twister product lines, which accounted for a small fraction of the projected cash flows. *See* Greco Rebuttal Report, sched. 1b.

award the $462,000 in damages directly to Marjo on a pro rata basis.[511] Marjo is also entitled to pre- and post-judgment interest at the legal rate, compounded quarterly.[512]

5. Whether Holding Aided and Abetted Breaches of Fiduciary Duty

Marjo also asserts that Holding aided and abetted the Founders' breaches of fiduciary duty to Twister.[513]

Under Delaware law, aiding and abetting a fiduciary breach requires: (1) a fiduciary relationship; (2) a breach of the fiduciary's duty; (3) knowing participation in that breach by the defendant; and (4) damages proximately caused by the breach.[514] Because the CFG Bank guaranty was entirely fair to Twister and Marjo proved no standalone overcharge under the Intercompany Services Agreement, aiding-and-abetting liability does not attach to those transactions.[515] As to the 25% Revolving Credit Agreement and the usurped capital-raising opportunities, however,

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[511] *See supra* Section II.C.2.b; *Deane*, 2022 WL 16557974, at *29-31 (ordering that "damages will be distributed pro rata" to specific members of an entity because payment to the entity itself "could lead to further deceit and inequity"); *El Paso Pipeline*, 132 A.3d at 75, 123-25 (recognizing that a court may award pro rata recovery on a derivative claim where entity-level recovery would return misappropriated property to the wrongdoers' control or benefit culpable equity holders).

[512] *See supra* Section II.C.2.b; 6 *Del. C.* § 2301(a).

[513] PTO ¶ 151; Defs.' Opening Post-trial Br. 44, 49-50.

[514] *In re Mindbody, Inc. S'holder Litig.*, 332 A.3d 349, 389 (Del. 2024) (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001)).

[515] *See supra* Sections II.B.3, II.C.2.a, II.C.3; *see also Mindbody*, 332 A.3d at 389.

the first, second, and fourth elements are established.[516] The only remaining issue is whether Holding knowingly participated in those breaches.[517]

Knowing participation requires proof of both scienter and active participation in the breach.[518] To establish scienter, a plaintiff must show that the aider and abettor had actual knowledge both that the primary actor's conduct constituted a breach of fiduciary duty and "that their conduct was legally improper."[519] The knowledge of a limited liability company manager acting within the scope of his authority is imputed to the entity.[520]

Here, the Founders served concurrently as managers and officers of both Twister and Holding.[521] Their actual knowledge that the 25% Revolving Credit Agreement was an unapproved, conflicted self-dealing transaction—and that

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[516] *See supra* Sections II.C.1-2, II.C.4.

[517] *Mindbody*, 332 A.3d at 389-90.

[518] *Id.* at 390-93; *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 342 A.3d 324, 329 (Del. 2025) (explaining that "the defendant must already have actual knowledge of the underlying tortious conduct").

[519] *Mindbody*, 332 A.3d at 390-91 (quoting *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 862 (Del. 2015)); *see also Columbia Pipeline*, 342 A.3d at 329 (explaining that "the acquiror must have actual knowledge of both the target's breach and the wrongfulness of its own conduct"); *Malpiede*, 780 A.2d at 1097.

[520] *See Triton Constr. Co., Inc. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *16 (Del. Ch. May 18, 2009) ("[I]t is the general rule that knowledge of an officer or director of a corporation will be imputed to the corporation."), *aff'd*, 988 A.2d 938 (Del. 2010); *see Teachers' Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 671 & n.23 (Del. Ch. 2006); *see also Metro Storage*, 275 A.3d at 849–50 (imputing fiduciary's knowledge to the entities he controlled).

[521] PTO ¶¶ 51-52, 78, 110; Schuster Tr. 107.

Holding's extraction of a 25% interest rate from Twister was improper—is imputed to Holding.[522] Holding also knowingly participated in the breach by entering into the Revolving Credit Agreement as counterparty and charging Twister the unfair 25% interest rate.[523]

I likewise impute to Holding the Founders' actual knowledge that they were diverting Twister's capital-raising opportunities to Holding and that doing so was wrongful.[524] Holding knowingly participated in that breach by raising capital based on Twister's machines, intellectual property, and business model, then using those funds to develop non-Twister product lines.[525] Holding therefore aided and abetted the Founders' breaches of fiduciary duty. Holding is jointly and severally liable with the Founders for the damages flowing from both the Revolving Credit Agreement ($43,142.46) and the Founders' usurpation of Twister's capital-raising opportunities ($462,000).[526]

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[522] PTO ¶¶ 51-52, 78, 110; Second LLC Agreement § 8.10(i); *see supra* Section II.C.2.a; *Triton Constr.*, 2009 WL 1387115, at *16.

[523] PTO ¶¶ 78, 110; Revolving Credit Agreement 3; Schuster Tr. 49-50, 107.

[524] JX 425; Schuster Tr. 77-78; Borom Tr. 486; *see supra* Section II.C.4; *Triton Constr.*, 2009 WL 1387115, at *16.

[525] JX 494 at 17; JX 760; Ellman Tr. 168-69; Anderson Tr. 647; *see supra* Section II.C.4.

[526] *See In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 220 (Del. Ch. 2014) ("A defendant who aids and abets a breach of fiduciary duty is jointly and severally liable for the damages resulting from the breach."), *aff'd sub nom. RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816 (Del. 2015); *supra* Sections II.C.2.b, II.C.4.c.

6. Whether Sullivan Breached His Fiduciary Duties

Twister and Holding bring a reciprocal claim for breach of fiduciary duty against Sullivan. The claim challenges his solicitation of third-party litigation funding, attempts to "take back" Twister, unilateral copyright filing, and dissenting Board votes.[527] In early 2022, Sullivan told acquaintances that he could "take the company back," forwarded Twister's internal management report outside the company, and sought investors to fund litigation against his co-managers.[528] In May 2022, he registered the PLC source code with the U.S. Copyright Office in his own name, even though PLC wrote the code under its contract with Twister.[529]

Twister and Holding's claim fails for three reasons. First, when soliciting litigation funding and registering the copyright, Sullivan acted in his individual capacity (or on Marjo's behalf) rather than "while acting in [his] capacity" as a member of Twister's Board.[530] He is thus shielded by Section 14.02(a)'s fiduciary duty waiver. Second, even if fiduciary duties applied—including to the extent Sullivan shared confidential information he received as a manager—Twister and

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[527] PTO ¶ 138; Pls.' Opening Post-trial Br. 74-75.

[528] JX 601; JXs 603-04; JX 617; Sullivan Tr. 430, 432-33, 437.

[529] PTO ¶¶ 89, 122; JX 125; JX 656; Sullivan Tr. 405-06. Unlike the conversion claim addressed below, this fiduciary duty claim is not preempted by the federal Copyright Act because a breach of fiduciary duty involves an "extra element" rendering it qualitatively different from a copyright infringement claim. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716-17 (2d Cir. 1992).

[530] Second LLC Agreement § 14.02(a), (c).

Holding proved no additional compensable loss.[531] They identify no harm from Sullivan's conduct beyond that under their contractual confidentiality claim, for which I have already awarded nominal damages.[532] Third, Sullivan did not breach his duties by voting against the financing proposals at the May 16 and June 2, 2022 Board meetings and advocating that Twister raise financing directly.[533] The three-member Board majority approved the transactions over his dissent.[534]

D. Peripheral Claims

Beyond their principal licensing and governance disputes, the parties assert two remaining claims.[535] First, Twister and Holding assert a conversion claim against Sullivan for registering the PLC source code with the United States Copyright Office.[536] Second, Marjo asserts a claim against Twister for breaching the parties' Consulting Agreement.[537] Both claims fail.

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[531] *See supra* Section II.B.4; *Pers. Touch*, 2019 WL 937180, at *25.

[532] PTO ¶ 183; *see* Pls.' Answering Post-trial Br. 74; *supra* Section II.B.4.

[533] PTO ¶¶ 121, 123; Second LLC Agreement §§ 14.01, 14.02(a)-(c); JX 643; JX 669; JX 1036; Sullivan Tr. 316-17; *cf. Pers. Touch*, 2019 WL 937180, at *24.

[534] PTO ¶¶ 121, 123; JX 643; JX 669.

[535] PTO ¶¶ 134, 148.

[536] *Id.* ¶ 134; Pls.' Opening Post-trial Br. 59-63.

[537] PTO ¶ 148; Defs.' Opening Post-trial Br. 49-50.

1. Twister and Holding's Conversion Claim

Twister and Holding allege that Sullivan converted Twister's proprietary property by registering the PLC source code with the U.S. Copyright Office.[538] Sullivan registered the code in his own name in May 2022, though he conceded that he did not write it.[539] This claim is preempted by the federal Copyright Act.[540]

Under 17 U.S.C. § 301(a), a state law claim is preempted when (1) the work at issue falls within the subject matter of copyright as defined in 17 U.S.C. §§ 102 and 103, and (2) the state law right asserted is equivalent to any of the exclusive rights within the general scope of copyright specified in 17 U.S.C. § 106.[541] Accordingly, "when a conversion claim . . . rests on an allegation of wrongful copying and distribution of intellectual property, it is 'equivalent' to a copyright infringement claim and thus preempted under the Copyright Act."[542]

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[538] PTO ¶ 134; Pls.' Opening Post-trial Br. 59-63.

[539] PTO ¶¶ 122, 134; JX 656; Sullivan Tr. 405-06.

[540] 17 U.S.C. § 301(a).

[541] 17 U.S.C. §§ 102-103, 106, 301(a); *see Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 206 (3d Cir. 2002) ("Congress amended the Act in 1980 expressly to extend copyright protection to computer programs and derivatives. . . . Computer programs are entitled to copyright protection as 'literary works.'"); *Thomson Reuters Enter. Ctr. GmbH v. Ross Intel., Inc.*, 694 F. Supp. 3d 467, 487 (D. Del. 2023) (setting forth the two-step preemption test under 17 U.S.C. § 301(a)); *OpenRisk, LLC v. MicroStrategy Servs. Corp.*, 876 F.3d 518, 523 (4th Cir. 2017) (same); *JET Sys., LLC v. United States*, 2025 WL 3227471, at *4 (D. Md. Nov. 19, 2025) ("[A] plaintiff may seek recovery via conversion for the loss of the tangible property, but not for the use or reproduction of the copyrightable work contained therein.").

[542] *OpenRisk*, 876 F.3d at 524.

Both requirements are met here. First, computer software source code is a literary work within the subject matter of copyright.[543] Second, Twister and Holding do not show that Sullivan erased or physically deprived Twister of its copy of the PLC source code or prevented Twister from operating its machines.[544] Rather, their claim concerns Sullivan's copying of the digital file and assertion of authorship through a copyright registration, which is governed exclusively by federal copyright law.[545]

2. Breach of the Consulting Agreement

Finally, Marjo asserts that Twister breached the parties' Consulting Agreement by abruptly terminating it in August 2020 without cause or an opportunity to cure.[546] The plain language of the agreement and the trial record defeat this claim.[547]

Marjo and Twister entered the Consulting Agreement effective September 1, 2019, for a two-year term ending on September 1, 2021.[548] Section 2.1 required Marjo to perform consulting services only "as mutually agreed in writing" by Twister and Marjo.[549] On July 31, 2020, Borom declared the machine's design

[543] *See* 17 U.S.C. § 102(a); *OpenRisk*, 876 F.3d at 523.

[544] Sullivan Tr. 343-44; Hess Tr. 585; Archer Dep. 57.

[545] *See* 17 U.S.C. §§ 102(a), 106, 301(a); *OpenRisk*, 876 F.3d at 523-24.

[546] PTO ¶ 148; Defs.' Opening Post-trial Br. 49-50.

[547] Consulting Agreement §§ 2.1, 4.1-4.4.

[548] PTO ¶¶ 71, 92–94; Consulting Agreement § 4.1.

[549] Consulting Agreement § 2.1(a); Borom Tr. 466.

"frozen" and told Sullivan there would be "no reimbursement for design work beyond [specified] items without my prior authorization."[550]

When Sullivan emailed Borom on August 3, 2020 to ask whether he should keep modifying a part for the PLC engineer, Borom replied, "Do you mean the stop?"[551] The "stop" is a physical component of the cone-rolling machine, and Borom understood Sullivan to be asking whether to finish designing it.[552] Sullivan testified that he interpreted Borom's reference to "the stop" as a stop-work order and believed that he was fired.[553]

That understanding is inconsistent with the record.[554] Borom told Sullivan that unauthorized hourly design work would pause but that Twister would honor its milestone payments.[555] Sullivan supplied the revised part shortly after the August 2 exchange, with Borom later authorizing additional design work in September 2020.[556]

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[550] JX 359; Borom Tr. 468.

[551] PTO ¶ 63; JXs 363-64; Borom Tr. 472.

[552] JXs 363-64; Borom Tr. 472; Sullivan Tr. 429 (acknowledging that a "stop" is a part of the cone-rolling machine).

[553] Sullivan Tr. 296-97.

[554] Borom Tr. 467, 471-73; JX 364; JX 384 at 2-3.

[555] Borom Tr. 467, 471.

[556] JX 364; JX 384 at 2-3; Borom Tr. 467, 471-73.

Twister thus chose to stop authorizing hourly work, as Section 2.1 permitted, and the Consulting Agreement expired by its terms on September 1, 2021.[557] On January 11, 2022, Borom wrote to Sullivan confirming that the agreement had expired and that Twister had paid Marjo's billings of approximately $126,000 in full.[558] In doing so, Twister did not breach the Consulting Agreement.[559]

E. Fee Shifting

Under the American Rule, litigants generally bear their own attorneys' fees absent a contractual or statutory right or "special circumstances," such as where a party has litigated in bad faith.[560] Both sides request fee shifting under the Second

[557] Consulting Agreement §§ 2.1, 4.1; PTO ¶ 94.

[558] PTO ¶¶ 94, 118; JX 564; Borom Tr. 472-73.

[559] Nor did the termination of the License Agreement (or the August 2020 freeze of hourly work) trigger any obligation for Twister to transfer the prototypes, production equipment, hardware, and software paid for by Twister under Section 4.3(c) of the Consulting Agreement. *See* Defs.' Opening Post-trial Br. 50. Section 4.4 provides that Section 4 survives expiration in accordance with its terms, but Section 4.3(c) links the return obligation to early terminations under Section 4.2 occurring before the agreement's expiration date. Consulting Agreement §§ 4.1-4.4; PTO ¶¶ 94, 127; JX 564.

[560] *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Est. Fund*, 68 A.3d 665, 686-87 (Del. 2013); *Pers. Touch*, 2019 WL 937180, at *30 ("Delaware follows the 'American Rule,' which provides that litigants 'are generally responsible for paying their own counsel fees, absent special circumstances or a contractual or statutory right to receive fees.'" (quoting *Scion Breckenridge*, 68 A.3d at 686)).

LLC Agreement or the bad faith exception to the American Rule.[561] Fee shifting is unwarranted.[562]

First, neither side is entitled to contractual fee shifting under Section 15.14 of the Second LLC Agreement, which states that "the prevailing party . . . shall be entitled to receive . . . reasonable attorneys' fees and expenses and court costs."[563] Each side prevailed on certain claims and lost on others. Given the split decision, neither side is the overarching prevailing party.[564]

Second, Twister and Holding renew their application for attorneys' fees under the bad-faith exception to the American Rule, emphasizing Sullivan and Marjo's

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[561] Second LLC Agreement § 15.14; Pls.' Answering Post-trial Br. 71, 74; Defs.' Opening Post-trial Br. 78.

[562] Second LLC Agreement § 15.14; PTO ¶ 176; Pls.' Opening Post-trial Br. 93-94, 97-98; Pls.' Answering Post-trial Br. 71, 74; Defs.' Opening Post-trial Br. 78. Both sides also invoke the equitable doctrine of unclean hands—Twister and Holding pointing to Sullivan's source code registration and litigation-funding pitches, and Sullivan and Marjo pointing to the Founders' formation and use of Holding. PTO ¶¶ 52, 143; Pls.' Answering Post-trial Br. 33, 35. I have already resolved the parties' claims on the merits under contract interpretation and fiduciary principles. I decline in my discretion to apply the doctrine of unclean hands to bar relief to either side. *See SmithKline Beecham Pharm. Co. v. Merck & Co.*, 766 A.2d 442, 448-49 (Del. 2000) (recognizing the Court of Chancery's "extraordinarily broad discretion" in deciding whether to apply unclean hands); *see also In re Aerojet Rocketdyne Hldgs., Inc.*, 2022 WL 2180240, at *20 n.208 (Del. Ch. June 16, 2022).

[563] Second LLC Agreement § 15.14.

[564] *See supra* Sections II.B-C; Defs.' Opening Post-trial Br. 78; Pls.' Answering Post-trial Br. 71, 74; *cf. Pers. Touch*, 2019 WL 937180, at *30 (declining to shift fees where "the outcome of this case is very much a split decision" and each side "won some significant claims and lost a number of others").

eve-of-trial withdrawal of trade secret claims and disruptive discovery conduct.[565] This request does not warrant fee shifting.[566]

In a February 27, 2026 order, I conditioned Sullivan and Marjo's leave to amend on the withdrawal of their trade secret and non-disclosure agreement claims operating as a dismissal with prejudice, while denying without prejudice Twister and Holding's request for fees so they could renew it post-trial if appropriate.[567] Twister and Holding now cite witness availability issues and discovery misconduct, contending that Sullivan and Marjo's counsel misstated when a non-party witness could appear at trial and disclosed only after trial what efforts had been made to collect data from three cell phones.[568] These complaints illustrate how an already bloated litigation was made unnecessarily complicated. Still, the record does not establish the clear evidence of bad faith required for fee shifting.[569]

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[565] PTO ¶ 176; Pls.' Opening Post-trial Br. 93-94, 97-98.

[566] *Scion Breckenridge*, 68 A.3d at 686-87; *Pers. Touch*, 2019 WL 937180, at *30.

[567] PTO ¶¶ 43-44; Order Granting in Part Mot. to Am. Second Am. Verified Pet. (Dkt. 279).

[568] *See* Letter from Counsel Regarding Post-trial Issues (Dkt. 330) 2, 4; Pls.' Opening Post-trial Br. 97-98.

[569] *See, e.g.*, *Dover Hist. Soc'y, Inc. v. City of Dover Plan. Comm'n*, 902 A.2d 1084, 1093 (Del. 2006) (explaining that the bad-faith exception "applies only in extraordinary cases"); *Beck v. Atl. Coast PLC*, 868 A.2d 840, 850–51 (Del. Ch. 2005) (requiring "clear evidence" of bad-faith conduct); *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997), *aff'd*, 720 A.2d 542 (Del. 1998).

Each side will bear its own attorneys' fees and expenses.[570]

III. CONCLUSION

For the reasons explained above, judgment on Count I is entered in favor of Twister and against Marjo for nominal damages of $1 for breaching the License Agreement and $1 for breaching the Second LLC Agreement. Count II is dismissed as preempted by the Copyright Act. Judgment on Count III is entered in favor of Twister and Holding, judgment on Count IV is entered in favor of Marjo and Sullivan, and judgment on Count VIII is entered in favor of Sullivan. The patent-related portion of Count V is dismissed without prejudice for lack of subject matter jurisdiction, and I otherwise decline to issue the declarations sought in Count V.

On Counterclaim V, judgment is entered in favor of Marjo and against Twister in the amount of $1,000,000, plus prejudgment interest at the simple rate of 18% per year from January 1, 2023 and post-judgment interest, together with $1 in nominal damages for breaching Section 4.9 of the License Agreement. Twister must also return to Marjo the original prototype built by PLC, the demonstration unit identified in Section 6.11(f), and the original CAD drawings, to the extent those items or their components remain in Twister's or Holding's possession, custody, or control. Marjo's request for the return of the PRO2 and PRO4 machines is dismissed without

[570] I separately addressed a different fee shifting request in an April 10, 2026 letter opinion. *See* Letter Op. Regarding Fee Shifting (Dkt. 320).

prejudice for lack of subject matter jurisdiction, and judgment is entered in favor of Twister to the extent Counterclaim V rests on Section 4.11. Judgment on Counterclaim VI is entered in favor of Twister.

On Counterclaims VII and IX, judgment is entered in favor of Marjo and against Borom, Schuster, Ellman, and Holding, jointly and severally, in the amounts of $43,142.46 and $462,000, plus pre- and post-judgment interest at the legal rate, compounded quarterly. Holding is also barred from collecting any unpaid portion of the 25% interest overcharge from Twister. Judgment is entered in favor of the Founders and Holding to the extent Counterclaims VII and IX challenge the CFG Bank guaranty. On Counterclaims VIII and X, judgment is entered in favor of the counterclaim defendants as to the July 2021 unit exchange, and in favor of Marjo for a declaration that Twister entered into the Revolving Credit Agreement and the Intercompany Services Agreement without the approval required by Section 8.10(i).

Other than fees previously shifted, each side shall bear its own attorneys' fees and costs. The parties must confer and submit a form of final order implementing this decision within 30 days.