



IN THE SUPREME COURT OF THE STATE OF DELAWARE

STARTOP INVESTMENTS, LLC, a
Wyoming limited liability company,

Defendant/Counterclaim
Plaintiff Below / Appellant,

v.

NICBYTE LLC, a Texas limited liability
company; NIC WISE RE LLC, a
Delaware limited liability company; 1701
18TH STREET, LLC, a California limited
liability company; 1715 18TH STREET,
LLC, a California limited liability
company; 1723 18TH STREET, LLC, a
California limited liability company; and
747 R STREET, LLC, a California
limited liability company,

Plaintiffs/Counterclaim
Defendants Below /
Appellees,

v.

and

WISHON ROW, LLC, a California
limited liability company; BW
INDUSTRIES INC., a Delaware
corporation; and BITWISE
INDUSTRIES, INC., a California
corporation,

Defendants Below.

No. 217, 2026

Court Below: Court of
Chancery of the State of
Delaware
C.A. No. 2023-0637-NAC

APPELLANT'S CORRECTED OPENING BRIEF

Dated: July 16, 2026

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MAMMARELLA, P.A.**

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- Exhibit B: April 8, 2026 Post-Trial Memorandum Opinion
- Exhibit C: February 21, 2025 Order Denying Defendant StarTop Investments, LLC’s Motion in Limine and Granting Plaintiffs’ Motion for Sanctions Due to StarTop Investments, LLC’s Spoliation of Evidence

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NATURE OF PROCEEDINGS

On June 20, 2023, Plaintiff-Appellees NICbyte, LLC (“NICbyte”); NIC WISE RE LLC (“NIC Wise” or “Company”); 1701 18th Street, LLC; 1715 18th Street, LLC; 1723 18th Street, LLC; and 747 R Street, LLC (collectively, the “SPEs” and, together with NICbyte and NIC Wise, “Plaintiffs”) filed a Verified Complaint for Injunctive and Declaratory Relief in the Delaware Court of Chancery (the “Action”) against, *inter alia*, StarTop Investments, LLC (“StarTop”). The complaint sought a declaration that StarTop’s pledge agreement, deeds of trust, and loan documents (the “Loans”) were unenforceable and a permanent injunction enjoining their enforcement. On January 24, 2024, Plaintiffs filed an Amended Complaint which pled facts related to StarTop misleading its investors but did not revise the requested relief or bring a fraud claim. On February 12, 2024, StarTop counterclaimed seeking a declaration and control of the underlying collateral.

StarTop filed a Motion in Limine on October 10, 2024, arguing that the trial court should not admit evidence regarding StarTop’s principals’ prosecutions for representations StarTop made to its investors.

On February 21, 2025, the trial court sanctioned StarTop for spoliated ESI, shifting the burden of proof to StarTop to refute Plaintiffs’ claims and raising the burden on StarTop’s claims and defenses to a clear and convincing standard.

A bench trial was held on February 25-26, 2025. On April 8, 2026, Vice Chancellor Cook issued the post-trial opinion (the “Opinion”).¹ The Court imposed additional sanctions after trial. The Court entered a declaratory judgment that the related contracts were invalid and unenforceable and found that StarTop holds no right, title, or interest in the underlying properties, NIC Wise, or the SPEs. The Court granted a permanent injunction against the enforcement of the security interests claimed. Additionally, the Court ordered StarTop to pay \$423,781 in fees and expenses to Plaintiffs as a sanction for spoliating ESI.

The Implementing Order Granting Declaratory Judgment and Injunctive Relief was entered on April 30, 2026 (the “Order”). StarTop appeals the Opinion, Order, and the order denying StarTop’s Motion in Limine and Granting Plaintiffs’ Motion for Sanctions.

¹ Citations to “Op.” refer to the Opinion attached as Exhibit B.

SUMMARY OF ARGUMENT

1. The trial court erred when it insinuated an “innocence” element into intended third-party beneficiary claims and interpreted a contract provision such that a third-party who knew the agent lacked authority could never be an intended third-party beneficiary because the result would be absurd.

2. The trial court erred in finding that Wishon Row lacked actual authority because it misinterpreted the plain meaning of the Manager’s unilateral authority to make Major Decisions, including entering into the Loans.

3. The trial court erred in heightening the burden of proof on StarTop’s third-party beneficiary and actual authority claims when the lost ESI was irrelevant to the elements of those claims such that Plaintiffs suffered no prejudice under Rule 37.

STATEMENT OF FACTS

I. Bitwise Industries, Inc.

Jake Soberal (“Soberal”) and Irma Olguin (“Olguin”) founded Bitwise Industries, Inc. (“Bitwise”), which purchased, renovated, and leased commercial properties in “secondary markets.” A1282:17-22; A96. Once fully occupied, Bitwise hoped to sell the properties while retaining property management in exchange for a share of those properties’ revenues. A1303:6-14.

Within a few years, Soberal indicated that Bitwise was headed toward an initial public offering (A2293-326), while Soberal and Olguin were lauded as visionaries. A1253:23-A1254:15, A1263:1-17. Although Bitwise was reportedly generating tens of millions in revenue, the company was secretly bleeding money, with its burn rate far outpacing earnings. A994:4- A999:3.

II. NICbyte and Wishon Row, LLC form NIC Wise.

On June 6, 2022, NICbyte and Wishon Row, LLC (“Wishon Row”) formed NIC Wise and executed the Limited Liability Company Agreement of NIC Wise RE LLC (the “JVA”). A98; A2327-334; A2335-410. Thereafter, BW signed Master Leases with each of the SPEs. *See e.g.*, A2618-729, A2926-3035. Prior to forming NIC Wise, NICbyte engaged in comprehensive due diligence related to Bitwise and BW Industries, Inc.’s (“BW”) financials during the formation process. A982:9-A985:5. NICbyte identified several red flags in Bitwise and BW’s

financial model, particularly regarding their reported cash position and burn rate, which appeared unsustainable. A986:1-A988:11, A990:23-A992:24, A994:4-A999:3. NICbyte also had doubts about BW's reported revenue explaining that "the latest figures provided by [Soberal] are *a bit odd as a substantial amount of the revenue is hardcoded* in the model and not attributable to any particular city." *Id.*; A986:22-A987:3, A997:19-A999:20; A2272; A2273-75; A2276-80.

Nonetheless, NICbyte formed NIC Wise because the value of the assets and future earnings from property sales outweighed the risks. A995:13-A997:2. If BW failed to pay rent, NICbyte understood that it could foreclose on and sell the properties, making their money back while turning a profit. *Id.*

NIC Wise's purpose was to acquire, invest in, and manage properties as part of a broader sale-leaseback transaction. A99; A2348-50 § 2.3(a)-(e); A1753:18-A1756:24. NICbyte contributed 95% of the capital to NIC Wise in exchange for a 95% membership interest, with Wishon Row holding the remaining 5%. A99. Wishon Row was designated NIC Wise's manager. A2339-48, § 1.1. Wishon Row is a wholly-owned subsidiary of BW and is managed by Bitwise. A93.

In June and July of 2022, NIC Wise formed five wholly-owned subsidiaries to hold the real property located at 747 R Street, Fresno, CA ("Fresno Property"); 1723 18th Street, Bakersfield, CA, ("1723 Property"); 1701 18th Street, Bakersfield, CA ("1701 Property"); 1715 18th Street, Bakersfield, CA ("1715 Property" and,

collectively, the “Bakersfield Properties”); and 1680 14th Street, Oakland, CA (“Oakland Property”). A100; A2327-334; A2419-617; A2730-925; A3036-237; A3238-419; A3420-609; A1763:9-16. NIC Wise owns 100% of the membership interests in the SPEs. A1755:16-A1756:9; A87-90. NICbyte understood that the Bakersfield Properties, Oakland Property, and Fresno Property (collectively, the “Properties”) were undergoing renovations. A1797:10-19.

A. The JVA.

Article 6 of the JVA governs NIC Wise’s Management. A2356, § 6.1. Wishon Row was NIC Wise’s Manager. A2344. Section 3.1 of the JVA makes NICbyte and Wishon Row responsible for making Capital Contributions² in proportion to their membership interests. A2351. And the JVA defines “Call” and “Call For Capital” as “a request by Manager [i.e., Wishon Row] for Capital Contributions ... pursuant to Sections 3.2, 3.3, or 3.4. . . .” A2340, § 1.1.

Section 3.3 permits Wishon Row, as Manager, to deliver a Call For Capital if it was approved or contemplated pursuant to Section 6.5. A2351, § 3.3. Section 6.5(a)(xviii) provides that a Call For Capital must be approved by both of NIC Wise’s members *except those that are Nondiscretionary Required Expenses*.

² The JVA defines “Capital Contributions” as “the amount of money and the initial Gross Asset Value of any property (other than money), less the amount of debt to which such property is subject, contributed to [NIC Wise] with respect to the Interest in [NIC Wise] held by such Member.” A2340, § 1.1.

A2363 (Nondiscretionary Required Expenses are not a “Major Decision”, which would require the approval of both Members). That is, Wishon Row, as Manager, could unilaterally make a Call For Capital for Nondiscretionary Required Expenses. *Id.*

Nondiscretionary Required Expenses are, *inter alia*, “costs associated with complying with ... lease[] requirements for leases approved in accordance with th[e] [JVA], ***including with respect to tenant improvement requirements.*** . . .”

A2364, § 6.6(b) (emphasis added). Section 3.3(a) provides that Nondiscretionary Required Expenses, along with Capital Contributions, are “Required Additional Capital Contributions.” A2351.

Under Section 6.6(b), NICbyte was responsible for funding Required Additional Capital Calls. A946:10-17 (explaining that renovation and sustainability improvement costs “would have been 100 percent funded by NICbyte”); A1798:18-A1801:19. Tenant improvements are Nondiscretionary Required Expenses and, therefore, Required Additional Capital Contributions, which must be made within ten business days of the Call For Capital. A951:9-20.

If a Member fails to make Required Additional Capital Contributions, then that Member becomes a “Defaulting Member.” A2352, § 3.4(a). A Defaulting Member loses the “right to request or approve ***Major Decisions.***” A2361, § 6.5(a) (emphasis added) (“...no Defaulting Member shall have the right to request or

approve Major Decisions.”). Entering into loan agreements and collateral pledges are Major Decisions. A2361-63, § 6.5(a)(i), (iv), (v), (xxx).

III. Adler and Hardcastle form StarTop.

Andrew Adler (“Adler”) and David Hardcastle (“Hardcastle”) formed StarTop in 2021. A91-92; A1252:15-24. On August 18, 2022, Soberal contacted Hardcastle to see if he was interested in a \$1M, 30-day loan secured by an unrecorded springing deed of trust on the Fresno Property. A1279:17-A1280:6; A3754-55. According to Soberal, BW needed cash to cover long lead time equipment, which would be paid off by permanent financing that was closing the following month. A1280:19-23; A3754-55. According to Soberal, BW could not use cash on its balance sheet to fund these expenditures while attempting an IPO. A1281:8-23; A3754-55. Specifically, Soberal said that Bitwise was focused on building schools in secondary cities and the opening of those schools drove the valuation. A1282:12-A1283:3. Hardcastle was interested given the Fresno Property’s \$18M appraisal. A1279:17-A1280:6; A1283:4-22; A3754-55.

In October of 2022, Hardcastle and Soberal discussed Bitwise’s long-term goal of selling the Properties. A1302:22-A1303:14. Due to the IPO in the offing, Soberal explained that Bitwise needed to get the properties off its balance sheet to avoid dragging down the IPO multiple. A1304:1-8. That was consistent with Soberal’s prior explanations of the plan for the Properties. A1303:3-24.

IV. NICbyte fails to make Required Additional Capital Contributions.

Both NICbyte and Wishon Row paid their Initial Capital Contributions. A1822:1-10; A2351. Between July and October 2022, Wishon Row submitted numerous Calls for Capital related to Nondiscretionary Required Expenses. A2411-18; A3635-43; A3644-53; A3654-61; A3662-67; A3668-71; A3672-77; A3678-81; A3700-702; A3703-53; A3756-821; A3822-49; A3876-4028; A4038-89; A4090-95. With each submission, NICbyte found an excuse to avoid making its proportionate contribution. A1822:11-21. For example, NICbyte objected to, *inter alia*, the format and named entities of various Calls. *Id.* NICbyte, however, paid at least three Capital Calls between July and August of 2022. A854:21-23; A3644-53; A3682-86; A3687-90; A3691-99.

On September 15, 2022, Wishon Row submitted a Call for a Required Additional Capital Contribution of \$196,084.28, related to renovation costs on the Oakland Property. A3850-75; A1861:1-14. These were Nondiscretionary Required Expenses and, therefore, had to be paid only by NICbyte within ten business days. A1059:13-15, A1060:4-8; A2351-54, §§ 3.3(a), 3.4(a). If the Call was not rejected or withdrawn but remained unpaid for ten business days, NICbyte would become a Defaulting Member, losing its right to approve Major Decisions. A2351-54, §§ 3.3(a), 3.4(a).

On September 30, Wishon Row withdrew an August 11 Call and supposedly submitted a Call dated September 30 through an embedded link within that email. A4206; A1062:5-23. That embedded link, however, was not live³ and, so, is not part of the record.

On October 3, Wishon Row emailed NICbyte, submitting a Call dated September 26 for \$195,084.28. A4096; A4099. On October 12, Wishon Row expressly withdrew the “September Capital Call dated September 26th, 2022.” A4154-204. The only September 26 Call in the record is the one that was submitted on October 3. A4096; A4099. The September 15 Call was never withdrawn, and NICbyte admits it was never funded. A1060:16-25. And so, NICbyte became a Defaulting Member under the JVA at midnight on September 30, 2022 (10 business days after the September 15 Call was issued).

V. The Patrick Investments Loan.

On November 13, 2022, Soberal asked Hardcastle if he had anyone interested in a 60-day, \$1-2M loan to Bitwise because Bitwise was looking to package several of its buildings together to “sell ... as a portfolio.” A1305:12-17. At that time, BW’s balance sheet showed over \$67M in cash. A1305:19-A1306:16; A4232-33.

³ *Id.*

Patrick Investments, LLC (“Patrick”) had previously invested in Voyager Pacific Opportunity Fund II—a real estate private equity fund previously managed by Hardcastle. A1249:7-16, A1304:22-A1305:9. Hardcastle emailed Patrick multiple opportunities, including a “Bitwise real estate loan at 6% per month.” A1306:18-A1308:1; A4236-40. A week later, Hardcastle and Patrick discussed that opportunity. A1308:10-A1309:3. Patrick was an experienced lender and preferred to take lead while Hardcastle remained communication conduit between Patrick and Soberal. A1309:24-A1310:12.

In response to Patrick’s questions regarding Bitwise’s need for funds, Soberal, consistent with his prior answers, explained that Bitwise required funds for “[r]eal estate improvements ... and other projects until portfolio is sold. Company has a covenant with equity investors not to use balance sheet capital on real estate expenses.” A4241-43; A1312:20-A1313:17. Following a call between Soberal, Hardcastle, Patrick, and Patrick’s attorney, Tim Parks (“Parks”), Soberal sent Hardcastle, *inter alia*, a loan participation agreement, promissory note, deed of trust, and certificate of occupancy for the Fresno Property, which Harcastle forwarded to Parks for review. A1316:5-8, A1318:4-A1319:7; A4244. Despite Parks’s concerns about those documents, Patrick was “willing to move forward but would need to solve the deficiencies of [the] current documents to make sure all the issues [Parks] points out are addressed and solved.” A4355-358; A1319:8-

A1320:13. To resolve these “deficiencies” Soberal “suggest[ed] pledging the collateral in the LLC that owns the asset - provided proof that I’m authorized to sign pledging the collateral.” A4353; A1321:3-9. In other words, Soberal was willing to record a deed on the Fresno Property and confirmed his authority to do so. A4353-54; A1321:10-19. Parks remained concerned that the borrower did not own the property collateralizing the loan. A4245-352; A1322:7-A1323:2. In response, Soberal attached documents establishing the ownership chain of the various BW-related entities, explaining that

- I am the CEO of BW Industries Inc.
- BW Industries Inc is the sole manager of Wishon Row LLC
- Wishon Row LLC is the sole manager of NIC WISE RE LLC
- NIC WISE RE LLC is the sole manager of 747 R Street LLC ⁴

Soberal included a document titled “Limited Liability Company of NIC Wise RE LLC.” *Id.*; A1323:21-24. Due to Parks’s involvement, Hardcastle did not review this document. A1324:1-11. Through this Action, Hardcastle learned that “Limited Liability Company of NIC Wise RE LLC” attached to that email was the JVA. A1324:12-A1326:1; A4277-352.

On December 20, 2022, Hardcastle forwarded Soberal emails between Emily Collins, a First American Title underwriter, and Parks in which Collins requested various documents. A1338:23-A1339:19; A4364-69. Soberal provided

⁴ A4246; A4901; A1323:2-20.

the requested documents, one of which was “NIC – Bitwise JV – LLC Operating Agreement.” A1339:20-A1340:11; A4370-471. Like the prior documents Soberal provided in response to Patrick’s requests, Hardcastle did not review these documents because he was simply the intermediary between Patrick and Soberal. A1324:1-11.

The attachment titled “NIC WISE RE LLC-Limited Liability Company Agreement.pdf” purported to be the JVA but defined “Member” as Wishon Row and stated that “Member owns 100 percent of the membership interest in the company [NIC WISE].” A1340:7-A1341:21; A4383. Although no one, including First American Title and Parks realized it at the time, this operating agreement was fake, drafted by Soberal, purporting that Wishon Row was NIC Wise’s sole member. A1341:20-A1342:1; A4382-86.

Upon receipt of these various documents, Collins requested a resolution naming Soberal as the authorized signor for 1701 18th Street, LLC and 1723 18th Street, LLC because “the borrowing LLC’s are member managed by LLC’s several layers deep down to Bitwise Industries Inc. . . .” A1342:2-A1343:6; A4491. Upon Soberal’s request for sample language, Collins emailed the following:

1701 18th Street, LLC, a California limited liability company

By NIC WISE RE, LLC, a Delaware limited liability company, its sole Member

By WISHON ROW LLC, a California limited liability company, its sole Member

By Bitwise Industries, Inc., a California corporation, its Manager

By: Jake A. Soberal, CEO

1723 18th Street, LLC, a California limited liability company

By NIC WISE RE, LLC, a Delaware limited liability company, its sole Member

By WISHON ROW LLC, a California limited liability company, its sole Member

By Bitwise Industries, Inc., a California corporation, its Manager

By: Jake A. Soberal, CEO

A4487-90; A1343:7-A1344:19. Soberal took that language, grafted it onto a resolution, and signed in the precise order Collins outlined. A4493; A1344:20-A1345:5. That signed resolution was sufficient to satisfy First American, and it issued the title policy. A1345:6-18. On December 22, 2022, Patrick’s \$2.75M loan to Bitwise closed (the “Patrick Loan”). A1345:19-23.

VI. NICbyte fumbles an opportunity to remove Wishon Row.

In response to Wishon Row’s October 3 Call for Capital, NICbyte informed Soberal that it was “processing the capital call” and requested BW and Bitwise’s financials. A1863:8-11; A4147-49. That is, four months into the joint venture, NICbyte had no visibility into BW and its subsidiaries’ financials and operations. A1863:8-A1864:10. The next day, NICbyte learned that BW hadn’t closed its Series C financing round with APAX Partners, L.P., which, in NICbyte’s view, would have allowed BW to overcome its burn rate issues. A2281-92; A992:4-15;

A4215-21. Stephen Hohenrieder, a NICbyte advisor, described Soberal's failure to inform NICbyte of its decision not to close on the Series C funding as "crazy."

A880:6-16; A4150. Moreover, as of October 26, 2022, NICbyte was unsure whether Wishon Row had opened bank accounts for NIC Wise or the SPEs.

A4209-14; A899:10-13.

On November 10, 2022, NICbyte's outside counsel sent Wishon Row and BW a notice of default for, *inter alia*, failing to provide bank and financial statements under the Master Leases, failing to provide NICbyte with access to the Company's books and records, and failing to provide Deposit Account Control Agreement statements as required by the Master Leases. A4222-27. Wishon Row did not cure those defaults, and on December 12, NICbyte emailed Cushman and Wakefield, a national commercial property management firm, explaining that it was "likely moving forward with a strategy to remove [its] partner as the managing member[,] " which it hoped would "coincide with a purchase of their interest in the joint venture and all five properties leaving [NICbyte] in full control of the assets, bank accounts, and decision making." A4474; A1815:9-A1816:9.

NICbyte, however, did not remove Wishon Row. A926:23-A927:3. Instead, NICbyte replacing its outside counsel with Duane Morris who ran title reports on the Properties because NICbyte was "concerned with renovation, construction things happening ... and mechanics liens being attached" to the Properties. A4360-

63; A932:8-12, A933:15-23. On December 30, Duane Morris sent Wishon Row and BW's attorneys another default letter, notifying them of their continuing default under the JVA and Master Leases and threatening to invoke NICbyte's rights under Section 6.3 of the JVA, which included the right to remove Wishon Row as Manager. A4509-19.

In NICbyte's view, these breaches were not curable. A936:1-9. NICbyte, nonetheless, chose to leave Wishon Row in place because the risk that Wishon Row's removal as Manager would trigger the loss of Bitwise as the anchor-tenant at the Fresno Property and, separately, the JVA's buy-out provision. McCormick A921:6-A922:2. The latter required NICbyte to purchase Wishon Row's five percent interest, which, in NICbyte's view, outweighed the risk of leaving Wishon Row in place as NIC Wise's Manager. *Id.* In other words, NICbyte was merely concerned with protecting the value of its investment. A995:13-A996:3. And so, rather than seizing the opportunity to remove Wishon Row, which would have prevented the Loans from ever materializing, NICbyte chose to leave Soberal in control of its investment.

VII. The StarTop Loans.

A. StarTop loans BW \$11M.

In December 2022, Adler and Hardcastle discussed Bitwise loan opportunities generally. A1346:16-24. Soberal beguiled Adler into thinking that

Bitwise needed to borrow cash at high interest rates despite Bitwise’s cash position. A1608:21-1612:21. Adler was “[e]xcited for [StarTop] to be the lead investor on the Bitwise loan.” A1347:1-11; A4359. StarTop required various deliverables prior to closing. A1347:12-A1348:2; A4359.

Hardcastle had previously obtained some of those documents through his role as liaison between Patrick and Soberal. A1359:4-7. Adler requested financials, a current BW cap table, details related to the \$4M of current debt and \$10M of long-term debt, formation documents and an operating agreement for the borrowing entity, corporate documents for the parent company, and an organization chart. A4359; A1349:12-A1350:10. Adler did not request the NIC Wise operating agreement (i.e., the JVA). A4359; A1358:21-23.

In response to Adler’s question regarding Bitwise’s liquidity needs given the cash on its balance sheet, Soberal explained, as he had before, that

Bitwise has covenants with its institutional investors that preclude it from spending capital on real estate investing activities. Long term, BW ... the operating company with intentions of an IPO will divest of its real estate portfolio entirely. In the interim, [BW] will need a variety of bridge debt to ready its real estate assets for optimal sale transactions. A4477-86; A1351:5-A1352:4.

Adler also questioned whether Bitwise had closed on its Series C round for a \$150M investment—i.e., the potential private equity partner that Soberal had alluded to in the summer of 2022. A1352:5-23; A4477-86. Soberal explained that

Bitwise ultimately passed on the Series C opportunity because they did not see the prospective investors as a good fit and, instead, had raised a Series B extension that included Goldman Sachs and Citibank. A1352:24-A1353:11; A4478.

Adler also requested documents for the “borrowing entity.” A1353:18-A1355:17; A4764-833. StarTop and Soberal understood that the borrowing entity was BW and, so, Soberal sent BW’s bylaws, articles of incorporation, and an organizational chart. *Id.* And, because Adler had requested corporate guarantees, Soberal also sent BW’s form corporate guarantees. *Id.* Indeed, BW is the only corporation present on the organization chart. *Id.* That organization chart identified BW as the 100% owner of Wishon Row, which owned 100% of NIC Wise, and identifies NIC Wise as owning 100% of the interests in the SPEs. A1356:6-A1358:4; A4767. This was all consistent with the Patrick Loan and, thus, StarTop did not have any concerns regarding Soberal’s authority to bind NIC Wise. A1357:20-A1358:12.

On December 23, 2022, Adler emailed Hardcastle a list of outstanding deliverables. A4494-96; A1372:18-A1373:12. On December 29, 2022, StarTop received the remaining deliverables from Soberal, which Adler described in a text message as “look[ing] [f’ing] great.” A4497-500; A4501-08; A1379:7-16. In Hardcastle’s experience, Soberal was “usually pretty tight on that stuff [because] he also has a whole legal department on staff.” A4501-08; A1379:17-24. On

December 31, StarTop received the final deliverables. A4520-21. This, in conjunction with the seemingly never-ending stream of positive Bitwise press, gave StarTop comfort that Bitwise had investors with real financial capital and backing. A1381:5-22; A4735-63. Indeed, the JPMC Strategic Investments I Corporation and Goldman Sachs side letter agreements provided StarTop with even greater comfort because it understood that institutional investors were investing in Bitwise. *Id.*; A1645:9-15 (Adler explaining that BW “had raised \$80 million ... in an additional capital raise and equity ... from like Citigroup and other people. There was like three big-name investors.”).

On January 2, 2023, Soberal and Hardcastle discussed the draft loan documents and, ultimately, decided to use the Patrick documents as a form, stripping out references to Patrick and replacing it with StarTop. A1384:8- A1385:10; A4522-79. That is because Patrick had counsel involved in drafting the documents and, thus, StarTop was comfortable using its forms. *Id.* Hardcastle recalled from the Patrick Loan that Soberal required a borrowing resolution authorizing Bitwise to borrow more than \$5M and, so, he requested a borrowing resolution authorizing Bitwise to take on a \$10M loan. A1385:11- A1386:2; A4522-79.

Soberal then provided a “Written Consent of the Directors of BW Industries Inc.”, which identified BW as the sole member of Wishon Row, which was the

sole member of NIC Wise, which was the sole member of 747 R Street. A4588-92; A1386:3-24. The written consent went on to state that BW “has determined that it is in the best interest of [BW] and [747 R Street, LLC] to obtain a Loan from StarTop ... which loan will be secured by ... a first lien deed of trust against real estate owned by [747 R Street, LLC].” A4588-92; A1387:4-8. The written consent was purportedly executed using DocuSign. A4592. The email address of each board member was redacted because, according to Soberal, he had privacy concerns and did not want StarTop or its participants to contact BW’s board members. A1387:12-21. StarTop would later learn, through this Action, that Soberal had forged those board members’ signatures and redacted the email addresses because they would have shown that Soberal had applied the BW Board’s signatures to the written consent. A1701:3-7.

The first StarTop loan closed on January 13, 2023 (“Loan One”). A4580-87. Originally, StarTop agreed to a \$10M loan. A1402:16-A1403:7. But due to the positive Bitwise news, StarTop was oversubscribed by \$1M and, so, the \$10M turned into \$11M. A1402:16-A1403:7; A4621-22. Many of those participants also participated in a second loan. A1269:14-A1271:6, A1275:16-A1276:4. After funding Loan One, StarTop recorded the deed of trust on the Fresno Property through a title company called Simplifile. A1395:22-A1396:8.

B. StarTop enters into a \$9M loan with BW in March of 2023 and cross-collateralizes it with Loan One.

Adler requested various documents from Soberal including the operating agreements for the entities that owned the Properties. A4593-94; A1398:3-13. Because the SPEs owned the Properties, what Adler was requesting were the operating agreements for each of the SPEs—not the NIC Wise operating agreement (i.e., the JVA). *Id.*; A3610-14; A3615-19; A3620-24; A3625-29; A3630-34.

On February 16, Soberal sent StarTop the operating agreements for the entities that owned the Bakersfield Properties (i.e., 1701 18th Street, LLC, 1715 18th Street, LLC, and 1723 18th Street, LLC). A4599; A1401:23-A1402:7. These discussions ultimately led to another StarTop loan to BW in mid-March of 2023, with the Properties serving as the collateral for the second StarTop loan (“Loan Two”). A1401:17-22; A4595-612; A4651-60; A4661-70; A4671-80; A4681-88. StarTop and Soberal also considered but declined to include the Oakland Property as collateral for Loan Two. A1423:4-A1424:11; A4623-25.

The deed of trust, loan agreements, and ancillary loan documents gave StarTop the comfort that it “had a pretty dense loan package.” A1645:16-24. And because Loan One preceded what would ultimately become Loan Two by mere weeks, and the fact that almost all of the prior due diligence was predicated upon the due diligence performed by Patrick’s attorney, Parks, StarTop did not engage

in any additional due diligence aside from obtaining an updated set of financials. A1421:14-A1422:24. StarTop decided to cross-collateralize Loan Two and merge it with Loan One. A1430:10-22.

On March 15, 2023, the cross-collateralization agreement was executed. A4636-50. On March 15, 2023, Loan Two closed. A4626-35; A4638:15-23. Unlike Loan One, StarTop obtained title insurance for Loan Two through Placer Title. A1438:24-A1449:4; A4693-704. StarTop personally invested \$345,000 in these loans. A1442:11-14.

C. The Third StarTop Loan.

In late April of 2023, another opportunity to loan Bitwise money arose. A1646:1-3. Soberal requested a \$5M litigation finance loan. A1648:2-18. In May of 2023, StarTop made a third loan to BW for \$1M, in which it re-invested \$500,000 of its retained earnings. A1442:2-10, A1648:12-20, A1649:11-19. This loan was unsecured. *Id.* In total, StarTop invested \$845,000 in various loans to BW.

In May of 2023, Bitwise imploded. A1649:2-23. StarTop was concerned not only because of the amount of money its participants had invested but also because StarTop had “everyone we know in this deal.” A4689; A1650:19-A1651:15. That included Adler’s mother-and-father-in-law, and other close friends and family members. A4613-20; A1638:15-A1639:21.

ARGUMENT

I. The trial court misunderstood the elements of third-party beneficiary claims and misconstrued the plain language of the JVA.

A. Question Presented.

Did the Court of Chancery err in insinuating an “innocence” element into intended third-party beneficiary claims and interpreting a contract provision such that a third-party who knew the agent lacked authority could never be an intended third-party beneficiary because the result would be absurd? Op. at 2, 28-29, 30, 40-41.

B. Scope of Review.

This question is one of law and involves contract interpretation, which are reviewed *de novo*. *Boardwalk Pipeline Partners, LP v. Bandera Master Fund LP*, 288 A.3d 1083, 1111 (Del. 2022) (citations omitted).

C. Merits of Argument.

The trial court’s opinion is susceptible to two readings, and it is not evident which the court intended. On the first, the court imposed an adverse inference, “as a further sanction ... that plaintiff’s agent did not have authority to enter into the loans and *that the defendant knew it.*”⁵ On the second, the court found that, “[b]ased on the multiple indicia of fraud and spoliation from the record, it is

⁵ Op. at 2 (emphasis added).

sufficient to impose an adverse inference against StarTop *that Soberal did not have apparent authority.*”⁶ StarTop continues to argue that the trial court misapplied the standard for imposing spoliation relief, nonetheless StarTop struggles to enunciate even a hypothetical in which a third-party’s actual knowledge of an agent’s lack of authority would allow that third party to successfully argue that the principal’s conduct led that third party to reasonably believe that such authority existed anyway.

It’s unnecessary to untangle that question because the trial court found that StarTop was “already aware” that Wishon Row (Soberal) lacked authority to bind NIC Wise.⁷ That is a finding of fact untethered to any adverse inference. And along with the heightened burden imposed on StarTop by the court’s pretrial sanction,⁸ the trial court insinuated an element into StarTop’s third-party beneficiary claim, requiring a showing by clear and convincing evidence that StarTop did *not* know that Wishon Row lacked authority—effectively asking StarTop to prove a

⁶ Op., 40-41 (emphasis added); *see also* Op., 29 (Referring to Hardcastle and Adler knowing that Soberal lacked authority to enter in the transactions, “[t]he Court must, at a minimum, impose an adverse inference of knowledge here.”).

⁷ Op., 30; *see also* Op., 28-9 (“Hardcastle and Adler would have known the security interests were fraudulent too . . . Ultimately, however, the surviving evidence and surrounding circumstances point directly at the conclusion that Hardcastle and Adler knew that Soberal lacked authority to enter into the loans with the security interest he purported to grant.”); Op., 40 (“[T]he limited record that remains points to a conclusion that Hardcastle and Adler had actual knowledge of Soberal’s lack of authorization to enter into the loans under the JVA.”).

⁸ Exhibit C.

negative. *See Op.*, 30 (modifying third-party beneficiary with the adjective “innocent”).

Delaware law, however, does not recognize the rights of “innocent” third party beneficiaries, only *intended* ones. “A third-party beneficiary’s rights are measured by the terms of the contract.” *Bako Pathology LP v. Bakotic*, 288 A.3d 252, 270 (Del. 2022). “To qualify as a third party beneficiary of a contract, (i) the contracting parties must have intended that the third party beneficiary benefit from the contract, (ii) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (iii) the intent to benefit the third party must be a material part of the parties’ purpose in entering into the contract.” *Id.* at 271. And “[w]hen a promised performance is rendered directly to the beneficiary, it is presumed that the contract was for the beneficiary’s benefit.” *Id.* (internal quotations omitted).

Article 6 of the JVA begins “[s]ubject to any express limitations set forth in th[e] [JVA], the management and control of the business and affairs of [NIC Wise] shall be vested solely in Manager.” A2356. The Manager at all relevant times was Wishon Row. A2344, § 1.1. Section 6.1 continues, “[s]ubject to any express limitations set forth in th[e] [JVA], the Manager shall have all authority, rights and powers permitted under the applicable provisions of the Act.” A2356. That is,

Wishon Row's authority to manage, control, and bind NIC Wise was subject to certain limitations expressed in the JVA.

Those limitations, however, do not impose any obligation on StarTop that would prohibit it from relying on Wishon Row's confirmation that it had the requisite authority to enter into the StarTop Loans. StarTop's admission that it had not read the JVA is of no import because Section 6.1 specifically states that StarTop is protected by NIC Wise in its reliance upon Wishon Row's confirmation of such authority. Indeed, the trial court did not reach a conclusion as to what StarTop did or did not know about the JVA's contents because the extent of that knowledge was irrelevant to its analysis. *See Op.*, 40.

Nothing herein contained shall impose any obligation on any Person or firm doing business with the Company to inquire as to whether or not the Manager has exceeded its authority in executing any contract, ... note, guaranty, loan agreement, pledge, security agreement ... or other transfer instrument or any other document or instrument of any kind or nature (each, a **"Contract"**) on behalf of the Company, ***and any third person shall be fully protected in relying upon Manager's confirmation of such authority.*** A2356 (emphasis added).

"Persons" and "firms" entering into loan agreements, pledges, and security agreements, like StarTop, are the intended third-party beneficiaries of the JVA. This benefit is intended, at the very least, as a gift to these third parties even in the event Wishon Row exceeded its authority to bind NIC Wise to a contract. And this benefit to third parties, like StarTop, was a material part of Wishon Row and

NICbyte’s purpose in entering into the JVA. NICbyte agrees. A949:3-6; *see also Eagle Force Hldgs., LLC v. Campbell*, 187 A.3d 1209, 1230 (Del. 2018)

(“common sense suggests that parties to a sophisticated commercial agreement, let alone any agreement, would not intend to be bound by an agreement that does not address all terms that they considered material and essential to that agreement...”).

The trial court concluded, nevertheless, that StarTop’s reliance on Section 6.1 for full protection by NIC Wise upon Wishon Row’s “confirmation of such authority”—confirmation that Soberal gave repeatedly—would result in a “fraud-free-for-all” and was “frankly absurd.” Op., 30. And so, the court did not endeavor to construe an ambiguity, presumably because StarTop’s interpretation of Section 6.1 produces an absurd result, one that no reasonable person would have accepted when entering the JVA. *See 8908 Kanis RemainCo LLC v. Gastroenterology & Surgery Ctr. of Arkansas, P.A.*, 2026 WL 1022300, at *6 (Del. Ch. Apr. 15, 2026) (explaining that “An interpretation is unreasonable if it produces an absurd result or a result that no reasonable person would have accepted when entering the contract.”) (internal quotations omitted). And the court considered no extrinsic evidence.

Consequently, the trial court was bound to give effect to the plain meaning of the JVA’s terms and provisions. *See id.* It did not. Instead, the court imported an “innocence” requirement into Section 6.1. Its reading is that the fully protected

third-party who can rely on the Manager's confirmation of his authority to enter into loans, without any duty to inquire further, must not have been convinced otherwise at the time he entered into that loan agreement with the Company.

The provision, however, does not speak to the third-party's scienter. If anything, relieving the beneficiary from any duty to investigate underscores the irrelevance of the beneficiary's scienter. That beneficiary's full protection is mandated by the parties' choice of the mandatory "shall." A2356; *Cf. Miller v. Spicer*, 602 A.2d 65, 67 (Del. 1991) (explaining that the "use of the verb 'shall' in legislation generally connotes a mandatory requirement); *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 782 (Del. 2012) (contract construction case applying *Miller v. Spicer*, 602 A.2d 65 (Del. 1991)). And Section 6.1 provides mandatory full protection to "*any* third person,"⁹ even one that, in the court's eyes, is not "innocent."

That plain reading is hardly unreasonable, let alone one that would yield an absurd result. By way of example, the concepts of ratification and modification by conduct belie the trial court's conclusion that no reasonable person would expect the company to fully protect a third-party who believed the manager lacked authority to bind the company to a loan. The Court of Chancery has found 6 *Del. C.* §18-106 permits a company to ratify acts when the required member consent

⁹ A2356 (emphasis added).

had not been obtained in advance. *HREF Senior Worthington, LLC, et al. v. Conroe WM LLC*, 2026 WL 84352, at *17 (Del. Ch. Jan. 12, 2026) (holding that when an operating agreement is silent on ratification, the LLC Act permits the company to ratify its void or voidable acts when “the approvals required by the company’s operating agreement were not obtained via its members, managers or other persons whose approval would be required under the limited liability company agreement”) (internal quotations omitted). It’s perfectly plausible that a manager might operate contrary to an operating agreement’s requirement of advance consent from members when the members acquiesce in such conduct, effectively modifying the agreement over time. *C.f. Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.*, 297 A.2d 28, 32-34 (Del. 1972) (holding that the parties’ course of conduct can modify an agreement even when the contract contains a requirement that amendments be in writing).

Short-term bridge loans by their very nature require fast action on the part of management. It is not absurd to consider a practice where members, or directors for that matter, would ratify or acquiesce in such loan and security agreements ex post facto. And the courts routinely encounter short-term bridge loans in the course of construction projects. *See, e.g., MRPC Christiana LLC v. Crown Bank*, 2017 WL 6606587, at *15 (Del. Super. Ct. Dec. 26, 2017) (“[T]he Interim Note was a

bridge loan during construction that would get paid off by proceeds from the SBA Loan.”).

Here, the JVA reveals the parties’ expectations that the Manager would make representations to third parties for the express reasons stated in Section 6.1 (i.e., executing loans, pledges, and security instruments). Indeed, NIC Wise was formed for the purpose of “improving, financing, refinancing, ... and otherwise dealing with” the Properties. A2348, § 2.3(a). NIC Wise’s members understood that “improving” and “otherwise dealing with” the Properties would require that the Properties be renovated. Wishon Row submitted numerous Calls related to renovation expenses and tenant improvements. *See, e.g.*, A2411-18; A3672-77; A3703-53; A3756-821; A3822-49. Those renovations would, of course, require funds. And so, it would not be unreasonable to think that NIC Wise’s members envisioned and agreed that Wishon Row had to be nimble, which required that third-party lenders and contractors be fully protected by relying on Wishon Row’s confirmation of its authority without further investigation. If, ultimately, NICbyte did not consent, NIC Wise—not the third party—would bear the risk. As such, StarTop is a fully protected *intended* third-party beneficiary under the JVA.

And so, the trial court’s reading of Section 6.1 as yielding an absurd result looks more like a proxy for some unsaid policy rationale for mandating that third-party beneficiaries be innocent of any knowledge that would contradict an agent’s

“confirmation” of that authority. It does more, however, than merely suggest that the third party not have engaged in fraud or either conspired with or aided and abetted the agent in his scheme to defraud the principal—a result that one could safely say rational parties would not have intended. The trial court’s use of “innocent” would disqualify any third-party beneficiary who had knowledge that Wishon Row lacked authority despite Wishon Row’s confirmation upon which a third party could rely unequivocally according to a plain reading of the JVA.

The trial court conflated StarTop’s knowledge of Wishon Row’s lack of authority with complicity in Soberal’s larger scheme to defraud NICbyte and veered into a novel public policy objection to StarTop’s third-party beneficiary claim. There was never a fraud or secondary liability claim leveled at StarTop and no finding that it was complicit with Wishon Row, or Soberal, in defrauding NIC Wise or NICbyte. There could be no such finding because that case was never tried. A1292:7-A1293:20; *see also See HOMF II Inv. Corp. v. Altenberg*, 2020 WL 2529806, at *27 (Del. Ch. May 19, 2020) (plaintiffs neither pled nor sought to conform the pleadings to the evidence under Rule 15(b) and, thus, “failed to establish a procedurally proper basis for asserting the claim”); *see also Hoffman v. First Wave BioPharma, Inc.*, 2023 WL 6295345, at *12 (Del. Ch. Sept. 27, 2023) (“A motion to amend is required where an issue is tried without the opposing party’s express or implied consent.”). That is because even after the trial court erroneously denied StarTop’s

Motion in Limine, the record contained no evidence that StarTop or its principals conspired with Soberal or his confederate, Olguin, to defraud NIC Wise or NICbyte.¹⁰

The trial court next posits that StarTop's reading ignores the surrounding text, focusing on the third-party's relief from any duty to inquire. *See Op.*, 30. The court's only support for that conclusion is an example in *Williston on Contracts* analyzing apparent authority which, itself, imposes a duty to inquire—not any case discussing third-party beneficiary claims. *See id.* at n.140 (citing 12 *Williston on Contracts* § 35:69). Third-party beneficiary law is discussed in Chapter 37 of *Williston on Contracts*; notably, § 37:58 cites to Restatement (Second) of *Contracts* § 309 in analyzing a beneficiary's rights when a promisee had failed to perform an obligation to a promisor. Section 309 of the Restatement speaks to a promisor's defenses to a third-party beneficiary claim. They include situations where (1) the contract out of which the beneficiary's rights arise (here, the JVA) is void, voidable, or illegal and (2) when that contract ceases to be binding on the

¹⁰ As the Soberal and Olguin pleas establish, the forged BW Board Consents were a representation made by Wishon Row to StarTop to induce StarTop into loaning BW money and accepting collateral pledges from NIC Wise and the SPEs, which NIC Wise managed through Wishon Row. A4718; A4733. There was never a fraud or other secondary theory of liability claim leveled at StarTop. *See HOMF II Inv. Corp.*, 2020 WL 2529806 at *27; *Hoffman*, 2023 WL 6295345 at *12. And so, this evidence was irrelevant to the claims in this Action. If such evidence had existed, it would have been in the forensic collections of Soberal and Olguin's devices and accounts and would have featured in those indictments.

promisor. Neither is present here. And so, the promisor's defenses against the promisee cannot be employed against the beneficiary's claim. Restatement (Second) of Contracts § 309. Illustration 8 in the comments to Section 309 is helpful:

B and his surety S contract with A, a city, to grade streets and to pay all laborers and materialmen on the job. The contract provides that any laborer working under the contract shall be entitled to sue and recover from S. A extends B's time for performance without S's consent. In a suit by C, a laborer, against S, the extension of time is not a defense.

Were a lack of innocence on the beneficiary's part a recognized exception in any jurisdiction, one would think Section 309 would have noted it here: *If C, however, were aware that B had not obtained S's consent to extend B's time for performance, S would have a defense against C's Claim.* The Restatement contains no such proviso.

Although it may be tautological that one need not inquire into that which one already knows, relief from a duty to inquire is hardly the promise on which full protection of all third-party lenders relying on Wishon Row's confirmation of authority hangs. After all, "[a] third-party beneficiary's rights are measured by the terms of the contract." *Bako Pathology LP*, 288 A.3d at 270. The lengthy sentence that is Section 6.1 is a compound one containing two independent clauses, the second of which is not conditioned on the first. As such, each could stand alone as

a separate sentence and are conjoined by the use of “and.” A2356. The first such clause relieves any “Person or firm doing business with the Company to inquire as to whether or not the Manager has exceeded its authority....” *Id.* The second provides, “any third person shall be fully protected in relying upon Manager’s confirmation of such authority.” *Id.* That is, the second clause is not grammatically dependent upon the first and expresses a separate thought: third persons shall be fully protected by NIC Wise when they act in reliance on Wishon Row’s confirmation of its authority to enter into loan transactions and security pledges on behalf of NIC Wise and the SPEs.¹¹

Again, it is perfectly plausible from the face of the JVA that the parties to that contract agreed that a third-party who recognized that Soberal’s purported proofs of Wishon Row’s authority appeared lacking, as the trial court concluded here, empowered the Manager to bind the Company for expediency provided the Manager confirmed his authority. Soberal confirmed Wishon Row’s authority

¹¹ See, e.g., Glenn D. West, *That Pesky Little Thing Called Fraud: An Examination of Buyers’ Insistence Upon (and Sellers’ Too Ready Acceptance of) Undefined “Fraud Carve-Outs” in Acquisition Agreements*, 69 Bus. Law. 1049, 1067-68 (2014) (explaining that a principal-entity is liable for fraud where its agent-officer is deemed to have committed fraud in negotiating on behalf of the principal-entity).

continuously. A4245-52, A4901, and A1323:2-20¹²; A4353-54 and A1321:3-9¹³; A1414:4-10¹⁴; A1610:18-A1612:21, A1645:9-17¹⁵. This represents a plain reading of Section 6.1, unclouded by the trial court’s credibility conclusions, which are irrelevant to construing the plain meaning of the JVA’s terms to divine the parties’ intentions. And those irrelevant credibility findings undergird the court’s third and final basis for rejecting StarTop’s plain reading of Section 6.1. *See Op.*, 30.

The point may be best illustrated by steelmanning the trial court’s construction: the parties to the JVA agreed that third-party lenders relying on Soberal’s confirmation of Wishon Row’s authority to bind NIC Wise should *not* be fully protected *if those third parties believed, at the time Soberal confirmed that authority, he was lying or mistaken about it*. That is the court’s reading, and it imports tacit caveats inappropriate for contract construction. Had the parties meant to condition a lender’s protection on its good faith belief or ignorance of Soberal’s artifice or exaggeration, they could have said so. Their silence is a chosen term, not

¹² In response to questions from Patrick’s attorney about Soberal’s authority to enter into the Patrick Loan, Soberal attached documents establishing the ownership chain of the various BW-related entities, and explained that “I am the CEO of BW Industries Inc.[,] BW Industries Inc is the sole manager of Wishon Row LLC[,], Wishon Row LLC is the sole manager of NIC WISE RE LLC[, and] NIC WISE RE LLC is the sole manager of 747 R Street LLC[.]”

¹³ Regarding the Patrick Loan, Soberal “suggest[ed] pledging the collateral in the LLC that owns the asset - provided proof that I’m authorized to sign pledging the collateral.”

¹⁴ Bitwise recently received a \$600M valuation from Reuters and obtained an \$80M investment.

¹⁵ Adler explaining that when he requested audited financials, Soberal chastised him and cautioned that neither Goldman Sachs nor Citigroup had requested audited financials, and institutional investors (like Citigroup) had just invested \$80M in the company.

a gap for the court to fill. *See Reybold Constr. Co. v. Lennar Corp.*, 2025 WL 2346985, at *9 (Del. Super. Ct. Aug. 13, 2025) (sophisticated parties knew how to include specific language but chose not to do so) (citing *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006)). Construction gives effect to the bargain the parties actually struck not the one a court supposes they should have struck. *See e.g., Johnson & Johnson v. Fortis Advisors LLC*, 352 A.3d 229, 253 (Del. 2026) (explaining that the implied covenant is not “a license for the court to rewrite the contract to appease a party who later wishes to rewrite a contract [it] now believes to have been a bad deal” and that a court should not “paint over contractual provisions that one side later regrets.”) (internal quotations omitted).

The trial court rounds out its reasoning by “reject[ing] StarTop’s attempt to employ Section 6.1 as a get-out-of-jail-free card.” Op., 30. The metaphor gives away the trial court’s conflation of culpability and knowledge—conspiracy with Soberal to defraud NICbyte and knowledge that Soberal didn’t have the authority to bind NIC Wise, which he had so frequently confirmed. A get-out-of-jail-free card is a conceit apropos of a civil conspiracy case. A beneficiary’s awareness of the promisee’s lack of authority, viewed through the lens of Section 6.1, requires no such redemption. And so, the trial court erred as a matter of law in construing the JVA such that StarTop could not find refuge in the third-party-beneficiary protections of its Section 6.1.

II. The trial court misinterpreted the plain meaning of the JVA in finding that Wishon Row did not have express actual authority to enter into the Loans.

A. Question Presented.

Did the Court of Chancery err in finding that Wishon Row lacked actual authority when it misinterpreted the plain meaning of the Manager's unilateral authority to make Major Decisions, including entering into the Loans, under the JVA? Op. at 31-32.

B. Scope of Review.

This question is a mixed one of law and fact that are reviewed *de novo*. *Brody v. Zaucha*, 697 A.2d 749, 753 (Del. 1997).

C. Merits of Argument.

Wishon Row did not need NICbyte's consent to bind the Company to the various loan documents. All of the evidence admitted at trial, much of which was NICbyte's business records, demonstrates that it missed a capital call, forfeiting its right to pre-approve Wishon Row's authority to bind the Company. As a result, Soberal, acting through Wishon Row as NIC Wise's manager, possessed actual authority to cause NIC Wise to pledge its interests and the SPEs' assets as collateral to the StarTop Loans.

A principal grants actual authority either expressly or implicitly to an agent. *Billops v. Magness Constr. Co.*, 391 A.2d 196, 197 (Del. 1978); *see also Jack J.*

Morris Assocs. v. Mispillion St. Partners, LLC, 2008 WL 3906755, at *3 (Del. Super. Ct. Aug. 26, 2008). “When an agent commits acts with actual authority, the ‘principal is bound by the legal consequences of the agent’s action.’” *B.A.S.S. Group, LLC v. Coastal Supply Co.*, 2009 WL 1743730, at *4 (Del. Ch. June 19, 2009) (quoting Restatement (Third) of Agency § 4.01 Introductory Note (2006)). As both member and manager of NIC Wise (the principal), Wishon Row (acting through Soberal), was the agent. *See Little River Landing LLC v. Allstate Vehicle & Prop. Ins. Co.*, 2024 WL 3251581, at *8 (Del. Ch. July 1, 2024).

A Manager can make a “Call” or “Call For Capital” pursuant to Sections 3.2, 3.3, or 3.4. A2340, § 1.1. Wishon Row, as Manager, can deliver a Call if it was approved or contemplated pursuant to Section 6.5. A2351, § 3.3. Calls require both members’ approval **unless** it is for Nondiscretionary Required Expenses. A2363, § 6.5(a)(xviii). The Manager alone can issue a Call to meet these Nondiscretionary Required Expenses, which include “costs associated with complying with ... lease[] requirements for leases approved in accordance with th[e] [JVA], including ... tenant improvement requirements. . . .” A2364, § 6.6(b).

Nondiscretionary Required Expenses are “Required Additional Capital Contributions,” which only NICbyte is required to pay. A2351, § 3.3; A946:10-A951:17 (renovation costs and sustainability improvement costs “would have been 100 percent funded by NICbyte”); A1798:18-A1801:19. Tenant improvements are

Nondiscretionary Required Expenses and, therefore, Required Additional Capital Contributions, which must be made by NICbyte ***within ten business days*** of the Call. A951:9-20.

If a Member fails to make Required Additional Capital Contributions, then that Member becomes a “Defaulting Member.” A2352, § 3.4(a). A Defaulting Member loses the “right to request or approve Major Decisions.” A2361, § 6.5(a). The Loans are Major Decisions. A2360-62, § 6.5(a)(i), (iv), (v), (xxx).

Between July and October 2022, Wishon Row issued numerous Calls for Nondiscretionary Required Expenses. A2411-18; A3635-42; A3644-53; A3654-61; A3662-67; A3668-71; A3678-81; A3700-02; A3703-53; A3756-821; A3822-49; A3876-4028; A4038-89; A4090-95. But with each submission, NICbyte found an excuse to avoid making its proportionate contribution. A1822:11-21. For example, NICbyte objected to the format and named entities of the various Calls. *Id.* NICbyte, however, paid at least three Calls between July and August of 2022. A854:21-23; A3644-53; A3682-86; A3687-90; A3691-99.

On September 15, 2022, Wishon Row submitted a Call for a Required Additional Capital Contribution of \$196,084.28 for renovation costs on the Oakland Property. A4029-37 (linking to A3850-75); A3850-75; A1861:1-14; A1058:3-20. These costs were Nondiscretionary Required Expenses. A1059:13-15, A1060:4-8.

On September 30, Wishon Row withdrew an August 11 Call and supposedly submitted a new Call through an embedded link within that email. A4206; A1062:5-23. That embedded link, however, was not live¹⁶ and, thus, is not part of the record. The email, however, refers specifically the “previous Capital Call dated August 11th. . . .” A4096. And so, it is not supplanting the September 15 Call.

On October 3, Wishon Row emailed NICbyte, submitting a Call dated September 26 for \$195,084.28. A4096; A4099. On October 12, Wishon Row expressly withdrew the “September Capital Call dated September 26th, 2022.” A4154-204. The only September 26 Call in the record is the one that was supposedly submitted on October 3. A4096; A4099. The September 15 Call was never withdrawn and NICbyte admits it was never funded. A1060:16-25. As a result, NICbyte became a Defaulting Member under the JVA at midnight on October 1, 2022 (10 business days after the September 15 Call was issued).

The trial court ignores that NICbyte’s corporate designee admitted to having no first-hand knowledge of the capital call process. A1775:22-A1776:4. The only witness directly involved in the process testified that he was “confused” and couldn’t “recall” what the October 3 Call was supplanting. A1863:1-16. Nonetheless, the record is devoid of any evidence that NICbyte funded the September 15 Call, which more than establishes a high probability that the

¹⁶ *Id.*

NICbyte became a Defaulting Member on October 1 and remained so thereafter. *Parke Bancorp Inc. v. 659 Chestnut, LLC*, 217 A.3d 701, 710 (Del. 2019) (“The clear and convincing standard requires evidence that produces in the mind of the trier of fact an abiding conviction that the truth of the factual contentions is highly probable.”).

But the trial court, relying exclusively on the self-serving, meaningless testimony of NICbyte’s corporate representative, ignored the distinction between the September 15 Call and the withdrawn September 26 Call. It found that the October 3 notice “was instead the same capital call for September 26, 2022, that Wishon Row ultimately withdrew.” Op., 32. Although this document was not attached to an email and unauthenticated at trial, it does not change the fact that the September 15 Call remained unpaid.

The JVA provides that failure to pay within ten business days renders NICbyte a Defaulting Member. A2352, § 3.4; A1865:5-A1867:17. Accepting Plaintiffs’ version of events, NICbyte either received notice of the September 15 Call that same day and that Call was not withdrawn until it was supplanted by way of notice dated October 3 (submitting the September 26 Call) *or* the September 26 Call was not withdrawn until October 12. Under either scenario, more than ten business days had lapsed since the Call, rendering NICbyte a Defaulting Member, whose consent was therefore unnecessary for the Manager to bind the Company to

the Loans. A2361, § 6.5(a), A2352, § 3.4(a)¹⁷. And so, the trial court erred when it found that Wishon Row did not have actual authority, and that conclusion is not altered by any finding of fact or sanction.

As a Defaulting Member, NICbyte lost the right to approve Major Decisions, including the approval of the Loans. *Id.* Because NICbyte never funded the September 15 Call, Soberal had express actual authority under the JVA to enter into the Loans without NICbyte's approval. Thus, when the Loans were consummated, Wishon Row (Soberal) had express authority to bind NIC Wise and pledge its interests and the SPEs' assets as collateral.

¹⁷ If the Call for Capital is not met, Wishon Row was permitted to withdraw the Call for Capital and leave NICbyte in default.

III. The trial court erroneously found that Plaintiffs were prejudiced by lost ESI that was irrelevant to StarTop’s third party beneficiary and actual authority claims.

A. Question Presented.

Did the Court of Chancery err in heightening the burden of proof on StarTop’s third-party beneficiary and actual authority claims when the ESI that was lost was entirely irrelevant to the elements of those claims such that Plaintiffs suffered no prejudice under Rule 37? A1229:5-10; A1235:6-10; Op. at 22-25.

B. Scope of Review.

This question presents a mixed question of law and fact, which this Court reviews *de novo* for abuse of discretion. *SARN SD3, LLC v. Czechoslovak Grp.* A.S., 326 A.3d 1170, 1194 (Del. 2024).

C. Merits of Argument.

StarTop sought a judgment declaring that it was a third-party beneficiary of the JVA and that Wishon Row had actual authority to enter into the Loans on NIC Wise’s behalf because NICbyte was a Defaulting Member. In October of 2024, NICbyte sought sanctions, arguing that StarTop had deleted ESI. A65-84. After an extensive investigation by a Discovery Neutral and supplemental briefing, on February 19, 2025, the trial court imposed two sanctions against StarTop: (i) shifting the burden of proof to StarTop to refute Plaintiffs’ claims; and (ii) increasing the burden on StarTop’s claims and defenses.

To obtain sanctions Plaintiffs must show that StarTop: “(i) ... had a duty to preserve the ESI, (ii) the ESI is lost, (iii) the loss is attributable to [StarTop’s] failure to take reasonable steps to preserve the ESI, and (iv) [Plaintiffs] suffered prejudice.” *Goldstein v. Denner*, 310 A.3d 548, 557 (Del. Ch. 2024). Court of Chancery Rule 37(e)(1) “requires that a party have suffered prejudice before a court will impose sanctions for failing to preserve ESI.” *Id.* at 583 (citing Del. Ch. Ct. R. 37(e) stating that “**upon finding prejudice to another party** from loss of information” the court “may order measures **no greater than necessary to cure the prejudice. . . .**”) (emphasis added). The trial court erred when it concluded that relevant ESI was lost resulting in prejudice to Plaintiffs.

The trial court was primarily concerned about the loss of StarTop’s internal communications. A1229:5-10; A1235:6-10. That is because StarTop’s communications with Soberal and Olguin were preserved—not lost. The Bankruptcy Trustee for BW and Bitwise obtained forensic images of Soberal and Olguin’s hard drives, cell phones, and Google Workspaces, which were subsequently obtained by the parties to this Action and, thus, no communications between StarTop on the one hand and Soberal and Olguin on the other were lost. A1135:18-A1136:3.

StarTop’s third-party beneficiary status and Wishon Row’s actual authority hinge upon a review of the JVA and Plaintiffs’ own documents. StarTop’s internal

communications are irrelevant to those claims. In the context of a Rule 37 analysis, “prejudice exists when spoliation prevents a party from obtaining and potentially using **relevant** evidence.” *In re Facebook Inc. Derivative Litig.*, 2025 WL 262194, at *10 (Del. Ch. Jan. 21, 2025) (emphasis added). The “mere fact that evidence is lost is not sufficient to demonstrate prejudice.” *Id.* Instead, Plaintiffs must provide a “plausible explanation as to why evidence **could have been relevant** such that the failure to preserve is prejudicial.” *Id.* (citations omitted) (emphasis added). The trial court found that Plaintiffs were prejudiced because there was no way to determine whether any unrecoverable ESI may have been relevant to this Action while noting that it was “sensitive to the fact that the spoliated evidence may not have been particularly central to all the claims in this [Action].” A1278:8-10.

Recall, a third-party beneficiary claim is dependent on the intent of the contracting parties—not StarTop—as gleaned from the face of the JVA. Actual authority is determined by the principal’s express or implied grant to the agent. In that regard, StarTop’s understanding of that authority vis-à-vis its internal communications is irrelevant. Because StarTop’s internal communications could not have been relevant to Wishon’s Row’s actual authority or StarTop’s third-party beneficiary status, Plaintiffs suffered no prejudice.

Wishon Row’s actual authority depends on NICbyte’s status as a Defaulting Member, an event that occurred at least three months before StarTop began

negotiating Loan One. And so, no spoliated evidence would have been probative of NICbyte's status as a Defaulting Member. *See, e.g., Micron Technology, Inc. v. Rambus, Inc.*, 917 F.Supp.2d 300, 319 (D. Del. 2013) (explaining that spoliated documents did "not seem likely to depend on internal [defendant] documents" and, thus, plaintiff "could not have been prejudiced by [defendant's] spoliation.") (citations omitted). The trial court made a factual finding that StarTop was aware of Wishon Row's lack of authority, obviating the need for a sanction. Nonetheless, that knowledge in the context of Section 6.1 is irrelevant to the question of whether StarTop was an intended third-party beneficiary of the JVA.

And so, in the absent prejudice, Rule 37 does not contemplate universal sanctions like burden shifting and heightening on all claims. *See Goldstein*, 310 A.3d at 583, 585 (citing Del. Ch. Ct. R. 37(e)). StarTop's missing internal communications result in no prejudice to Plaintiffs. And so, the court erred in imposing burden shifting and heightening.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's decision denying StarTop's third-party beneficiary and actual authority claims and enter judgment in StarTop's favor to enforce the Loans.

Dated: July 16, 2026

**GORDON, FOURNARIS &
MAMMARELLA, P.A.**

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