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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Rick, P.J., Shapiro and Yates, JJ.

KATHRYN KIRCHER, Individually, and as Trustee of the Kathryn L. Kircher Revocable Living Trust Agreement, dated December 19, 1984, as Amended and Restated,

Plaintiff/Appellee

v

BOYNE USA, INC., a Michigan Corporation; and STEPHEN KIRCHER, Individually, and as Trustee of the Stephen M. Kircher Revocable Living Trust Agreement dated October 10, 1982, as Amended and Restated,

Defendants/Appellants,

and

JOHN E. KIRCHER, individually, and as Trustee of the John E. Kircher Revocable Living Trust Agreement dated December 12, 1976, As Amended and Restated, and AMY KIRCHER WRIGHT,

Defendants.

MSC No.: 166459

Court of Appeals No. 360821
Trial Court No. 20-107011-CK
(Emmet County Circuit Court)

DEFENDANTS-APPELLANTS BOYNE USA, INC. AND STEPHEN M. KIRCHER'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the implied covenant of good faith and fair dealing applies only as an interpretive tool to understand the express terms of a contract?

2. Whether the plaintiff stated a valid claim for breach of contract based on defendants entering into the 2018 real estate transaction that significantly added to the debt of defendant Boyne USA, Inc.?

3. Whether the plaintiff stated a valid claim for breach of contract based on the defendants' refusal to negotiate an alternative formula to calculate the redemption price of the plaintiff's shares?

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STATEMENT OF FACTS

In 2014, Defendants Boyne, USA, Inc. and Stephen Kircher entered into a settlement agreement with Plaintiff Kathryn Kircher ("2014 Settlement Agreement") that resolved Plaintiff's first lawsuit against Boyne and her brother, Stephen.[1] The 2014 Settlement Agreement gave Plaintiff a conditional ability to redeem her minority, non-voting stock in Boyne USA, Inc.[2] Under Paragraph 2 of the 2014 Settlement Agreement, if Plaintiff met certain conditions, she could redeem shares in Boyne annually until she no longer had any shares.[3]

In the 2014 Settlement Agreement, the parties agreed to a Formula to calculate Plaintiff's redemptions. The Formula included (among other components) a five-year average of EBITDA and Boyne's "Total Company Debt" as variables. As a result, the per share price calculated by the Formula changed every year.[4] The 2014 Settlement Agreement provided that the maximum amount Boyne had to pay Plaintiff for her annual redemption, assuming she qualified, was $250,000 for the years 2013 through 2017. Thereafter, the maximum amount was $150,000 per

---

[1] See **Exh. 1**, Pl.'s Compl., ¶ 13; Appx. 5.

[2] See **Exh. 1**, Pl.'s Compl., ¶¶ 14 & 18; Appx. 5-6. These conditions are unambiguously set forth in the 2014 Settlement Agreement. See **Exh. 2**, 2014 Settlement Agreement, ¶¶ 2(c) & 10(a); Appx. 57 and 65-66; Plaintiff did not comply with her obligations under the 2014 Settlement Agreement and those issues were fully litigated in the 2016 Litigation (Plaintiff's second lawsuit against Boyne and her brother, Stephen Kircher). Plaintiff never qualified for a redemption after 2015. Plaintiff's claims for her 2015 and 2016 redemptions, along with her other frivolous claims, were dismissed and/or found to be meritless, and Plaintiff, along with her counsel, were sanctioned. This Court can take judicial notice of the Emmet County Circuit Court Opinions and Orders, including that Plaintiff agreed not to appeal them in the April 2019 Settlement Agreement. See MRE 201(b)(2). See Emmet County Circuit Court Opinion (08/22/2018), **Exh. 3**, pg. 5; Appx. 79. See also **Exh. 1**, Pl.'s Compl. ¶¶ 32-33; Appx. 8.

[3] See **Exh. 1**, Pl.'s Compl. ¶ 15 & Exh. A, ¶ 2(b) & (c)(v); Appx. 5, 28 and 29.

[4] See **Exh. 1**, Pl.'s Compl. ¶¶ 15-17 & Exh. A, ¶ 2(c); Appx. 5, 6 and 28. The parties could have negotiated to use static numbers or to put limits on the maximum or minimum for each component but did not. The parties agreed to use the Formula and whatever price it produced for Plaintiff's redemptions.

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year until her stock in Boyne was fully redeemed.[5] The 2014 Settlement Agreement states that "unless otherwise agreed by the Parties", the Formula would apply, and the redemption amounts would be capped at these amounts.[6]

The 2014 Settlement Agreement is an unambiguous and comprehensive settlement. It was negotiated by sophisticated parties—all of whom were represented by competent legal counsel.[7] The 2014 Settlement Agreement also contains a merger/integration clause, which Plaintiff has not challenged in this or any other action.[8]

Shortly after the 2014 Settlement Agreement, Plaintiff sued Boyne and Stephen Kircher for nonpayment of the 2015 and 2016 redemptions ("2016 Litigation").[9] The Emmet County Circuit Court found that Plaintiff was not entitled to her 2015 and 2016 redemptions because she did not qualify for them or otherwise failed to comply with the 2014 Settlement Agreement.[10] The circuit court not only dismissed Plaintiff's claims but also opined that the claims were sanctionable.[11]

---

[5] See **Exh. 1**, Pl.'s Compl. Exh. A, ¶2(b); Appx. 28. The redemption dollar amount is fixed, the number of shares to redeem is not.

[6] See **Exh. 2**, 2014 Settlement Agreement, ¶¶ 2(b) & (c); Appx. 57.

[7] Plaintiff has admitted that the 2014 Settlement Agreement is unambiguous. See **Exh. 4**, Response to Request to Admit at No. 20; Appx. 96.

[8] See **Exh. 2**, 2014 Settlement Agreement, ¶ 15; Appx. 68-69. The parties affirmed and acknowledged that "no promises or considerations were made to any of them other than set forth above."

[9] Plaintiff's second lawsuit against Boyne and Stephen Kircher. See **Exh. 5**, Emmet County Circuit Court Opinion (05/09/2018), pg. 5; Appx. 109.

[10] See **Exh. 1**, Pl.'s Compl. ¶ 32; Appx. 8. See **Exh. 5**, Emmet County Circuit Court Opinion (05/09/2018), pg. 5; Appx. 109.

[11] See **Exh. 1**, Pl.'s Compl. ¶ 33; Appx. 8. See **Exh. 3**, Emmet County Circuit Court Opinion (08/22/2018), pg. 10; Appx. 84.

On March 14, 2019, the parties were at the Emmet Circuit Court to resolve the amount of the sanctions. After three years of litigation and a trial, Defendant Boyne was seeking more than $400,000 in sanctions. The parties appeared to reach an agreement, beyond the sanctions, that included paying Plaintiff redemptions that the trial court had previously ruled that Plaintiff had not qualified for.[12] The parties placed on the record that Plaintiff would redeem shares for the years 2015, 2016, 2017, and 2018 at per share prices that had been previously calculated and disclosed to Plaintiff pursuant to the 2014 Settlement Agreement.[13]

The parties agreed that the 2019 redemption price would be calculated using the Formula based on the 2018 Audited Financials.[14] The parties understood that the calculated price would come out in May of 2019.[15] Unlike the 2014 Settlement Agreement in which Plaintiff was entitled to 30 days' advance notice of the per share price before she agreed to a redemption,[16] in March of 2019, Plaintiff agreed to redeem her shares for 2019 not knowing what the per share price would

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[12] See **Exh. 1**, Pl.'s Compl. ¶ 34; Appx. 8. See **Exh. 5**, Emmet County Circuit Court Opinion (05/09/2018), pg. 5; Appx. 109. See April 2019 Settlement Agreement, **Exh. 6**, ¶ 1; Appx. 111-112.

[13] See **Exh 7**, Transcript (03/14/19), pg 4, lines 18-25; Appx. 122. On several occasions, prior to the March 14, 2019 hearing, Plaintiff acknowledged that she was not entitled to the redemptions and that she was in default, but that she would like to be paid the back redemptions, along with the 2019 redemption to reset the 2014 Settlement Agreement.

[14] See **Exh. 6**, April 2019 Settlement Agreement, ¶ 1, fn 1; Appx. 111-112. The parties agreed that the 2019 strike price shall be calculated based on the 2014 Settlement Agreement "in the same manner and form as previous years." The 2014 Settlement Agreement required that EBITDA be calculated using the Company's "audited annual calendar year financial statements." See **Exh. 2**, 2014 Settlement Agreement, ¶ 2(c)(vi)(b); Appx. 59;

[15] See **Exh. 6**, April 2019 Settlement Agreement, ¶ 1, fn 1; Appx. 111-112. See also **Exh. 2**, 2014 Settlement Agreement, ¶ 2(c)(ii); Appx. 57 (requiring that Plaintiff be notified of the per share price by May 31st). On March 14, 2019, it was also placed on the record that the 2019 strike price should come out in May of 2019. See **Exh. 7**, Transcript (03/14/19), pg. 12, lines 18-25; Appx. 130.

[16] See **Exh. 2**, 2014 Settlement Agreement, ¶¶ 2(c)(ii) & (iii); Appx. 57-58.

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be.[17] The initial settlement that was placed on the record broke down, and the parties, through counsel, negotiated a subsequent settlement agreement to resolve many issues.[18] These negotiations resulted in the April 2019 Settlement Agreement.

As Plaintiff did in March of 2019, in the April 2019 Settlement Agreement, Plaintiff agreed to the 2019 redemption without knowing the 2019 redemption price.[19] The parties agreed that it would be calculated in the same manner and form as it had been done in previous years.[20] Plaintiff did not request that the "unless otherwise agreed by the Parties" language be included in the April 2019 Settlement Agreement, and no such language is included.[21] The parties agreed to the 2019 redemption without condition.[22]

Like the 2014 Settlement Agreement, the April 2019 Settlement Agreement is an unambiguous and comprehensive settlement agreement negotiated by sophisticated parties–all represented by competent legal counsel. The April 2019 Settlement Agreement contains the following unambiguous provisions:

> Before executing this Agreement, each Party became *fully informed* *of the terms, contents, conditions, and effect of this Agreement.*[23]

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[17] See **Exh. 6**, April 2019 Settlement Agreement, ¶ 1; Appx. 111-112.
[18] See **Exh. 1**, Pl.'s Compl. ¶ 48; Appx. 10.
[19] See **Exh. 6**, April 2019 Settlement Agreement, ¶ 1; Appx. 111-112.
[20] See **Exh. 1**, Pl.'s Compl. ¶ 40 & Exh. B, ¶ 1, fn 1; Appx. 9 and 46-47.
[21] There would be no reason to include such language as the redemptions would be fully consummated by January of 2020.
[22] See **Exh. 6**, April 2019 Settlement Agreement, ¶ 1; Appx. 111-112.
[23] See **Exh. 6**, April 2019 Settlement Agreement, ¶5(a); Appx. 115. Emphasis added.

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> Each Party relied *solely on their own judgment and/or the advice of counsel* for such Party in executing this Agreement.[24]
> There are no representations made outside of this Agreement. No party is relying on any document, email, statement, other than is contained within this Agreement.[25]
>
> This Supplemental Agreement and any attachments, along with documents incorporated herein, contain the final, complete and exclusive agreement between the parties in relation to Case No. 16-105196-CK which is the subject of this Agreement. . . .[26]

On May 15, 2019, after receipt of $525,000,[27] Plaintiff, through counsel, stipulated to an interlocutory order that again memorialized the redemptions for 2015 through 2019, including that Plaintiff would be redeeming shares for the 2019 redemption at a price that would be disclosed at the end of May ("May 2019 Order").[28] By the end of May 2019, Boyne had paid Plaintiff the $1,050,000 that was required by the April 2019 Settlement Agreement and May 2019 Order.[29] Since the 2019 calculated "strike" price[30] was lower than $9.57 per share, and Boyne had paid her $1,050,000 for her 2015-2019 redemptions as required, all of the remainder of Plaintiff's shares were redeemed. Plaintiff was paid $9.57 per share for her 2019 redemption.

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[24] See **<u>Exh. 6</u>**, April 2019 Settlement Agreement, ¶5(a); Appx. 115. Emphasis added.

[25] See **<u>Exh. 6</u>**, April 2019 Settlement Agreement, ¶6(a); Appx. 115.

[26] See **<u>Exh. 6</u>**, April 2019 Settlement Agreement, ¶12; Appx. 116.

[27] The first of two installment payments. See **<u>Exh. 6</u>**, April 2019 Settlement Agreement, ¶1; Appx. 111-112.

[28] See **<u>Exh. 1</u>**, Pl.'s Compl., ¶ 52, Appx. 11. See **<u>Exh. 8</u>**, May 2019 Order; Appx. 145.

[29] Boyne timely mailed out the redemption price for the 2019 redemption showing the negative per share price. Tracking receipts confirm delivery to Plaintiff. See **<u>Exh. 9</u>**, Affidavit of Pam Greetis & Tracking Receipts; Appx. 152. Plaintiff has admitted under oath that she does not dispute that it was mailed to her or that her office received it. See **<u>Exh 10</u>**, Testimony of Kathryn Kircher (05/01/24) (Case No.: 16-105196-CK), pg. 19, line 12 – pg. 20, line 15; Appx. 162-163.

[30] The 2014 Settlement Agreement uses the term per share price related to Plaintiff's redemptions and the April 2019 Settlement Agreement uses the term strike price. The terms appear to be synonymous, and the parties have used them as such.

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In 2020, Plaintiff sued Boyne and Stephen Kircher (which was Plaintiff's third lawsuit against Boyne and her brother).[31] Four of the counts in Plaintiff's Complaint were dismissed on summary disposition. Plaintiff's sole remaining count alleges that Boyne breached the 2014 Settlement Agreement.[32] Plaintiff alleges that Defendants breached the 2014 Settlement Agreement when, in May 2018, Boyne incurred $300 million in debt, which in turn, affected the Formula price.[33] Boyne incurred the debt as part of a long-term business strategy to purchase (or, in some cases, re-purchase) resort properties that Boyne was leasing. Plaintiff has admitted to knowing about the transaction in May of 2018[34]—nearly a year before Plaintiff entered into the April 2019 Settlement Agreement.[35]

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[31] Plaintiff also filed a Motion to Reopen Case to Enforce Order and Request Relief from the May 15, 2019 Stipulated Order Pursuant to MCR 2.612. Although required to challenge the final order under MCR 2.612, Plaintiff's Motion to Reopen fails to do so. In fact, it expressly states that Plaintiff is not challenging the final order. See by way of example **Exh. 11**, Motion to Reopen, pg. 2 wherein Plaintiff states that she is *only* seeking relief from the May 2019 Order; Appx. 171.

[32] See **Exh. 1**, Pl.'s Compl., ¶¶ 79-90; Appx. 14-15. Plaintiff had no more shares to redeem. See **Exh. 1**, Pl.'s Compl., ¶ 64; Appx. 12.

[33] See **Exh. 1**, Pl.'s Compl., ¶ 64; Appx. 12.

[34] The 2018 transaction closed in May of 2018. See **Exh. 12**, Press Releases; Appx. 208.

[35] See **Exh. 13**, Hearing on Defendants' Motion for Summary Disposition (05/20/22), pg. 17, lines 17 – 25 (wherein Plaintiff's counsel stated: "just a short clarification for the Court, the transaction happened in March, we found out about it in *May of '18*, but it's not really significant. We find out about this and *we wanna redeem our shares*.") Not only did Plaintiff and her counsel know about it, the 2018 transaction was discussed by Plaintiff and her counsel at the settlement conference on March 14, 2019 when she agreed to redeem her shares; Appx. 230. See **Exh. 14**, Deposition Transcript of Kathryn Kircher (11/16/22), pg. 317, line 18 – 318, line 10; Appx. 280-281.

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Defendants moved to dismiss the breach of contract claim because there was no provision in the 2014 Settlement Agreement that prohibited Boyne from incurring debt.[36] The trial court denied the motion. Defendants sought leave to appeal. The Court of Appeals granted the application and limited the appeal "to the issues raised in the application and supporting brief."[37] The issue relevant for this Court's consideration is:[38]

> Did the trial court err by denying Appellants' motion for summary disposition under MCR 2.116(C)(8) where Plaintiff alleged that Appellants breached a contract by incurring debt to finance a real estate purchase, but the express terms of the parties' unambiguous, integrated, and written contract did not prohibit Appellants from incurring debt or purchasing real estate?[39]

[36] Boyne's debt for purposes of the strike price increased every year from 2013 to 2016 without objection from the Plaintiff.

[37] See **Exh. 15**, Order of the Michigan Court of Appeals dated October 3, 2022; Appx. 284.

[38] Defendants also appealed a second issue to the Court of Appeals which was whether:
the trial court erred by denying Appellants' motion for summary disposition under MCR 2.116(C)(7) where Plaintiff alleged that Appellants breached a contract in spite of her express representation in an unambiguous, integrated, and written settlement agreement that Appellants had "fulfilled their obligations" to her and that she had "no claims" against them? See **Exh. 16**, Defendants/Appellants' Application for Leave to Appeal, pg. vii; Appx. 293, attachments omitted.

[39] See **Exh. 16**, Defendants/Appellants' Application for Leave to Appeal, pg. vii; Appx. 293. See **Exh. 17**, *Kircher v Boyne USA, Inc*, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 360821). (App. 1, Slip Opinion.), pg. 7; Appx. 317. After the April 2019 Settlement Agreement, the Parties then executed another settlement in August 2019 (See **Exh. 18**, "August 2019 Settlement Agreement"; Appx. 319). In the lower court, Defendants argued that the release in that agreement precluded Plaintiff's claim. Although Defendants Boyne and Stephen Kircher believe the panel erred in its holding on this issue, Defendants only seek leave to address the panel's holding regarding good faith and fair dealing as that holding has the most obvious, negative implications for this state's jurisprudence as a whole.

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On this issue, the Court of Appeals found that no such claim was sustainable.[40] The Court stated that "as to the increased debt, there is no underlying contractual term to which the implied duty of good faith and fair dealing applies."[41] Plaintiff did not appeal this holding.

Neither party briefed the issue related to the interpretation or application of the language "unless otherwise agreed by the Parties" or how that would impact the implied duty of good faith and fair dealing. Nor was it argued by counsel, or questioned by the panel, during oral argument. Despite never being addressed by the parties, the Court of Appeals went on to hold that Plaintiff had stated a claim on a theory that Boyne might have breached the 2014 Settlement Agreement by refusing to "consider" an alternative method to the Formula for Plaintiff's redemption.[42] According to the Court of Appeals, the duty to consider an alternative method arose from this provision: "Beginning in 2018 and each year thereafter, Plaintiff may redeem Plaintiff's shares not to exceed $150,000 in value as determined in accordance with 2(c) ***unless otherwise agreed by the Parties*** until such time as Plaintiff has redeemed all of her shares."[43] The Court concluded that the language "unless otherwise agreed by the Parties" implied a duty of good faith and fair

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[40] See **Exh. 17**, *Kircher v Boyne USA, Inc*, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 360821). (App. 1, Slip Opinion.), fn 7; Appx. 315.

[41] See **Exh. 17**, *Kircher v Boyne USA, Inc*, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 360821). (App. 1, Slip Opinion.), fn 7; Appx. 315.

[42] Plaintiff has not alleged that prior to executing the April 2019 Settlement Agreement, she offered an alternative method to calculate the redemption prices. See **Exh. 1**, Pl.'s Compl.; Appx. 3.

[43] See **Exh. 2**, 2014 Settlement Agreement, ¶ 2(b); Appx. 57. All of Plaintiff's shares were redeemed as the result of the April 2019 Settlement Agreement. See **Exh. 1**, Pl.'s Compl., ¶ 64; Appx. 12.

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dealing. And Defendants, the Court said, could be liable for breaching that duty by failing to consider an alternative method to the Formula.[44]

In creating this claim, the Court of Appeals did not address the fact that the Plaintiff never alleged that she was interested in or offered an alternative method, whether Defendants had to agree to an alternative method, when Defendants were supposed to have "considered" it, nor did the Court explain whether the alternative method even had to be "better" for Plaintiff. In fact, in paragraph 87 of Plaintiff's Complaint, Plaintiff does not even allege that Defendants failed to negotiate a different or alternative method—simply that Defendant failed to use an alternative, acting as if the Defendant had sole discretion to change the manner and form in which Plaintiff's shares were redeemed.

The Court of Appeals also did not consider the fact that the April 2019 Settlement Agreement itself was an alternative method for Plaintiff's redemptions. The Court did not address the provisions in the April 2019 Settlement Agreement that expressly dictated the method and manner the Defendants were to redeem Plaintiff shares—provisions that Plaintiff agreed to.[45] The Court of Appeals likewise did not address the fact that Plaintiff stipulated to the method of valuating her shares and the redemption in the May 2019 Order nor explain how Defendants could have breached the covenant of good faith and fair dealing by complying with a court order.

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[44] See **Exh. 17**, *Kircher v Boyne USA, Inc*, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 360821). (App. 1, Slip Opinion.), pg. 5; Appx. 315.

[45] See **Exh. 6**, April 2019 Settlement Agreement, ¶ 1; Appx. 111-112.

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The Court also failed to explain how the trial court should evaluate this novel theory or what relief Plaintiff could obtain if she prevailed.

Defendants timely filed an application for leave to appeal from the Court of Appeals' Opinion. In an Order dated April 12, 2024, this Court ordered the Parties to file Supplemental Briefs addressing the following issues:

1. Whether the implied covenant of good faith and fair dealing applies only as an interpretive tool to understand the express terms of a contract;

2. Whether the plaintiff stated a valid claim for breach of contract based on defendants entering into the 2018 real estate transaction that significantly added to the debt of defendant Boyne USA, Inc.; and

3. Whether the plaintiff stated a valid claim for breach of contract based on the defendants' refusal to negotiate an alternative formula to calculate the redemption price of the plaintiff's shares.[46]

Each issue will be addressed *seriatim*.

STANDARD OF REVIEW

This Court reviews "de novo the grant or denial of a motion for summary disposition."[47]

LAW & ARGUMENT

The Court should follow Michigan's established law and treat the covenant only as an interpretive tool that applies to express contractual obligations that are within a party's sole discretion. It should reject the approach suggested in *Vylene* that would allow courts to write substantive rights and obligations into contracts based on their own sense of "fairness." Michigan's historical approach not only better aligns with this Court's established contract principles, it promotes certainty and utility in contracting.

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[46] See **<u>Exh. 19</u>**, Order of the Michigan Supreme Court (04/12/24); Appx. 328.
[47] *Glass v Goeckel*, 473 Mich 667, 676; 703 NW2d 58 (2005).

Michigan's approach especially makes sense in this context. Whereas *Vylene* involved the interpretation of a franchise agreement, the parties' dispute here arises from the interpretation of three unambiguous fully integrated settlement agreements, along with two corresponding stipulated orders.[48] Unlike a franchise agreements, settlement agreements, as a general rule, are "final and cannot be modified."[49] Meaning that unlike a franchise agreement, settlement agreements are often intended to end a relationship or the litigation between the parties. Because public policy favors finality, settlements are favored by the law. Settlement agreements are often negotiated at arms-length through legal counsel, as was the case here, to end pending litigation. Under such circumstances, a court should not be concerned with the amount of consideration.[50] Thus, the idea that one party could come forward later and argue that the other party breached obligations that are not expressly contained within the settlement agreement should be viewed with close scrutiny and ultimately rejected.

[48] After the parties entered into the April 2019 Settlement Agreement, the parties entered into a third comprehensive and unambiguous settlement agreement dated August 15, 2019 (See **Exh. 18**, "August 2019 Settlement Agreement"; Appx. 319). In the August 2019 Settlement Agreement, Plaintiff represented and acknowledged that she received her compensation under the April 2019 Settlement Agreement for her redemptions, and that as of August 15, 2019, she had no claims, causes of action, etc. against Boyne, Stephen Kircher, or Amy Kircher Wright, and that Boyne, Stephen Kircher, and Amy Kircher Wright had fulfilled their obligations to her, including the manner and form in which Plaintiff's redemptions were made in the April 2019 Settlement Agreement. See **Exh. 18**, ¶3; Appx. 321. This provision (paragraph 3 of the August 2019 Settlement Agreement) was also included in the final stipulated order dismissing the case. See **Exh. 20**, September 2019 Order; Appx. 330.

[49] *Smith v Smith*, 292 Mich App 699, 702; 823 NW2d 114 (2011).

[50] Courts do not generally inquire into the adequacy of consideration; legally speaking, it has been stated that a cent or a peppercorn constitutes valuable consideration. See *Gen Motors Corp v. Dep't of Treas*, 466 Mich 231, 238–239; 644 NW2d 734 (2002).

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On Michigan's established law, Plaintiff's claims fail. Starting with the debt, there is no dispute that nothing in the 2014 Settlement Agreement limits Boyne's right to incur debt. Plaintiff has admitted as much in a request to admit.[51] The Court of Appeals found Plaintiff's claim unsustainable on the issue of the amount of debt. Under Michigan's established approach to the covenant, Plaintiff has no claim.

The same holds true for the novel "failure to utilize an alternative method" claim. The language that the Court of Appeals seized on—unless otherwise agreed by the Parties—does not create rights or duties that could implicate the covenant. The language also does not confer any unilateral discretion on Defendants that would be necessary for the covenant to apply.

But no matter what approach the Court adopts, these claims still fail because, among other reasons, the subsequent agreements preclude any claim on the covenant. Plaintiff, relying on the advice of multiple experienced lawyers, and while consulting with financial advisors, negotiated the April 2019 Settlement Agreement in which Plaintiff agreed to use the Formula from the 2014 Settlement Agreement while knowing about the 2018 transaction and without demanding any "unless otherwise agreed" language. Thereafter, Plaintiff, through counsel, stipulated to the use of the Formula in the May 2019 Order. These agreements unambiguously required Defendants to perform the redemption in the exact manner they performed it. Not only that, but in the August 2019 Settlement Agreement and September 2019 Order, Plaintiff agreed to and acknowledged the following:

> **Kathryn L. Kircher.** By signing this agreement, Kathryn L. Kircher represents and acknowledges that she has received her compensation as set forth in the Supplemental Agreement dated April 17, 2019 for the 2014 through 2019 redemptions, and that at the present time, she has no claims, causes of action, demands for

[51] See **<u>Exh. 4</u>**, Response to Request to Admit at No. 18; Appx. 95.

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> arbitration, or disputes of any kind against Stephen Kircher, Amy Kircher Wright, and/or Boyne USA, Inc., and that up to the date of this document (August 15, 2019), Boyne USA, Inc., Stephen Kircher, and Amy Kircher Wright have fulfilled their obligations to her, including but not limited to the manner and form that the redemptions were made in the April 17, 2019 Agreement.[52]

Thus, there can be no claim under any theory of the covenant.

I. The Implied Covenant of Good Faith and Fair Dealing Applies Only as an Interpretive Tool and Only in the Circumstance When There is an *Existing Obligation in a Contract.*

A. Long-standing Michigan law Treats the Covenant as an Interpretive Tool That Applies Only to Existing Obligations in a Contract.

Four of the baseline principles of the implied covenant of good faith and fair dealing in Michigan are that 1.) Michigan does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing;[53] 2.) the implied covenant of good faith and fair dealing *only* applies where there is an *existing obligation* that is within the sole discretion of the performing party;[54] 3.) the implied covenant of good faith and fair dealing exists to ensure that a party's sole discretion in performing a specific duty under a contract is done in good faith;[55] and 4.) the application of the covenant of good faith and fair dealing cannot be imposed to override a

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[52] See **<u>Exh. 18</u>**, August 2019 Settlement Agreement, ¶3; Appx. 321. See **<u>Exh. 20</u>**, Stipulated Order (09/17/19), pg. 3; Appx. 332.

[53] *Bank of Am, NA v Fid Nat Title Ins Co*, 316 Mich App 480, 501; 892 NW2d 467 (2016).

[54] See **<u>Exh. 21</u>**, *Interquim, SA v Berg Imports, LLC*, No. 21-10665, 2022 WL 790802, at *4 (ED Mich, Mar 14, 2022); Appx. 337-338.

[55] See **<u>Exh. 21</u>**, *Interquim, SA v Berg Imports, LCC*, No. 21-10665, 2022 WL 790802 at *4 (ED Mich, Mar. 14, 2022); Appx. 337-338. See also 3A Corbin, Contracts, § 644 (1960), pgs 78-84 (where a party to a contract makes the manner of its performance a matter of *<u>its own</u>* discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith). Emphasis added.

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contract's express terms,[56] nor does "it require a party to ignore, forego or waive its express rights (contractual or otherwise)."[57]

Based on these established principles, the implied covenant of good faith and fair dealing exclusively applies as an interpretive tool where a party has an *existing obligation* in a contract—the performance of which is in that party's *sole discretion*. One need look no further than the comments to MCL 440.1304 of the Uniform Commercial Code, which expressly state that there is "no independent cause of action for failure to perform or enforce in good faith", and that the provision is simply used as an interpretive tool "and does not create a separate duty of fairness and reasonableness which can be independently breached."[58] Thus, the covenant is applied as an interpretative tool to analyze whether the performer of the *existing contractual obligation* performed that obligation in good faith.[59] Simply put, it is the legal standard by which performance of an express contractual duty solely within the discretion of one of the parties is measured.

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[56] *Cook v Little Caesar Enter, Inc,* 210 F3d 653, 657 (CA 6, 2000) (citing *General Aviation, Inc v Cessna Aircraft Co,* 915 F2d 1038, 1041 (CA 6, 1990)). When the parties have "unmistakably expressed their respective rights," the covenant does not adhere. *Hubbard Chevrolet Co v General Motors Corp,* 873 F2d 873, 877 (5th Cir. 1989). See also *Clark Bros Sales Co v Dana Corp,* 77 F Supp 2d 837, 852 (ED Mich, 1999) (the implied covenant does not supersede the express terms of the parties contract and cannot form the basis for a claim independent of that contract); *Van Arnem Co v Mfrs Hanover Leasing Corp*, 776 F Supp 1220, 1223 (E.D.Mich. 1991)(the implied covenant does not require a party to forego or waive its express contractual rights); *Eastway & Blevins Agency v Citizens Ins Co of America,* 206 Mich App 299, 303; 520 NW2d 640 (1994)(even "a lack of good faith cannot override an express provision in a contract").

[57] *Van Arnem Co v Mfrs Hanover Leasing Corp,* 776 F Supp 1220, 1223 (E.D.Mich.1991) (citations omitted).

[58] MCL 440.1304.

[59] In other words, the implied covenant of good faith and fair dealing only applies to the express duties and obligations in which the performer has discretion in performance, which is why it does not create a cause of action in Michigan. It must be specifically tied to a party's obligation or performance under the contract.

This Court's reference to *Gorman v American Honda Motor Co. Inc,*[60] is illustrative of this point. In upholding the trial court's grant of summary disposition in favor of the defendants, the Court of Appeals articulated:

> Michigan does not recognize, nor does the UCC create, an independent cause of action for a breach of the obligation of good faith it imposes. The obligation of good faith is not an independent duty, but rather a modifier that requires a subject to modify. It is a principle by which contractual obligations or other statutory duties are to be measured and judged. Thus, while the obligation of good faith under the UCC may affect the construction and application of UCC provisions governing particular commercial transactions in various situations, it has no life of its own that may be enforced by an independent cause of action. Caselaw and the UCC itself provide no basis to infer that the obligation of good faith should be applied differently than the common-law implied covenant of good faith and fair dealing, which the parties agree is not enforceable as an independent cause of action.[61]

The *Gorman* court reiterated "that the obligation of good faith has no application apart from some other contractual obligation or statutory duty."[62]

The above principle has been confirmed by Michigan courts time and again. See *Ulrich v Fed Land Bank of S. Paul*, 192 Mich App 194, 197; 480 NW2d 910 (1991) ("Michigan does not recognize an independent tort action for an alleged breach of a contract's implied covenant of good faith and fair dealing."); *Fodale v Waste Mgt of Mich, Inc.*, 271 Mich App 11, 35; 718 NW2d 827 (2006) ("Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing."); *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 475 (2003) (The trial court properly ruled that Michigan does not recognize a claim for breach of an implied

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[60] 302 Mich App 113 (2013).
[61] *Id.* at 133-34.
[62] *Id.* at 134.

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covenant of good faith and fair dealing); *Westrick v Jeglic*, No 291470, 2010 WL 2793556 (Mich Ct App, July 15, 2010) (rejecting the plaintiffs argument that although the plaintiffs did not assert that the defendants breached any actual terms of the parties' contract, the implied covenant "imposed an *implicit* duty of good faith and fair dealing on defendants");[63] *5504 Reuter, LLC v Deutsche Bank Nat Trust Co*, No 317854, 2014 WL 7215197 (Mich Ct App, Dec 18, 2014) (in order to succeed on a breach of contract claim, plaintiff would need to show a breach of the *terms* of the contract itself; it cannot premise a breach of contract action on a breach of the implied duty of good faith and fair dealing).[64]

B. The *Vylene* Decision Suggests a Different Role for the Covenant, Which is to Allow Courts to Insert Unwritten Duties and Obligations Into a Contract.

In requesting supplemental briefing, this Court contrasted the approach to the covenant reflected in *Gorman* (which applies Michigan law) with the approach reflected *In re Vylene Enterprises, Inc*. (a federal decision applying California law).[65] In *Vylene*,[66] a franchisee claimed that the franchisor breached the implied covenant of good faith and fair dealing in two ways: (i) by refusing to negotiate renewal of the franchise in good faith and (ii) by placing another franchise a mile-and-a-half away.[67] As to the first theory, the contract gave the franchisee the "right, upon giving timely notice, to extend the franchise agreement 'on terms and conditions to be negotiated within said sixty (60) days.'"[68] The court held that the covenant required the franchisor to negotiate

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[63] See **Exh. 22**; Appx. 342.
[64] See **Exh. 23**; Appx. 349
[65] 90 F3d 1472, 1477 (CA 9, 1996).
[66] 90 F3d 1472 (CA 9, 1996).
[67] *Id.* at 1476-77.
[68] *Id.* at 1476.

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the renewal in good faith. As to the second theory, the court recognized that the contract did not give the franchisee an exclusive territory. Despite as much, the court held that the franchisor's construction of another franchise breached the contract.

In analyzing the franchisee's renewal claim, the *Vylene* decision—while in no way supporting that Plaintiff has stated a claim here—generally tracked with Michigan law. The court recognized that the franchise agreement specifically *granted* the franchisee the right to extend the franchise for another eight years "on terms and conditions to be negotiated."[69] Unlike the language in the 2014 Settlement Agreement in this case, the agreement in *Vylene* created *a right* for the franchisee to extend and *required* the parties to negotiate the terms and conditions of the extension. The *Vylene* court found the covenant of good faith and fair dealing applied to the franchisor's obligation to negotiate the extension.[70] It was on that basis—the interpretation of a provision creating an express right and an express duty—that the court found a breach of the implied covenant of good faith and fair dealing.[71]

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[69] *Id.* at 1473. Although the Court upheld the finding of the bankruptcy court that the franchisor negotiated the option to extend in bad faith, the franchise agreement specifically obligated the parties to negotiate the renewal should the franchisee exercise the option. There is no such obligation in this case.

[70] Something that does not exist in this case with regard to the settlement agreements executed by the parties.

[71] In this case, despite not being obligated to do so, the parties did in fact negotiate a subsequent agreement modifying the terms of the 2014 Settlement Agreement–the April 2019 Settlement Agreement. Despite Plaintiff not being contractually entitled the 2015–2019 redemptions, the parties agreed to those redemptions in the April 2019 Settlement Agreement. The parties also agreed to the method by which the shares would be redeemed. Following the April 2019 Settlement Agreement, the parties then entered into the May 2019 Order, which also required Defendant Boyne to redeem Plaintiff's shares at the Formula price. See **Exh. 6**, April 2019 Settlement Agreement, ¶1; Appx. 111-112. See also **Exh. 8**, May 2019 Order, pg. 2; Appx. 146.

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In its second holding on the covenant of good faith and fair dealing, the *Vylene* court's reasoning differed from Michigan Law. The franchise agreement in that case contained no provision granting the franchisee an exclusive territory. Nonetheless, the franchisee claimed that the franchisor breached the implied covenant of good faith and fair dealing by placing another franchise a mile-and-a-half away.[72] Although the *Vylene* court stated that it was not impliedly reading rights into the contract, that is exactly what the *Vylene* court did. The court imposed exclusive territory rights against the franchisor despite there being no express language granting the same to the franchisee. In short, the court held that the covenant imposed duties on the franchisor not set forth in the agreement.

As this Court's order for supplemental briefing suggested in comparing *Vylene* to *Gorman*, the second holding in *Vylene* conflicts with existing Michigan law and a party's constitutional right to freedom of contract. If *Vylene*'s approach were adopted, the covenant would cease to be only an interpretive tool meant to judge performance of an express contractual duty. Rather, the covenant would become a license for courts create unwritten, substantive rights and obligations for parties outside their contracts' terms. In short, adopting *Vylene*'s approach would work a sea change in Michigan law.

C. This Court Should Affirm Michigan's Long-standing Approach to the Covenant of Good Faith and Fair Dealing and Reject the Approach From *Vylene*.

This Court should affirm Michigan's historical approach to the covenant of good faith and fair dealing and reject the *Vylene* court's approach. It should do so for at least a few reasons. First, the *Vylene* court's approach is inconsistent with basic contract principles and has been sharply

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[72] *Id.* at 1477.

criticized for this reason. Second, the *Vylene* approach, by empowering courts to create unwritten rights and obligations that parties never agreed upon, creates uncertainty around contracting and undermines the utility of contracts. Finally, adopting the *Vylene* approach would also undermine the reliance interests of parties who have contracted against Michigan's established law.

1. The *Vylene* Court's use of the Covenant to Insert new Rights and Obligations into a Contract is Inconsistent With Basic Contract Principles and has Been Criticized and Rejected for This Reason.

The Court should affirm Michigan's historical approach to the covenant of good faith and fair dealing and reject *Vylene*'s approach. The *Vylene* approach allows courts to insert substantive rights and obligations into a contract that do not exist in the contract's terms based on a court's subjective ideas about "fairness." This approach conflicts with basic contract principles, including principles that this Court has repeatedly affirmed. See *Rory v Cont'l Ins Co,* 473 Mich 457, 468; 703 NW2d 23 (2005) ("We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' . . .") *McDonald v Farm Bureau Ins Co,* 480 Mich 191, 197; 747 NW2d 811, 816 (2008) ("[C]ourts cannot rewrite the parties' contracts if the terms are expressly stated[.]").

For this reason, other courts have harshly criticized *Vylene* and the case law that *Vylene* relies upon. In finding that California law would impose unwritten obligations on the franchisor, the *Vylene* court relied almost exclusively on *Scheck v Burger King*,[73] an Eleventh Circuit decision applying Florida law. It appears that courts no longer regard *Vylene* and *Scheck* as good law in part because of the approach they take to the covenant. Indeed, a mere four years after *Vylene* was

[73] 756 F Supp 543 (SD Fla 1991).

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decided, the Eleventh Circuit disavowed the holding in *Scheck*, calling the decision not only inconsistent with Florida law but also "unconvincing logically" and "logically unsound" for reading rights and duties into a contract where none existed:[74]

> The reasoning of *Scheck I* and *Scheck II* is also unconvincing logically. The *Scheck* court held that the franchisee had a cause of action, even though the franchise agreement provided no right to exclusive territory, because BKC had not expressly reserved the right to license additional Burger King® restaurants nearby. The flaw in this reasoning is that right and duty are different sides of the same coin; if one party to a contract has no *right* to exclusive territory, the other party has no *duty* to limit licensing of new restaurants.
>
> The rights and duties of the parties to a franchise agreement are created by the agreement. In the absence of an agreement, neither party has a duty to perform and neither has a right against the other. Thus, in this case, if Weaver's franchise agreement did not grant him a right to an exclusive territory, BKC incurred no duty to refrain from licensing new franchises in the area. It is undisputed that Weaver's franchise agreements did not grant Weaver the right to an exclusive territory. Therefore, BKC had no duty to refrain from licensing new franchises in Great Falls. The *Scheck* court's attempt to separate the franchisee's right from the franchisor's duty is logically unsound.[75]

The Eleventh Circuit has not been alone in this criticism. A recent Tenth Circuit case criticized *Vylene* on similar grounds while noting that the decision appears to contradict California's actual law on the covenant of good faith and fair dealing:

> And although *Vylene* was purporting to follow California law, there appears to be no support for its holding in the California appellate courts. On the contrary, an unpublished Court of Appeals opinion expressly rejected *Vylene*'s interpretation of California law, stating

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[74] *Burger King Corp v Weaver*, 169 F3d 1310, 1317 (1999).

[75] *Id.* The *Weaver* Court also noted that the case upon which *Scheck* relied was not in accord with the ruling in *Scheck* calling *Scheck's* confidence in *Coira v Florida Med Ass'n*, 429 So2d 23 (Fla Dist Ct App 1983) misplaced. The *Weaver* Court stated that "*Coira* does not suggest, explicitly or implicitly, that the Florida courts recognize breach of the implied covenant of good faith as an independent cause of action." *Id.* at 1317.

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> that it "disagree[d] with *Vylene*" and "[t]he better reasoned authority defines the parties' commercially reasonable expectations in light of the express language in the franchise agreement with respect to exclusive rights and protected market areas." *Primrose Food Servs, Inc v Romacorp, Inc*, No G024917, Bus Franchise Guide (CCH) ¶ 11990, 33781–82, 2000 WL 36695982 (Cal Ct App 2000) (unpublished).
>
> Our view of the caselaw is shared by a discussion of claims for breach of the implied covenant of good faith and fair dealing for franchise encroachment that appears in a chapter on franchising in an ABA Litigation Section's publication. *See* 14 Thomas J. Collin & Matthew D. Ridings, *Business and Commercial Litigation in Federal Courts* § 150:38 (Robert L. Haig, ed., 5th ed. 2022). The discussion states that the holding of *Vylene* "has been criticized and conflicts with California law as applied by state courts" and that the *Scheck* opinion "has long since been repudiated."[76]

Courts in Michigan have recognized the problems with these decisions, too. In *Cook v Little Caesar Enterprises*, *Inc*,[77] the United States District Court for the Eastern District of Michigan rejected *Scheck* as being "contrary to Michigan law" and "discredited by other cases in the Southern District of Florida."[78] The *Cook* Court noted:

> that at least two courts in the Southern District of Florida, have expressly refused to follow *Scheck.* In *Barnes v Burger King Corp,* Bus Fran Guide (CCH) ¶ 10,932 (S.D.Fla.1996) the court held that "if [the franchisee] is unable to maintain a claim for breach of the express terms of the Franchise Agreement, then [the franchisee] cannot maintain a claim for breach of the implied covenant of good faith." *Id.* at 28, 208. *See also Burger King Corp. v. Weaver,* Bus. Fran. Guide (CCH) ¶ 10,762 (S.D. Fla. 1995) (stating that "[t]o the extent that our decision today may conflict with *Scheck,* we find that *Scheck* read Florida law more expansively than is warranted by the caselaw.").[79]

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[76] *Kazi v KFC US, LLC*, 76 F 4th 993, 1005 (10th Cir 2023).
[77] *Cook v Little Caesar Enterprises, Inc*, 972 F Supp 400 (ED Mich 1997).
[78] *Id.* at 409.
[79] *Id.* at 409.

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This Court has no reason to follow *Vylene*'s discredited approach of treating the covenant as a source for judicially created rights and obligations outside the parties' contract. The approach does not align with Michigan's well-established principle that courts cannot rewrite unambiguous contracts based on their subjective sense of fairness. It also conflicts well-established principles of contractual interpretation in Michigan, including that a party's alleged "reasonable expectations" cannot alter the unambiguous terms of a contract:

> The main goal of contract interpretation generally is to enforce the parties' intent. But when the language of a document is clear and unambiguous, interpretation is limited to the actual words used, and parol evidence is inadmissible to prove a different intent. An unambiguous contract must be enforced according to its terms. The judiciary may not rewrite contracts on the basis of discerned "reasonable expectations" of the parties because to do so is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy.[80]

What is more, in disregarding the parties' actual agreement for what a court might believe is a "better" agreement, the *Vylene* approach offends the basic freedom to contract that this Court has called "the bedrock principle of American contract law":

> The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art. I, § 10, cl. 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society. Few have expressed the force of this venerable axiom better than the late Professor Arthur Corbin, of

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[80] *Burkhardt v Bailey,* 260 Mich App 636, 656–657; 680 NW2d 453 (2004) (citations and quotation marks omitted).

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> Yale Law School, who wrote on this topic in his definitive study of contract law, *Corbin on Contracts,* as follows:
>
> One does not have "liberty of contract" unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made.[81]

The *Vlyene* approach conflicts with fundamental contract principles. Courts have roundly rejected it for this reason. This Court should reject this approach, too, and affirm Michigan's long-standing approach to the covenant of good faith and fair dealing, which uses the covenant as an interpretative tool to measure the performance of an express, discretionary duty. Doing so would be consistent with Michigan law and basic contract principles.

2. Adopting the *Vylene* Approach Would Create Uncertainty Around Contracts and Undermine Their Utility.

In conflicting with basic contract principles, the *Vylene* approach undermines the basic utility of contracts. Parties often reduce their contracts to writing for the very purpose that they want a clear, definitive record of their respective rights and obligations. In doing so, parties often strive (albeit at times imperfectly) for certainty and predictably. Not only will they frequently choose the contract's precise terms carefully, but they will also frequently include, among other things, merger and integration clauses meant to ensure that the contract's terms alone control.

If courts can rewrite contracts to include new duties or obligations that no party contracted for, the benefits of a clear, integrated contract evaporate. Parties who wanted certainty and clarity are left to the whims of a given judge's sense of fairness. This approach is not what parties want when they contract. It also fundamentally misunderstands the purposes of contract law. See *Bloomfield Estates Improvement Ass'n, Inc v Birmingham,* 479 Mich 206, 213; 737 NW2d 670

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[81] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776, 782 (2003).

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(2007), quoting *Rich Products Corp v Kemutec, Inc,* 66 F Supp 2d 937, 968 (ED Wis, 1999) ("Because the parties have freely set forth their rights and obligations toward each other in their contract, when resolving a contractual dispute, 'society is not motivated to do what is fair or just in some abstract sense, but rather seeks to divine and enforce the justifiable expectations of the parties as determined from the language of their contract.'").

Perhaps worse still, such an approach would inevitably encourage cynical litigation. Parties without any contractual rights or duties on which to base a claim, but upset (or purportedly upset) with some outcome, would look to the implied covenant of good faith and fair dealing for a catchall claim. The result would be that a party without any express right in an integrated contract could drag its counterparty into litigation to extract benefits, whether through a judicial declaration of unwritten rights or a nuisance settlement, which that party never bargained for in the first place.

The Court should affirm Michigan law's historical approach to the implied covenant of good faith and fair dealing. To adopt *Vylene*'s approach would not only contradict this Court's established contract law principles, but it would also undermine the many efforts contracting parties make to ensure that their contracts embody their actual and complete agreement. What is more, the approach would encourage wasteful litigation that clear, integrated contracts would otherwise prevent.

3. Adopting *Vylene's* Approach Would Undermine the Interests of Parties who Have Contracted Against Michigan law.

The *Vylene* approach conflicts with contract law principles and misunderstands the aim of contract law. Those reasons alone suffice to reject it. But the very fact that *Vylene* deviates from Michigan's established law is also a reason to reject it. Parties necessarily contract against existing background law. The law in Michigan has long been that covenant cannot be used to imply new rights or obligations. In crafting contracts' provisions, including choice-of-law provisions, parties

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have relied on Michigan's background law. To adopt the approach in *Vylene* now would be to fundamentally change that law. And parties who once thought they could rely on their choices of what to include and omit from their contracts would face unpredictability and uncertainty that they never contemplated when contracting.

This Court has expressed appropriate skepticism about deviating from long-established rules when those rules have engendered reliance. See *Bott v Comm'n of Nat Res of State of Mich Dep't of Nat Res*, 415 Mich 45, 61–62; 327 NW2d 838 (1982) (rejecting an invitation to change "rules of property law which" had "been fully established for over 60 years" that parties had relied on and the Legislature could change). Michigan has a long-standing approach to the covenant that limits its role to only an interpretive tool where a party has an *existing obligation* in a contract.[82] To shift the law now to treat the covenant as a tool for courts to "find" unwritten obligations in a contract would undermine the reliance interests of parties who contracted against Michigan's well-established background law.

The Court should not deviate from Michigan's approach to the covenant. No good reason exists to do so. But even if the *Vylene* approach had merit, which it does not, no reason exists for a sudden shift in the law that would leave parties who have relied on Michigan law, and in some cases chosen it specifically to govern their contracts, to face the brunt of such a change.

[82] The performance of which is in that party's *sole discretion.*

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II. On any Understanding of the Covenant, Plaintiff has Not Stated a Valid Claim for Breach of Contract Based on Boyne Entering Into the 2018 Transaction That Added to its Debt.

A. Plaintiff has Not Stated a Claim for Breach Under Michigan's Approach.

If the Court affirms Michigan's historical approach to the covenant, it is clear that Plaintiff has not stated a valid claim for breach. It is settled law that a plaintiff can only succeed on a breach of contract claim where the terms of a contract are breached.[83] Where the terms of a written contract are clear and unambiguous, they "must be enforced as written."[84] Courts have no authority to "look past the plain and unambiguous terms of a contract to impose an obligation on a party that has not been clearly delineated in the parties' agreement."[85] And as set forth above, Michigan law correctly does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing apart from a claim for a breach of the contract itself.[86]

In this case, Plaintiff has admitted that "there is no express term or provision in the May 2014 [Settlement Agreement] that limits Boyne USA's ability to incur debt."[87] The express language of the 2014 Settlement Agreement supports this admission. Yet, Plaintiff alleges that Boyne's acquisition of debt breached Paragraph 2 of the 2014 Settlement Agreement. However, nothing in Paragraph 2 limits the amount of debt Boyne can incur. And contrary to Plaintiff's assertion in her Complaint that "[t]he parties' agreed to a formula that would provide a *reasonable value* of Plaintiff's shares each year, based on Boyne USA's financials from the prior year,"[88] there

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[83] *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 554; 904 NW2d 192 (2017).
[84] *Id.* at 547.
[85] *Id.* at 449.
[86] *Bank of Am, NA,* 316 Mich App at 501.
[87] See **Exh. 4**, Response to Request to Admit at No. 18; Appx. 95.
[88] See **Exh. 1**, Pl.'s Compl., ¶ 81; Appx. 14.

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is nothing in the 2014 Settlement Agreement to support that assertion or that provided Plaintiff with any right to any particular per share price (negative or positive). Similarly, there is nothing in the 2014 Settlement Agreement or any other agreement that gave her a right to redemptions beyond 2019, which is when her shares were fully redeemed under the Formula.[89]

In fact, it is clear from the 2014 Settlement Agreement, which grants Plaintiff a 30-day window after being notified of the per share price to decide whether to redeem her shares, that the parties anticipated that there may be years that Plaintiff did not like the per share price and did not want to redeem shares.[90] And that reality is also clear from the variable nature of the Formula.[91] The per share price would be different every year and every year Plaintiff could choose whether she wanted to redeem shares (assuming she qualified).

Moreover, the parties chose to use the term "Total Company Debt" to mean all of Boyne's debt with limited exceptions.[92] The parties certainly could have negotiated a limit on Boyne's debt for purposes of the Formula, as the parties had negotiated other limits in the agreement. For example, Plaintiff's borrowing had express limits. Additionally, the total amount that Plaintiff could redeem in any one year was limited. However, the parties chose not to limit Boyne's debt in defining the term "Total Company Debt", and therefore, that is the best evidence, and only evidence, of the parties' intent. Historically, the decision of whether to incur debt has always been made by Boyne management. Absent an express provision changing that, the decision is left to

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[89] See **Exh. 2,** 2014 Settlement Agreement ¶ 2; Appx. 56. When, as here, a party alleges a breach of contract claim, and attaches the contract, the contract itself becomes part of the pleadings. MCR 2.113(C)(1) & (2).
[90] See **Exh. 2,** 2014 Settlement Agreement ¶ 2(c)(ii) & (iii); Appx. 57-58.
[91] See **Exh. 1**, Pl.'s Compl., ¶ 39; Appx. 9.
[92] See **Exh. 2,** 2014 Settlement Agreement, pg. 4, fn 2; Appx. 57.

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Boyne. Plaintiff's allegations are simply not a breach of Paragraph 2 of the 2014 Settlement Agreement or any other term of the Settlement Agreement. Thus, there is no basis to find that acquiring debt somehow violated Paragraph 2 of the 2014 Settlement Agreement because ***nothing*** in that paragraph prohibits Boyne from increasing its debt.[93]

The Court of Appeals' correctly opined on this issue as follows:

> We disagree with plaintiff that she has stated a cognizable breach-of-contract claim with respect to defendants' decision to acquire significant debt in 2018. The 2014 settlement does not contain any specifications or restrictions on Boyne USA's ability to take on debt. . . . Accordingly, as to the increased debt, there is no underlying contractual term to which the implied duty of good faith and fair dealing applies.[94]

These principles are well illustrated by *Belle Isle Grill Corp v Detroit*.[95] There, the City of Detroit entered a lease with the plaintiff to operate a grill at a refreshment stand on Belle Isle.[96] A few months later, the City issued an order that prevented groups from gathering in the area.[97]

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[93] *Van Buren*, 319 Mich App at 554. Plaintiff even alleges in the Complaint that the Company's debt changed from year to year leading up to the 2019 redemption. See **Exh. 1**, Pl.'s Compl., ¶ 22; Appx. 6-7. Plaintiff never objected. Notably, the trial court appeared to agree that Paragraph 2 does not limit Boyne's ability to incur debt, yet still stated that "Plaintiff's breach of contract claim will obviously hinge on plaintiff's theory that defendants breached an implied covenant of good faith and fair dealing." See **Exh. 24**, Transcript (10/18/21), at 5-6; Appx. 360-361. However, as set forth above, Michigan jurisprudence does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing apart from a breach of the underlying contract itself. And that is true even where one party's conduct outside of the scope of the contract allegedly upsets the other party's expectations. Under such circumstances, this Court has found that "to allow such a person to bind another to an obligation not covered by the contract as written because the first person thought the other was bound to such an obligation is neither reasonable nor just." See *Raska v Farm Bureau Ins Co*, 412 Mich 355, 363; 314 NW2d 440 (1982).

[94] See **Exh. 17**, *Kircher v Boyne USA, Inc*, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 360821). (App. 1, Slip Opinion.), fn. 7; Appx. 315.

[95] 256 Mich App 463, 476; 666 NW2d 271 (2003).

[96] *Id.* at 465-66.

[97] *Id.* at 466-67.

The plaintiff alleged that, under this order, "access to his stand was frequently eliminated" because the City "blocked access" to it and ordered potential customers to disperse.[98] He sued for breach of warranty and breach of the implied covenant of good faith and fair dealing. The Court of Appeals affirmed the dismissal of both claims, reasoning that nothing in the parties' lease prevented the City from taking actions that made the plaintiff's leasehold less profitable, and the trial court had "properly ruled that Michigan does not recognize a claim for breach of an implied covenant of good faith and fair dealing."[99]

Similarly, in *In re Leix*,[100] a husband and wife agreed to execute mutual wills.[101] Following the wife's death, the husband modified his will.[102] A lawsuit was filed alleging that the modification breached the implied covenant of good faith and fair dealing barring the husband from destroying their contractual right to an interest in the trust by transferring marital assets.[103] The trial court granted summary disposition because "nothing in the agreement put any restrictions on what the surviving party could do with the parties' assets."[104] The Court of Appeals affirmed, explaining that:

> ***[T]he contract does not expressly limit the parties from transferring assets.*** Unlike some other jurisdictions, Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing. ***Regardless of whether the transfers were made for the purpose of avoiding the testamentary***

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[98] *Id.* at 467.
[99] *Id.* at 475-76.
[100] 289 Mich App 574; 797 NW2d 673 (2010).
[101] *Id.* at 575.
[102] *Id* at 575-76.
[103] *Id.*
[104] *Id.* at 577.

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<u>disposition, the agreement did not restrict [the husband] from disposing of the assets as he saw fit.</u>[105]

In other words, when a contract is "clear and specific regarding the parties' rights and obligations," courts cannot cite the implied covenant of good faith and fair dealing to invent new terms.[106] The reason why is obvious: where "the entirety of the parties' obligations are found in the written contract between them," a court cannot "look past the plain and unambiguous terms of a contract to impose an obligation on a party that has not been clearly delineated in the parties' agreement."[107] Doing so would hold a party liable for breaching an independent, unwritten obligation, which is a theory of liability that Michigan law has unequivocally rejected.[108]

In *Trzeciak v Allstate Property and Casualty Ins Co,*[109] the plaintiffs alleged that Allstate breached the implied covenant of good faith and fair dealing by relying on non-risk-based factors to calculate the plaintiffs' insurance premiums.[110] The Court found that the plaintiffs had not stated a viable claim because the amount of the premium was an express term in the insurance contract, including that it was based on a proprietary retention model.[111]

In *Certified Abatement Services, Inc v Dept of Management and Budget*,[112] the Court of Appeals upheld the dismissal of the plaintiff's breach of contract claim based on the implied

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[105] *Id*. at 591. (citation and quotation marks omitted, emphasis added).
[106] *Bank of Am*, 316 Mich App at 501.
[107] See *Ulrich*, 192 Mich App at 198 and *Van Buren*, 319 Mich App at 549.
[108] See *Belle Isle*, 256 Mich App at 475-476 ("Michigan does not recognize a claim for breach of an implied covenant of good faith and fair dealing."); *In re Leix*, 289 Mich App at 575-576 (same).
[109] 569 F Supp 3d 640 (ED Mich 2021).
[110] *Id.* at 646.
[111] *Id.* at 647.
[112] *Certified Abatement Services, Inc v Dept of Management and Budget*, No 245307, 2004 WL 136835 (Mich Ct App, Jan 27, 2004).

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covenant of good faith and fair dealing.[113] The plaintiff had sued the defendant for payment for services related to asbestos removal when the amount of asbestos to be removed was underestimated. The Court of Appeals found that the

> defendant's manner of performance was not discretionary. The contract clearly described defendant's payment obligations. The discretionary nature of estimating the amount of asbestos did not relate to defendant's performance of the contract. More importantly, Michigan does not recognize a claim for breach of an implied covenant of good faith and fair dealing.[114]

The Court of Appeals has endorsed the following rationale for the rule against imposing obligations on parties through the implied covenant of good faith and fair dealing:

> [T]he [ ] limited application of the implied good faith duties serves important contractual purposes. Where a party wishes to impose specific obligations upon the other contracting party on a matter not central to the contract, those obligations must be bargained for and included in the contract. This also prevents courts from having to flounder through unexpressed intentions in a vain attempt to discern the true agreement of the parties. To impose such a duty upon courts would thwart the very purposes of objective contractual interpretation. Where the parties are sophisticated parties who engaged in extensive negotiations, where the contract expressly addresses specific issues, and where the contested provisions are not central to the existence of the contract or to performance of the purposes of the contract, a court may not read into the contract terms which the parties have not included.[115]

Those limitations are consistent with basic contractual principles:

> As our Supreme Court has explained, the judiciary is without authority to modify unambiguous contracts or rebalance the

[113] The lower court in *Certified Abatement Services* had noted "that plaintiff entered the contract 'with [its] eyes open,'; that the contract was not unconscionable; that the parties knew that certain 'unknowns' existed; and that the facts did not support plaintiff's claims. *Id.*, at *2.
[114] *Id.,* at *2 citing *Belle Isle Grill Corp v. Detroit*, 256 Mich App 463, 476; 666 NW2d 271 (2003), citing *Ulrich v Federal Land Bank of St. Paul*, 192 Mich.App 194, 197; 480 NW2d 910 (1991).
[115] *Fifth Third Mortgage* Co *v Chicago Title Ins Co*, 758 F Supp 2d 476, 490 (SD Ohio 2010)(ellipses omitted) (cited in *Bank of Am*, 316 Mich App at 501).

> contractual equities struck by contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions. ***<u>Nor do we, as plaintiff requests, look past the plain and unambiguous terms of a contract to impose an obligation on a party that has not been clearly delineated in the parties' agreement</u>***.[116]

Time and again, Michigan courts have barred claims similar to Plaintiff's.[117] Whether to increase debt or acquire assets are fundamental business decisions that go to the heart of successfully operating any enterprise. It would be astounding for a court to insert such limitations into an agreement when the parties never negotiated for them. Because the 2014 Settlement Agreement does not limit Boyne's right to make such decisions, the parties left them reserved to Boyne. Therefore, the trial court lacks any basis to permit parol evidence to decide whether to imply a covenant of good faith and fair dealing in regard to limiting Boyne's ability to run its business. And under Michigan's historical approach to the covenant, Plaintiff has failed to state a claim for breach.

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[116] *Van Buren*, 319 Mich App at 549 (emphasis added).

[117] See further, **<u>Exh. 25</u>**, *Lancia Jeep Hellas SA v Chrsler Grp Int'l, LLC*, No 329481, 2016 WL 1178303, at *10 (Mich Ct App, Mar 24, 2016) (rejecting a claim that defendant had breached the implied covenant of good faith and fair dealing by destroying the value of a contractual right where nothing in the agreement prohibited the actions that allegedly destroyed the value of the contract), Appx. 378; See **<u>Exh. 26</u>**, *Gay v Fannie* Mae, No 315868, 2014 WL 4215093, at *2-3 (Mich Ct App, Aug 26, 2014) (affirming summary disposition where a contract did not prohibit the defendant from foreclosing on a home because "to invoke the implied covenant of good faith and fair dealing, a litigant must show that a party breached the underlying contract itself"), Appx. 380-381; See **<u>Exh. 27</u>**, *Daniel v Public Storage Inc*, No 301563, 2012 WL 832851, at *2 (Mich Ct App, Mar 13, 2012) ("Michigan does not recognize a common law cause of action for breach of an implied covenant of good faith and fair dealing without a valid underlying claim for breach of contract."); Appx. 385.

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B. Plaintiff has Also not Stated a Claim for Breach Based on the Debt Under any Other Understanding of the Covenant.

Not only does Plaintiff's claim fail under Michigan's established law, it fails under any theory related to the implied covenant of good faith and fair dealing. Whatever Plaintiff alleges about the 2014 Settlement Agreement, the April 2019 Settlement Agreement leaves no question about the viability of Plaintiff's claim. The redemption that Plaintiff complains about is the 2019 redemption, which occurred under the April 2019 Settlement Agreement—not the 2014 Settlement Agreement. This point is clear from a plain reading of the April 2019 Settlement Agreement.

The 2018 transaction took place in May 2018—nearly a year *before* the parties entered into the April 2019 Settlement Agreement.[118] Plaintiff will likely be hard-pressed to find case law applying the implied covenant to actions that occurred *before* the contract and conduct at issue (the April 2019 Settlement Agreement and 2019 redemption). Even if Boyne breached the 2014 Settlement Agreement in entering into the 2018 transaction (which it did not), Plaintiff entered into the April 2019 Settlement Agreement. Plaintiff's actions have legal consequences in regards to any claim for breach of the 2014 Settlement Agreement.

> [I]f a material breach of contract occurs that does not indicate an intention to repudiate the remainder of the contract, the injured party must elect to either continue performance or cease performance and seek damages. Consequently, any act by the injured party that indicates an intent to continue will operate as a conclusive election to waive the breach. Moreover, once the injured party has waived the breach, it may then be held liable for its subsequent breach of the contract.[119]

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[118] Plaintiff, through her counsel, has admitted to knowing about the 2018 Transaction in May of 2018. See **Exh. 13**, Hearing on Defendants' Motion for Summary Disposition (05/20/22), pg. 17, lines 17 – 25; Appx. 230.

[119] See **Exh. 29**, *West Branch Tank*, No 194399, 1998 WL 2016554 (March 10, 1998) citing *Schnepf v Thomas L McNamara, Inc*, 354 Mich 393, 397; 93 NW2d 230 (1958); Appx. 399.

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In this case, by entering into the April 2019 Settlement Agreement, wherein she agreed to use the Formula for her 2015-2019 redemptions Plaintiff can no longer claim a breach of the 2014 Settlement Agreement. Moreover, because the remainder of Plaintiff's shares were redeemed under the April 2019 Settlement Agreement, Plaintiff can have no cause of action under the 2014 Settlement Agreement related to the per share price because she has no future shares to redeem—that is, she has no damages to pursue.[120]

The Court has no reason to adopt the approach from *Vylene* or to otherwise deviate from Michigan's established law. But no matter what approach to the covenant of good faith and fair dealing this Court adopts, Plaintiff fails to state a claim related to Boyne's debt. This Court should affirm that this theory fails to state a claim.

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[120] Finally, to assert a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must plead facts supporting bad faith conduct. See, e.g., *Ferrell v Vic Tanny Int,l, Inc*, 137 Mich App 238, 244; 357 NW2d 669 (1984) ("Plaintiffs have failed to show that the dress code was enacted in bad faith. Accordingly, we find that the trial court correctly ruled that the facts as pled failed to state a claim for breach of contract upon which relief can be granted."). Plaintiff has alleged no facts, as opposed to conclusory statements, that purchasing resort properties amounted to "bad faith." Nor could she do so plausibly. It would make little sense for Boyne to incur $300 million in debt to purchase properties simply to undermine Plaintiff. Apart from all the other problems with her claim, Plaintiff has also alleged no facts supporting that the decision to purchase resort properties was anything but a good faith effort to do what was best for Boyne's business. In fact, in post pleading discovery, Plaintiff has admitted that the 2018 transaction was a good business decision, and she did not object to it. See **Exh. 10**, Transcript – Testimony of Kathryn Kircher (05/01/24), pgs. 179-180; Appx. 166-167. Moreover, in the August 2019 Settlement Agreement and September 2019 Order, Plaintiff represented and acknowledged that she had no causes of action against Boyne, Stephen Kircher, and Amy Kircher Wright and that they had fulfilled their obligations to her, including the manner and form in which her redemptions were made in the April 2019 Settlement Agreement. See **Exh. 18**, August 2019 Settlement Agreement, ¶3; Appx. 321. See **Exh. 20**, Stipulated Order (09/17/19), pg. 3; Appx. 332.

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III. On any Understanding of the Covenant, Plaintiff has Not Stated a Valid Claim for Breach of Contract Based on an Alleged Failure to Utilize an Alternative Formula to Calculate the Redemption Price of Plaintiff's Shares.

Plaintiff has also failed to state a claim for breach of contract based on the alleged failure to use an alternative formula to calculate Plaintiff's redemption price. Like Plaintiff's debt theory, this theory fails under any understanding of the covenant of good faith and fair dealing. Thus, no matter what approach the Court adopts, this Court should reverse the Court of Appeals on this point.

A. Plaintiff has Not Stated a Claim Under Michigan's Established Law Because There is no Duty or any Discretion to Which the Covenant Might Apply.

Plaintiff's claim based on the phrase "unless otherwise agreed by the Parties" fails under existing Michigan law for a straightforward reason: the cited language creates no rights or duties. Courts applying Michigan law have recognized that the covenant of good faith and fair dealing only applies as an interpretative tool to determine, for instance, how a *performing party must carry out its sole <u>duty</u>* under the contract.[121] The implied covenant exists to "ensur[e] that ***a party's sole discretion in performing a <u>specific duty</u> under a contract is done . . . in good faith***."[122]

The Court of Appeals found that the language "unless otherwise agreed by the Parties" in the 2014 Settlement Agreement could sustain a claim because it "conferred discretion on the defendants to agree to alternative method to calculate plaintiff's redemption price."[123] However, Plaintiff has not alleged that Defendants refused to agree to or negotiate an alternative method to

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[121] See **<u>Exh. 21</u>**, *Interquim, SA v Berg Imports, LLC*, No 21-10665**,** 2022 WL 790802, at *4 (ED Mich, Mar 14, 2022); Appx. 337-338.

[122] See **<u>Exh. 21</u>**, *Interquim, SA v Berg Imports, LLC*, No. 21-10665**,** 2022 WL 790802, at *4 (ED Mich, Mar 14, 2022); Appx. 337-338.

[123] See **<u>Exh. 17</u>**, *Kircher v Boyne USA, Inc*, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 360821). (App. 1, Slip Opinion.), pg. 5; Appx. 315.

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calculate Plaintiff's redemption price. Plaintiff simply alleges that Defendants failed to utilize an alternative method—as if Defendants could unilaterally change the Formula without an agreement with Plaintiff. However, had Defendants utilized an alternative method, it would have breached the April 2019 Settlement Agreement and violated the May 2019 Order, which both dictated exactly how Plaintiff's shares were to be redeemed.

For discretion to matter under the covenant, the discretion must be tied to some duty. The language "unless otherwise agreed by the Parties" by its plain terms does not create a duty to negotiate or, as the Court of Appeals found, a duty "to consider an alternative method."[124] This is particularly important here where the parties had an established method of redeeming Plaintiff's shares. Under the 2014 Settlement Agreement, absent the parties reaching another agreement, if Plaintiff qualified for a redemption, and upon receipt of the redemption price and Plaintiff indicating that she wanted to redeem, the method of redemption was determined by the 2014 Settlement Agreement. The language at issue here has little to do with a future right or duty as was the case in *Vylene*, which involved an option to extend the franchise into the future.

Without any duty to negotiate, it cannot be a breach of the agreement if a party refuses to renegotiate or consider an alternative term. Any discretion that exists is discretion both parties have: to renegotiate or amend terms of a contract, or more importantly, not to renegotiate or amend the terms of a contract. This "discretion" cannot implicate the covenant in any way.

To be sure, if a contract *obligates* the parties to negotiate a term in the future, which the 2014 Settlement Agreement does not, some case law has held that the parties must conduct those negotiations in good faith due to the covenant. But in those cases, the contracts actually contain an

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[124] See **<u>Exh. 17</u>**, *Kircher v Boyne USA, Inc*, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 360821) (App. 1, Slip Opinion.), pg. 5; Appx. 315.

express obligation. Case law makes this distinction clear. For example, in *Charter Township v Visteon Corp*,[125] the defendant agreed to negotiate with the plaintiff in good faith over certain payments. The pertinent language in the parties' agreement provided:

> To the extent that the property tax payments made by defendant to plaintiff . . . are inadequate to permit plaintiff to meet its payment obligations, . . . **defendant hereby agrees to negotiate with plaintiff in good faith** to determine the amount of the shortfall. . .[126]

In finding that the unambiguous language of the contract obligated the defendant to engage in negotiations once a shortfall occurs, the Court of Appeals relied on long-standing legal principles:

> It is true that this contract is not particularly strong, or overly beneficial to plaintiff. However, we do not create ambiguities to rewrite or rebalance the equities of a contract, especially when, as in this case, the contract was voluntarily drafted and entered into by consenting parties. As our Supreme Court has explained, ''[t]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions.[127]

In some cases, parties might agree to create a duty to negotiate, such as for an option to extend a lease, or like in *Vylene*, a franchise. But the rights and duties in those cases are still explicit rights and duties created by an agreement. Absent such clear terms, and in a manner consistent with Michigan law, courts have not foisted a duty to renegotiate on parties who never agreed to as much. See, e.g., *Racine & Laramie, Ltd v Dep't of Parks & Recreation*, 11 Cal App 4th 1026,

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[125] 319 Mich App 538; 904 NW2d 192 (2017).
[126] *Id.* at 546.
[127] *Id.* at 550.

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1032; 14 Cal Rptr 2d 335, 339 (1992) (holding that "rather simple and unassailable contract law principles" precluded using the covenant of good faith and fair dealing to impose an obligation to renegotiate based on provision that simply recognized parties' ability to amend); *Badgett v Sec State Bank*, 116 Wash 2d 563, 572; 807 P2d 356 (1991) ("While the parties may choose to renegotiate their agreement, they are under no good faith obligation to do so.").

The language "unless otherwise agreed by the Parties" does not create an obligation to re-negotiate nor can it reasonably be construed as doing so. It is language commonly found in contracts, agreements, and stipulations. It grants no rights and obligates no party to do anything. Its purpose is to make certain that in the absence of another agreement, the redemptions would be done pursuant to paragraph 2 of the 2014 Settlement Agreement. Stated another way, the language simply serves to recognize that, unless amended, the agreement's terms control. Considering Plaintiff has sued Boyne and her brother three times in the last ten years, no amount of language can be considered too detailed. But under no circumstances can the language sustain a claim for breach based on the implied covenant of good faith and fair dealing under Michigan's existing law based on a theory that the Defendant did not "utilize" an alternative method.

Even apart from the failure to create any rights, the language cannot sustain a claim under Michigan law because it necessarily does not confer ***unilateral*** discretion. As Michigan case law recognizes, the discretion to which the covenant applies must be a party's ***sole*** discretion over how to perform a duty or obligation. Defendants have no discretion to impose a new formula on their own nor could they under this language.[128] The term "unless otherwise agreed by the Parties"

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[128] Reaching an agreement is never within a performing party's sole discretion. See *Kamalnath v Mercy Memorial Hospital Corp*, 194 Mich App 543; 487 NW2d 499 (1992) (Simply put, one cannot unilaterally modify a contract because by definition, a unilateral modification lacks mutuality).

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creates no legal duties. It also confers no unilateral discretion. Thus, Plaintiff's claim fails under Michigan's established law. Any finding to the contrary is at odds with the implied covenant's fundamental principles in Michigan, including that a breach of the implied covenant must arise from a breach of the contract itself and that the covenant only applies to an *existing* contractual obligation.

B. The Court of Appeals Also Erred in Finding That Plaintiff Stated a Claim Under any Approach to the Covenant Because Plaintiff Never Alleges Facts Supporting a Claim on This 'Failure to Utilize an Alternative Formula' Theory.

Although this Court should apply Michigan's established approach to the covenant and hold that Plaintiff failed to state a claim, the result should be the same no matter what approach to the covenant the Court takes. In her Complaint, Plaintiff nowhere alleges that she proposed an alternative formula nor does she identify at what point Boyne supposedly breached an obligation to consider an alternative formula. Defendants' alleged breach could not have occurred after the April 2019 Settlement Agreement was executed and the May 2019 Order was signed. The omission matters in part because Plaintiff has an obligation to allege facts, not conclusions, supporting a breach.[129]

Not only does Plaintiff have to allege facts supporting a breach, in this case, timing matters. The parties did agree, through the April 2019 Settlement Agreement, to a redemption for 2019. The April 2019 Settlement Agreement unambiguously requires this 2019 redemption to take place at the Formula price. And the Agreement does not include the "unless otherwise agreed by the Parties" language. Because this Agreement would control over the 2014 Settlement Agreement's

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[129] *ETT Ambulance Serv Corp. v Rockford Ambulance, Inc*, 204 Mich App 392, 396; 516 NW2d 498, 500 (1994).

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language, there would be no basis for Plaintiff's claim even on the Court of Appeals' misguided theory after the April 2019 Settlement Agreement was executed, and certainly not after the May 2019 Order was signed. For this reason, no matter what approach the Court takes, the Court should reverse the Court of Appeals' decision and find that Plaintiff has failed to state a claim.

C. The Terms of the April 2019 Settlement Agreement and May 2019 Order, Which the Court of Appeals Never Addressed, Also Preclude Plaintiff's Claim Under any Understanding of the Covenant.

The Court of Appeals erred in finding that Defendants had any duty to which the covenant might attach or any relevant discretion under the 2014 Settlement Agreement. It also erred in failing to hold Plaintiff to the proper pleading standard. Those reasons alone suffice to reverse. But this Court should also reverse because the Court of Appeals misinterpreted the 2014 Settlement Agreement and failed to consider the April 2019 Settlement Agreement and May 2019 Order.

When, as here, a party alleges a breach of contract claim, and attaches the contract, the contract itself becomes part of the pleadings.[130] Plaintiff attached to her complaint not only the 2014 Settlement Agreement but the April 2019 Settlement Agreement as well. The language the Court of Appeals relied on to create Plaintiff's "failure to utilize an alternative formula" claim is contained in the 2014 Settlement Agreement. The April 2019 Settlement Agreement contains no such language.

[130] MCR 2.113(C)(1) & (2). The April 2019 Settlement Agreement was attached to Plaintiff's Complaint as Exhibit B. See **Exh. 1**, Pl.'s Complaint, Ex B; Appx. 46.

There can be no dispute that under the April 2019 Settlement Agreement, Defendants were required to calculate the "strike" price for Plaintiff's 2019 redemption using the Formula and pay Plaintiff $1,050,000 for her redemptions regardless of the strike price.[131] A reading of Plaintiff's Complaint, the 2014 Settlement Agreement, the April 2019 Settlement Agreement, and the May 2019 Order all require use of the Formula.[132] More importantly, the assertions in paragraphs 22, 26, and 73 of Plaintiff's Complaint, which are to be accepted as true, allege an application of the Formula for the 2019 redemption as well.

Had Plaintiff not entered into the April 2019 Settlement Agreement, she would have received notice of the per share price by May 31, 2019. Plaintiff, however, chose, with the advice of counsel, to redeem her shares not knowing what the per share price might be.[133] Plaintiff also agreed that she was "fully informed" in entering the April 2019 Settlement Agreement. Thus, any risk falls squarely on the shoulders of Plaintiff. Further, following the April 2019 Settlement Agreement, Plaintiff and her counsel stipulated to the entry of May 2019 Order, which mirrors Paragraph 1 of the April 2019 Settlement Agreement (the redemption provision). The May 2019 Order leaves no discretion to any party on what is supposed to occur. Plaintiff's shares are to be redeemed pursuant to the Formula in the same manner and form as previous years.

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[131] See **Exh. 6**, April 2019 Settlement Agreement, ¶ 1; Appx. 111-112; **Exh. 8**, Emmet County Circuit Court Order dated May 15, 2019, ¶ 1; Appx. 146.

[132] See **Exh. 1**, Plaintiff's Complaint, ¶ 40; Appx. 9; **Exh. 6**, April 2019 Settlement Agreement, ¶ 1; Appx. 111-112; **Exh. 8**; Emmet County Circuit Court Order dated May 15, 2019, ¶ 1; Appx. 146. Plaintiff also subsequently approved the manner and form in which her redemptions were made in the August 2019 Settlement Agreement and September 2019 Order. See **Exh. 18**, August 2019 Settlement Agreement, ¶3; Appx. 321. See **Exh. 20**, Stipulated Order (09/17/19), pg. 3; Appx. 332.

[133] **Exh. 6**, April 2019 Settlement Agreement, ¶ 1, 5(a), & 5(c) Appx. 111-112 and 115.

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Contrary to the plain language of the agreements, the Court of Appeals' theory found that Boyne was required to consider an alternative to the Formula for Plaintiff's 2019 redemption. Essentially, the Court of Appeals said Defendants had to forego or waive their rights under the 2014 Settlement Agreement and the April 2019 Settlement Agreement. The Court of Appeals' holding would also require Defendants to breach the April 2019 Settlement Agreement and violate the May 2019 Order.

The covenant of good faith and fair dealing does not apply to override a contract's express term or a Stipulated Court Order.[134] ***Nor is the interpretative tool applied in a manner that requires a party to ignore, forego, or waive its express contractual rights***."[135] Requiring Defendants to renegotiate the contract here would not only force Defendants to forgo or waive their express contractual rights under the 2014 Settlement Agreement, it would require them to do so under the later April 2019 Settlement Agreement as well. It would also require Defendants to violate the May 2019 Order. These are points that the Court of Appeals entirely ignored in its holding.

The question for this Court is if the parties negotiated for the use of the Formula in the 2014 Settlement Agreement and the express terms of the April 2019 Settlement Agreement (and May 2019 Order) require use of the Formula to determine the 2019 strike price, can a party assert

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[134] *Cook v Little Caesar Enter, Inc*, 210 F3d 653, 657 (CA 6, 2000) (citing *General Aviation, Inc v Cessna Aircraft Co*, 915 F2d 1038, 1041 (CA 6, 1990)). When the parties have "unmistakably expressed their respective rights," the covenant does not adhere. *Hubbard*, 873 F2d at 877. See also *Clark Bros Sales Co v Dana Corp*, 77 F Supp 2d 837, 852 (ED Mich, 1999) (the implied covenant does not supersede the express terms of the parties contract and cannot form the basis for a claim independent of that contract).

[135] *Van Arnem Co v Mfrs Hanover Leasing Corp*, 776 F Supp 1220, 1223 (ED Mich1991) (citations omitted).

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a claim for breach of the 2014 Settlement Agreement because she no longer likes the price? The answer is no. And this answer would be the same under any understanding of the covenant of good faith and fair dealing that this Court might adopt.

The result makes imminent sense. Consider, for instance, *Cook v Little Caesars Enterprises, Inc*.[136] In *Cook*, the Plaintiff entered into a franchise agreement with Little Caesars that limited Little Caesars' right to issue franchises within 1-mile of the plaintiff's location. The plaintiff argued that Little Caesars breached the implied covenant of good faith and fair dealing by using its discretion to franchise other Little Caesars restaurants in nearby towns.[137] However, the Sixth Circuit disagreed with the Plaintiff.

> In the franchise agreements, Little Caesar Enterprises reserved the right to grant licenses to others subject only to Cook's "exclusive territory," which, by the terms of the franchise agreement, was a one-mile exclusive territory. This limitation was an express term of the franchise agreement and as such, under Michigan law, the implied covenant of good faith and fair dealing cannot be employed to override it.[138]

No other result would make sense. If a contract expressly defines the parties' rights and obligations on a subject, the covenant has no application in changing them.

In *Taylor v Countrywide Homes*,[139] the plaintiffs received a loan from Countrywide to refinance their property. Under the terms of the mortgage, if plaintiffs failed to pay the property taxes, Countrywide had the right to pay the taxes and plaintiffs would be obligated to repay

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[136] 210 F3d 653 (CA 6, 2000).
[137] *Id.* at 657-58.
[138] *Id.* at 657.
[139] See **Exh. 28**, *Taylor v Countrywide Homes*, 2010 WL 750215 (ED Mich, Mar 14, 2022); Appx. 388.

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Countrywide the amounts paid.[140] Ultimately, Countrywide paid the taxes on the plaintiff's behalf and set up an escrow account to ensure timely future payments.[141] The plaintiffs filed suit alleging, among other things, that Countrywide's failure to notify them prior to paying the taxes breached the implied covenant of good faith and fair dealing because Countrywide exercised its discretion to pay the taxes and establish the escrow in bad faith. The court found that

> a covenant of good faith and fair dealing cannot be used in the interpretation of a contract "to override express contract terms." *Stephenson,* 328 F.3d at 826–827, citing, *Cook v. Little Caesar Enter., Inc.,* 210 F.3d 653, 657 (6th Cir. 2000). Thus, when the parties have "unmistakably expressed their respective rights," the covenant does not adhere. *Hubbard,* 873 F.2d at 877; *see also Clark Bros. Sales Co. v. Dana Corp.,* 77 F.Supp.2d 837, 852 (E.D.Mich.1999) (the implied covenant does not supersede the express terms of the parties' contract and cannot form the basis for a claim independent of that contract). The undersigned suggests that plaintiffs' attempt to characterize Countrywide's conduct as "bad faith" or a breach of the covenant of good faith and fair dealing is merely an attempt to override the express terms of the parties' agreement, ***which included express language permitting Countrywide to take the actions about which plaintiffs' complain***. Thus, the undersigned suggests that plaintiff's claims of "bad faith" fraud or breach of the covenant of good faith and fair dealing must fail.[142]

Similarly, relying on the Seventh and Eighth Circuits, the Sixth Circuit Court of Appeals has noted that "a party's acting according to the express terms of a contract cannot be considered a breach of the duties of good faith and fair dealing."[143]

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[140] See **Exh. 28**, *Taylor v Countrywide Homes*, 2010 WL 750215, *4 (ED Mich, Mar 14, 2022); Appx. 390.

[141] See **Exh. 28**, *Id.* at *3; Appx. 389.

[142] See **Exh. 28**, *Id.* at *12; Appx. 395.

[143] *Big Yank Corp v Liberty Mut Fire Ins Co*, 125 F3d 308, 313 (CA 6, 1997).

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Here, Plaintiff and Defendants entered into the 2014 Settlement Agreement, which provided that Plaintiff could redeem her shares in Boyne on an annual basis pursuant to the Formula and subject to a number of conditions. Plaintiff asserts in paragraph 87 of the Complaint, that the "2014 Settlement Agreement permits the parties to agree to another method, beside the Formula, to calculate the annual redemption share price."[144] However, absent an agreement to modify the Formula, the Formula controlled. Under the 2014 Settlement Agreement and the April 2019 Settlement Agreement, along with the May 2019 Order, it was Boyne's express right for the strike price to be calculated pursuant to the Formula. The implied covenant of good faith and fair dealing cannot override this express right or require Boyne to forego those rights.[145]

Further, the language "unless otherwise agreed by the Parties" was ***not*** included in the April 2019 Settlement Agreement or May 2019 Order.[146] It would not make sense to include such language since by the very terms of the April 2019 Settlement Agreement, the redemptions were going to be executed by January of 2020. Further, related to the 2019 redemption, both the April 2019 Settlement Agreement and May 2019 Order provide that for 2019 "the strike price *shall be* calculated pursuant to the Settlement Agreement executed on May 7, 2014 in the *same manner and form as the previous years*."[147] In all years prior, the strike price was calculated pursuant to the Formula.[148]

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[144] See **Exh. 1**, Pl.'s Compl. ¶ 87; Appx. 15.

[145] *Van Arnem Co v Mfrs Hanover Leasing Corp*, 776 F Supp 1220, 1223 (ED Mich, 1991) (citations omitted).

[146] See **Exh. 6**, April 2019 Settlement Agreement; Appx. 111; **Exh. 8**, Emmet County Circuit Court Order dated May 15, 2019; Appx. 145.

[147] See **Exh. 6**, April 2019 Settlement Agreement, ¶ 1; Appx. 111-112. **Exh. 8**, Emmet County Circuit Court Order dated May 15, 2019, ¶ 1; Appx. 146.

[148] See **Exh. 1**, Pl's Compl. ¶ 22; Appx. 6-7.

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Here, there is no question or discretion over how the 2019 strike price would be determined.[149] It would be calculated pursuant to the 2014 Settlement Agreement's Formula in the same way as prior years. Certainly, if the parties were concerned about the outcome of the 2019 strike price, Plaintiff and Defendants could have negotiated in the April 2019 Settlement Agreement or the May 2019 Order an alternative method. The Court of Appeals finding that Defendants were required to "consider" some alternative formula or method is contrary to the express language of the April 2019 Settlement Agreement and May 2019 Order. Simply put, both documents contain "*express language permitting [Boyne] to take the actions about which [P]laintiff complains*,"[150] and in which Defendant Boyne had clear express rights and obligations and no discretion.

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[149] Not only that but the Court of Appeals' Opinion also conflicts with other express provisions of the April 2019 Settlement Agreement, including that the Parties agreed that the April 2019 Settlement Agreement "and any attachments, along with the documents incorporated herein contains the final, complete, and exclusive agreement between the Parties in relation to Case Number 16-105196-CK, which is the subject of this Agreement, ***and may not be modified, amended, altered, or supplemented*** except upon the execution and delivery of a written agreement executed by the Parties hereto." See **Exh. 6**, April 2019 Settlement Agreement, ¶ 12; Appx. 116. The Court of Appeals' ruling is contrary to this provision.
The 2014 Settlement Agreement was attached as Exhibit A to the April 2019 Settlement Agreement. See **Exh. 6**, April 2019 Settlement Agreement, pg 1; Appx. 111.
The April 2019 Settlement Agreement also provides that the Parties "agree that upon execution of this Agreement, all arguments previously raised regarding the validity, or enforceability of the Settlement Agreement or the enforceability of this Agreement are hereby waived. See **Exh. 6**, April 2019 Settlement Agreement, ¶ 6(c); Appx. 115.

[150] See **Exh. 28**, *Taylor v Countrywide Homes*, 2010 WL 750215, *12 (ED Mich, Mar 14, 2022); Appx. 395.

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D. Although Under no Legal Duty to do so, the Parties did in Fact Negotiate Alternate Terms for Plaintiff's Redemptions in the April 2019 Settlement Agreement.

Plaintiff has also failed to state a claim because, contrary to the Court of Appeals' holding, the parties did negotiate an alternative to the terms of Plaintiff's redemptions by entering the April 2019 Settlement Agreement. Plaintiff admits in her pleadings that she was legally not entitled to the 2015 or 2016 redemptions.[151] Plaintiff was not paid the 2017 or 2018 redemptions for the same reasons as her 2015 and 2016 redemptions were not paid. Plaintiff, however, did not redeem her shares pursuant to 2014 Settlement Agreement. Her shares were redeemed pursuant to the April 2019 Settlement Agreement and the May 2019 Order.

So while the Court of Appeals erred in finding that Defendants had a duty to negotiate, even if that decision had been correct, the Court still erred because it did not take into account that the April 2019 Settlement Agreement was a negotiation of Plaintiff's redemption rights. Thus, on any understanding of the covenant, Plaintiff's claim on this theory fails.

CONCLUSION

This Court should affirm Michigan's longstanding, principled approach to the covenant of good faith and fair dealing and reject *Vylene*'s approach. Doing so would be most consistent with this Court's established contract principles and the purposes behind contract law. But no matter what approach this Court adopts, it should affirm the Court of Appeals' holding that Plaintiff has failed to state a claim for breach based on Boyne's debt while reversing that Court's decision to create a negotiation claim for Plaintiff. Under any approach to the covenant, these claims fail. Thus, Defendants ask that the Court grant leave to appeal and reverse the panel's decision. In

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[151] See **Exh. 1**, Pl's Compl. ¶ 32 & 33; Appx. 8. See **Exh. 5**, May 9, 2018 Opinion, pg. 2; Appx. 106.

the alternative, they ask that the Court peremptorily reverse the panel's decision and remand for judgment in Defendants' favor.

Respectfully submitted,

ABOOD
LAW FIRM 1956

Dated: June 21, 2024

/s/ Andrew P. Abood
Andrew P. Abood (P43366)

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Dated: June 21, 2024

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ALWARD FISHER PLC

Dated June 21, 2024

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WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rule 7.212 because, excluding the parts of the document exempted, this document contains no more than 16,000 words. This document contains 15,986 words.

Dated: June 21, 2024

/s/ *Carrie J. Koerber*
Carrie J. Koerber (P73548)

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PROOF OF SERVICE

I hereby certify that on June 21, 2024, I electronically filed the foregoing using the MiFile System, which will send notification of each filing to all registered counsel of record.

Dated: June 21, 2024

/s/ *Carrie J. Koerber*
Carrie J. Koerber (P73548)