

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

Case Below:

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

APPELLEES' ANSWERING BRIEF

Dated: August 17, 2026

OF COUNSEL:

Stephen H. Sutro (*pro hac vice*)
Suzanne R. Fogarty (*pro hac vice*)

DUANE MORRIS LLP

One Market, Spear Tower
Suite 2200
San Francisco, CA 94105
Telephone: (415) 957-3000
shsutro@duanemorris.com
srfogarty@duanemorris.com

DUANE MORRIS LLP

Richard L. Renck (#3893)
Brandon R. Harper (#6418)
1201 North Market Street, Suite 501
Wilmington, DE 19801-1659
Telephone: (302) 657-4900
Facsimile: (302) 657-4901
rlrenck@duanemorris.com
bharper@duanemorris.com

*Counsel for Plaintiffs/Counterclaim
Defendants Below / Appellees*

TABLE OF CONTENTS

	Page
NATURE OF PROCEEDINGS.....	1
SUMMARY OF ARGUMENT	6
COUNTERSTATEMENT OF FACTS	8
A. The Parties and the Joint Venture.	8
B. Soberal gets into business with Hardcastle and Adler – 2112 LLC Loans.....	9
C. Patrick Investments and other December 2022 short term loans.....	11
D. StarTop Loans	12
E. StarTop’s principals engage in fraud against their own investors.....	15
F. Discovery of the fraud and criminal consequences.	17
G. StarTop’s spoliation of evidence.....	18
ARGUMENT	22
I. The Trial Court correctly held that StarTop cannot invoke § 6.1 of the JVA to enforce loan documents procured through fraud when StarTop’s principals knew Soberal lacked authority.....	22
A. Question Presented.....	22
B. Scope of Review.....	22
C. Merits of Argument.....	23
1. The Trial Court’s ruling—that StarTop cannot rely on § 6.1 to enforce contracts it knows are unenforceable—was correct.....	23
a. The Trial Court was correct when it found StarTop’s reading of § 6.1 “absurd.”.....	23

b.	Section 6.1 Must Be Read in Harmony with § 6.5	25
c.	StarTop’s New “Compound” Sentence Argument is Waived and Fails on the Merits.	28
d.	Section 6.1 applies only to the “Company,” not the subsidiaries.	29
2.	StarTop cannot rely on a document it never read.	29
3.	StarTop is not a third-party beneficiary of the JVA.	31
4.	StarTop’s Restatement § 309 and “silence is a chosen term” theories are waived and, in any event, meritless.	33
II.	The Trial Court correctly found that Wishon Row lacked actual authority to enter into the StarTop Loans.....	35
A.	Question Presented.	35
B.	Scope of Review.....	35
C.	Merits of Argument.	36
1.	The JVA expressly restricts Wishon Row’s authority over loans and pledges.	36
2.	Unauthorized transactions are “void and ineffective” under JVA § 9.1.	36
3.	The Trial Court’s “no default” finding is entitled to deference.	37
4.	StarTop’s ratification and modification-by-conduct theory is waived and, in any event, unsupported.....	39
III.	The Trial Court did not abuse its discretion in imposing spoliation sanctions, and the post-trial adverse inference is independently sufficient to support the judgment.	41
A.	Question Presented.	41
B.	Scope of Review.....	41

C.	Merits of Argument.....	41
1.	The Trial Court imposed two separate and independent spoliation sanctions.....	41
2.	The Trial Court did not err by imposing sanctions for StarTop’s vast and prejudicial spoliation.....	43
CONCLUSION.....		46

TABLE OF AUTHORITIES

Cases

<i>8908 Kanis RemainCo LLC v. Gastroenterology & Surgery Ctr. of Arkansas, P.A.</i> , 2026 WL 1022300 (Del. Ch. Apr. 15, 2026).....	24
<i>AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC</i> , 268 A.3d 198 (Del. 2021)	23
<i>B.A.S.S. Gp., LLC v. Coastal Supply Co.</i> , 2009 WL 1743730 (Del. Ch. June 19, 2009)	30, 39
<i>Backer v. Palisades Growth Cap. II, L.P.</i> , 246 A.3d 81 (Del. 2021)	22, 38
<i>Bako Pathology LP v. Bakotic</i> , 288 A.3d 252 (Del. 2022).....	32, 34
<i>Boardwalk Pipeline Partners, LP v. Bandera Master Fund LP</i> , 288 A.3d 1083 (Del. 2022)	22, 35
<i>Caribbean Sun Airlines Inc. v. Halevi Enterprises LLC</i> , 2025 WL 250787 (Del. Jan. 21, 2025).....	30-31
<i>Cede & Co. v. Technicolor, Inc.</i> , 758 A.2d 485 (Del. 2000).....	23
<i>CompoSecure, L.L.C. v. CardUX, LLC</i> , 206 A.3d 807 (Del. 2018).....	37
<i>Comrie v. Enterasys Networks, Inc.</i> , 2004 WL 293337 (Del. Ch. Feb. 17, 2004)	32
<i>DCV Holdings, Inc. v. ConAgra, Inc.</i> , 889 A.2d 954 (Del. 2005).....	26
<i>Emerald P’rs v. Berlin</i> , 726 A.2d 1215 (Del. 1999).....	28, 33, 36, 39
<i>Flaa v. Montano</i> , 2013 WL 5498045 (Del. Ch. Oct. 4, 2013)	30
<i>In re Fox Hill Office Investors, Ltd.</i> , 926 F.2d 752 (8th Cir. 1991)	27
<i>Genger v. TR Invs., LLC</i> , 26 A.3d 180 (Del. 2011).....	41
<i>Goldstein v. Denner</i> , 310 A.3d 548 (Del. Ch. 2024)	43
<i>Harmon v. State, Del. Harness Racing Comm’n</i> , 62 A.3d 1198 (Del. 2013) ...	35-36

<i>Holifield v. XRI Investment Holdings LLC</i> , 304 A.3d 896 (Del. 2023)	37
<i>Iron Branch Assocs., LP v. Hartford Fire Ins. Co.</i> , 559 F. Supp. 3d 368 (D. Del. 2021)	28
<i>Johnson & Johnson v. Fortis Advisors LLC</i> , 352 A.3d 229 (Del. 2026)	23, 25
<i>Madison Realty Partners 7, LLC v. Ag ISA, LLC</i> , 2001 WL 406268 (Del. Ch. Apr. 17, 2001)	32
<i>Manti Holdings, LLC v. Authentix Acquisition Co., Inc.</i> , 261 A.3d 1199 (Del. 2021)	25
<i>Micron Technology, Inc. v. Rambus, Inc.</i> , 917 F. Supp. 2d 300 (D. Del. 2013)	44
<i>Estate of Osborn v. Kemp</i> , 991 A.2d 1153 (Del. 2010)	25, 28
<i>Premcor Refining Group v. Natl. Fire Ins. Co. of Hartford</i> , 855 F. Supp. 2d 237 (D. Del. 2012)	30, 39
<i>Rudnitsky v. Rudnitsky</i> , 2000 WL 1724234 (Del. Ch. Nov. 14, 2000)	31
<i>SARN SD3, LLC v. Czechoslovak Grp. A.S.</i> , 326 A.3d 1170 (Del. 2024)	23, 41, 44
<i>Terrell v. Kiromic Biopharma, Inc.</i> , 338 A.3d 1272 (Del. 2025)	25
<i>In re Tesla, Inc. Derivative Litigation</i> , 2025 WL 3689114 (Del. Dec. 19, 2025)	33, 39
Statutes	
6 Del. C. § 18-106	39
Other Authorities	
Ct. Ch. R. 37	<i>Passim</i>
Supr. Ct. R. 8	39
Restatement (Third) of Agency § 2.01	35

Restatement (Second) of Contracts § 302	33
Restatement (Third) of Agency § 3.03	28
Restatement (Second) of Contracts § 309.....	33-34

NATURE OF PROCEEDINGS

Appellant StarTop Investments, LLC (“StarTop”) asks this Court to enforce \$20.4 million of security interests that its principals procured with forged documents while knowingly participating in a fraudulent lending scheme, and that it then sought to defend by destroying the evidence. That request cannot be granted.

After a two-day trial, the Court of Chancery found that the interests were never validly granted—the purported grantor lacked any authority to grant them—and that StarTop’s principals knew as much when they took them. The action arises from StarTop’s attempt to claim security interests over property owned by Appellees and enforce loans procured through fraud by former Bitwise¹ Co-CEOs Jake Soberal (“Soberal”) and Irma Olguin (“Olguin”), together with StarTop principals Andrew Adler (“Adler”) and David Hardcastle (“Hardcastle”). Op. at 1.² Soberal, Olguin, Adler and Hardcastle have all pled guilty to fraud in connection with the very loans StarTop seeks to enforce against Appellees. Op. at 21. Soberal, Olguin, and Adler

¹ “Bitwise” refers to Bitwise Industries Inc., which is a wholly owned subsidiary of BW Industries Inc. (“BW”). Wishon Row LLC (“Wishon Row”) is also a wholly owned subsidiary of BW. Collectively, Bitwise, BW, and Wishon Row are referred to in this brief as “Bitwise” or “BW.”

² The Trial Court’s April 8, 2026 Post-Trial Memorandum Opinion is attached to StarTop’s Opening Brief as Exhibit B and cited herein as “Op.” StarTop’s Opening Appellate Brief is cited herein as “OB.”

are currently serving prison terms, and Hardcastle is scheduled to be sentenced in October.

The evidence at trial showed that StarTop’s principals did not merely overlook red flags; they partnered with Soberal. Adler and Hardcastle funded the loans by lying to StarTop’s investors and creating forged documents to make the loans appear to bear interest at “only” 24%, when the true rate was 60%. Op. at 14, 28. They also covered for BW when loan interest payments were missed by distributing their own money to StarTop investors so “that the investors never [knew] the difference,” thereby making the loans appear to perform and enabling fundraising for additional loans (and profit to Adler and Hardcastle). Op. at 19. As part of this scheme, at StarTop’s request, Soberal lied directly to StarTop’s investors. Op. at 17.

StarTop then flouted the truth-seeking process by lying and intentionally spoliating evidence to conceal its wrongdoing. Op. at 21-22. At trial, StarTop’s dishonesty was on full display. Vice Chancellor Cook found StarTop’s principals not credible. In fact, the audacity, evasiveness, and untruthfulness of Hardcastle’s testimony led the Vice Chancellor to state:

THE COURT: Well, I will put it to you, I, frankly, think you are lying to me right now. . . . So I’m putting it to you quite directly as to what it is that is my impression of all of this and your testimony.

Op. at 18, n. 97. The Trial Court’s post-trial ruling confirmed that assessment. It found StarTop’s witnesses “dubious and wholly lacking credibility” Op. at 30.

Hardcastle and Adler’s penchant for dishonesty also manifested itself through intentional spoliation of evidence on “a frankly vast scale”—“Adler and Hardcastle engaged in wide-ranging spoliation of critically important data after delivery of [a] Litigation Hold.” Op. at 21-22. The record before the Special Discovery Neutral, and, ultimately, the Trial Court showed that thousands of documents and communications were deleted or destroyed, with spikes in those destruction efforts “roughly coinciding with NICbyte’s service of discovery requests and also around the time NICbyte filed its first motion to compel.” Op. at 23.

As an initial sanction, the Trial Court: (a) shifted the burden of proof to StarTop where NICbyte otherwise bore it and (b) elevated StarTop’s burden of proof to clear and convincing evidence where StarTop already bore the burden. Op. at 24. The Trial Court reserved judgment on whether other, more severe, sanctions were warranted until it could consider the trial evidence. That record warranted a separate sanction: the Court concluded that “the contemporaneous written record and the record of spoliation compel the Court to conclude that an adverse inference that Soberal did not have apparent authority to enter into the loans” and that “StarTop failed to meet its burden of proof that Soberal was authorized to enter into the loans” was warranted. Op. at 27.

The parties completed post-trial briefing on June 18, 2025. On April 8, 2026, the Trial Court issued a comprehensive 45-page Memorandum Opinion holding, on

the trial record and the adverse inference drawn from StarTop's own spoliation, that the contracts at issue were invalid and unenforceable and that StarTop held no right, title, or interest in the subject real estate properties, NIC Wise, or the SPEs.³ The Trial Court entered a permanent injunction against the enforcement of StarTop's claimed security interests and, as a further consequence of StarTop's spoliation, ordered StarTop to pay \$423,781 in fees and expenses to Plaintiffs.

An Implementing Order granting declaratory judgment and injunctive relief was entered on April 30, 2026.

StarTop's appeal of the Trial Court's well-reasoned opinion suffers from many of the same flaws that proved fatal to StarTop at trial. StarTop also attempts to make legal arguments to this Court that it never presented below and functionally seeks to relitigate the critical factual findings noted above. Those efforts should be rejected. The Trial Court properly exercised its discretion in applying both its pre- and post-trial sanctions to StarTop, and its factual findings are not clearly erroneous and should not be disturbed. Moreover, the Trial Court's conclusions that StarTop's loans were unenforceable against NICbyte, because StarTop failed to prove that

³ "NICbyte" refers to NICbyte LLC. "NIC Wise" refers to NIC Wise RE LLC. "SPEs" refers to 1701 18th Street, LLC, 1715 18th Street, LLC, 1723 18th Street, LLC, and 747 R Street, LLC (each an "SPE" or "Plaintiff Subsidiary," collectively the "SPEs" or the "Plaintiff Subsidiaries" and, collectively with NICbyte and NIC Wise, "Plaintiffs" or "Appellees"). The relationship of NICbyte, NIC Wise, and the SPEs is described in the fact section below.

Soberal had actual or apparent authority to enter into the challenged Loans and because StarTop knew he had no such authority, are legally sound and fully supported by the record. Thus, NICbyte respectfully asks that this Court affirm the rulings of the Trial Court in all respects.

SUMMARY OF ARGUMENT

1. **Denied.** The Trial Court correctly rejected StarTop’s attempt to use § 6.1 of the Joint Venture Agreement (“JVA”)—a document StarTop’s principals admitted they never read—to enforce loan documents StarTop knew were procured through fraud. StarTop possessed both the genuine JVA and a fabricated version, ran a parallel fraud on its own investors using the same method of forgery as Soberal, concealed Soberal’s fraud, and ignored a warning to “run away” rather than lend to BW. In that setting, StarTop’s proffered interpretation of § 6.1 as a “fraud-free-for-all” is “absurd,” as the Trial Court recognized. Op. at 30. StarTop also argues new theories regarding the Court’s interpretation of § 6.1 that it never argued below, which are not only waived on appeal, but also fail on the merits.

2. **Denied.** The Trial Court correctly found that Wishon Row lacked actual authority to enter into the loans and encumber the properties, recognizing that the “JVA precluded Wishon Row from entering into a financing, pledging NIC Wise’s interests, or encumbering its properties without the consent of NICbyte.” Op. at 31. In fact, the JVA deems unauthorized transactions “void and ineffective.” The Trial Court correctly rejected StarTop’s argument regarding “NICbyte’s purported failure to pay a capital call” and found “no evidence to suggest a default occurred” that could have stripped NICbyte’s consent rights. Op. at 32. That factual finding is entitled to clear-error deference.

3. **Denied.** The Trial Court imposed two separate, independently sufficient spoliation sanctions: a pretrial, burden-shifting order under Court of Chancery Rule 37(e)(1) and a post-trial, adverse inference under Rule 37(e)(2). The adverse inference—that Soberal lacked authority and StarTop knew it—rests on overwhelming evidence of intentional, post-litigation-hold destruction of documents. StarTop challenges only the pretrial sanction and has waived any challenge to the adverse inference.

COUNTERSTATEMENT OF FACTS

The Trial Court's Post-Trial Memorandum Opinion, issued on April 8, 2026, sets forth detailed factual findings after a two-day trial. Those findings establish that StarTop's principals were not innocent victims of Soberal's fraud but his partners in crime and active participants who ignored repeated warnings, helped conceal the scheme, defrauded their investors, and then destroyed evidence relevant to their knowledge and authority.

A. The Parties and the Joint Venture.

On June 6, 2022, NICbyte and Wishon Row, BW's wholly owned subsidiary, executed a JVA (which doubled as the entity's operating agreement) to form NIC Wise. The purpose of the joint venture was to acquire, invest in, and manage real properties as part of a broader sale-leaseback transaction. Op. at 5-6; A2348-50. NICbyte owned 95% of the membership interests and contributed approximately \$35.5 million in capital. Op. at 5; A2392; A2398. Wishon Row owned the remaining 5%. *Id.*

The JVA designated Wishon Row as NIC Wise's "Manager" to perform certain enumerated duties related to the day-to-day management and maintenance of the Properties. Op. at 6; A2344. Wishon Row was managed by Bitwise and controlled by co-CEOs Soberal and Olguin. B10.

Section 6.5 of the JVA limited Wishon Row's authority, as Manager, by requiring NICbyte's approval for Major Decisions made on behalf of NIC Wise and the SPEs. A2360-64 ("Major Decisions ... *shall require the approval of the Members*"); Op. at 6. Under § 6.5, absent NICbyte's consent, Wishon Row could not obtain financing, pledge or transfer interests in real estate, or grant security interests in the SPEs membership interests or NIC Wise's assets. Op. at 5-6; A2360-64 (§ 6.5(a)(i), (ii), (iv), (v)).

The JVA further prohibited any member from making any transfer or assignment of any portion of NIC Wise, the Plaintiff Subsidiaries, or their properties or interests without first obtaining consent and authorization from the other Member and provided that "any Transfer in contravention of any of the provisions of this Article 9 *shall be void and ineffective, and shall not bind, or be recognized by, the Company.*" A2375 (emphasis added); Op. at 7.

B. Soberal gets into business with Hardcastle and Adler – 2112 LLC Loans.

Jake Soberal, co-CEO of BW Industries and Bitwise, began a business relationship with David Hardcastle in the fall of 2013 when the pair worked on a website development project together. Op. at 2 (citing B1). However, their working relationship soured and eventually ended in 2015 over a billing dispute where both

men exchanged barbed accusations of dishonesty.⁴ Despite this acrimonious origin story, the two men gave their working relationship another try in 2022 when Soberal approached Hardcastle seeking short-term bridge loans to Soberal’s company, Bitwise. Op. at 3.

In his pitch to Hardcastle, Soberal claimed he was in the final stages of a transaction to sell a third of Bitwise and (despite apparently having about \$40 million in cash on hand) needed cash quickly to service capital and real estate until the deal closed. Op. at 3-4 (citing B18). Given the parties’ prior dealings, that request should have prompted heightened scrutiny, but Hardcastle proceeded nonetheless. Op. at 3-4. He loaned BW nearly half of the loan amount while soliciting investors for the balance who had little to no visibility into Soberal or his business dealings. Op. at 4 (citing A1260:21–A1261:7, A1445:16–19 (Hardcastle)).

Between May and August 2022, Hardcastle (through 2112 LLC) made three loans totaling approximately \$3 million to Bitwise—each on short notice, funded with help from Hardcastle’s investors, and with high “loan fees” paid to Hardcastle. Op. at 3-5; *see also* B23; B39; B49; B95. In connection with the third loan, Soberal

⁴ B5 (Soberal emailing Hardcastle that, “[a]s I mentioned in our phone conversation, I strongly disagree with your conclusion and believe that you and your team are being dishonest and unfair in our efforts to resolve this billing inquiry”); *id.* (Hardcastle emailing Soberal that, “[w]hat I do know though after my audit with regards to our original agreement and what has been paid and what has been delivered, that’s not dishonest or unfair, that’s black and white. If you don’t make good on that, that would be the definition of unfair and dishonest”).

signed a “springing” Deed of Trust on one of the NICbyte properties, 747 R Street, which Hardcastle agreed not to record until and unless there was an event of default—the obvious purpose of which was to conceal the encumbrances and debt. Op. at 7-8; A3754; B57. Hardcastle received a loan fee for each of these loans. Op. at 4-5, 8-9; B36; B39-49; B64-68.

C. Patrick Investments and other December 2022 short term loans

In December 2022, Hardcastle arranged additional loans for Soberal and Bitwise. A1606:11-A1609:9; B356; B368. To do so, Hardcastle again turned to investors to fund the loans, one of which was Patrick Investments LLC. Op. at 10; A4222. Patrick Investments’ attorney reviewed draft documents and called them “the worst legal documents I have ever encountered.” Op. at 11 (citing B321). The attorney pointed out numerous red flags like incorrect payee references, no maturity date or stated interest rate, a borrower that did not own the collateral, and concerns about unrecorded deeds of trust. *Id.* He described the deal as “an unsecured handshake loan” and advised “run[ning] away as fast as you can.” *Id.*

Hardcastle did not heed the warning and ignored these red flags. Significantly, on December 2, 2022, Soberal sent Hardcastle and Patrick Investments the authentic JVA, which disclosed NICbyte as the 95% owner of NIC Wise and expressly stated that Wishon Row did not have authority to enter into loans encumbering the underlying real estate. Op. at 11; A4245. Then, a few weeks later,

Soberal sent Hardcastle and Patrick a fabricated version of the JVA that differed materially and falsely listed Wishon Row as the sole member of NIC Wise. Op. at 11-13; A4370. Hardcastle never asked Soberal why he had received two different operating agreements for NIC Wise; he testified that he did not read either of them. A1320:20–A1323:3, A1493:7-A1495:16; A1496:19-A1497:17.

The \$2.75 million Patrick Loan closed on December 19, 2022, bore 5% monthly interest (nominally, 60% per annum), and was secured by a recorded deed of trust on the three Bakersfield Properties owned by NIC Wise subsidiaries. Op. at 12; B379. Hardcastle received a \$55,000 marketing fee for the Patrick Loan. Op. at 12.

In addition to the Patrick Loan, Hardcastle and Adler made 10-day loans to Bitwise through their other companies, Premier Property Manager LLC and Voyager Pacific in December 2022 to provide Bitwise with emergency liquidity while the Patrick Loan was finalized. A1607:11-A1610:9; B356; B368; A257:4-A258:13. These loans were paid off with the proceeds of the Patrick Loan. B386-87.

Accordingly, by December 2022, StarTop was well aware of BW's cash shortages.

D. StarTop Loans

Despite the red flags and troubling circumstances revealed through having brokered the Patrick Loan, Hardcastle pressed forward and within weeks began

soliciting investors for an even larger loan to Bitwise to be made through StarTop. Op. at 14 (citing B366; B1344; A1630:9–A1631:14 (Adler)).

The terms of the alleged StarTop loans were oppressive.

On January 13, 2023, StarTop made a loan to BW for \$10,000,000. Op. at 16 (citing A4580); B389-93; B399 (Adler presenting a plan “to squeeze money out . . . on the participant side too.”). The interest rate on the January loan to Bitwise was a “sky-high” 60% nominal annual rate. Op. at 14 (citing B1627; B404). The January loan was secured by a recorded deed of trust against 747 R Street in Fresno as well as a pledge of the membership interests of the SPE that owned that real estate. Op. at 16 (citing B1360); B1243.

Soberal provided StarTop with forged BW Industries board consents bearing obvious and suspiciously redacted signature audit trails that concealed his electronic forgery—more red flags that StarTop ignored. Op. at 16 (citing B1194, A4588; B1453 (omitting the audit trail entirely from the second StarTop loan)). These falsified documents also inaccurately listed NIC Wise as being wholly owned by Wishon Row. Op. at 15 (citing B463).

Critically, at this time, Hardcastle and Adler possessed *both* the genuine 45-page JVA (received during the Patrick Investments negotiations) that correctly identified NICbyte as the 95% member *and* a fraudulent 5-page version falsely listing Wishon Row as sole member, which Soberal sent for the StarTop loans. Op.

at 13 (citing A4245; A4370). As the Trial Court found, “[e]ven a cursory review of [those documents] would have revealed the stark differences.” Op. at 12-13, 40; *compare* A4370 with A4245. StarTop’s failure to read or compare these documents forecloses any claim of good faith reliance.

On March 15, 2023, StarTop made a second loan to BW for \$5,000,000 at the same 60% annual rate. Op. at 19. This loan was secured by membership interests of 1701 18th Street, LLC, 1715 18th Street, LLC, and 1723 18th Street, LLC and their respective properties. Also on March 15, 2023, Soberal signed a Cross-Collateralization Agreement that increased the overall loan amount for the January loan and March loan to a total of \$20,400,000. Op. at 19 (citing A4626, A4636, A4651, A4661, A4671). More than half the proceeds went towards paying off the earlier Patrick Loan. A4626;B1460; B1495; B1529; B1569; A4636.

Soberal, through Wishon Row, lacked authority to execute these agreements. Op. 31 (citing A2360-64); A1761:12-16, A1762:1-A1763:9. None of the loan proceeds went to NIC Wise or the Plaintiff Subsidiaries. Op. at 34-35. Bank records show that StarTop’s loan proceeds were wired into BW’s operating account. B846; B1569; B1575; A1791:13-15. None of the loan proceeds were used for the JVA’s stated purpose of acquiring, investing in, or managing the properties. B846; A1538:24–A1540:19, A1730:15–A1731:2, A1732:18–A1733:3; B1569; B1575.

E. StarTop's principals engage in fraud against their own investors.

StarTop's principals and Soberal were partners in fraud. Op. at 17-19. Hardcastle touted his personal relationship with Soberal when raising money for the Bitwise loans, stating "I know the [Bitwise] CEO's [sic] personally and one is my neighbor." B52; A1467:17-23. Adler listed himself as a member of the Advisory Board to Bitwise on his LinkedIn page. A1722:7-20.

In marketing the StarTop loans, Hardcastle and Adler took a page out of Soberal's criminal playbook. The interest rates on the StarTop loans to Bitwise were 60% per annum. Op. at 14 (citing B1627, B404). However, Hardcastle and Adler represented to their investors that the loans would bear interest at two percent per month, nominally 24% per annum. Op. at 14 (citing B366, B1344-54; A1630:9–A1631:14 (Adler)). As Soberal had done with the forged Board Consents and fake JVA, Hardcastle and Adler forged Soberal's signature on fake term sheets and created false promissory notes that each misrepresented the loans' interest rate as 24% instead of 60%, allowing them to pocket the 36% undisclosed yield spread premium. Op. at 14 (citing B1185; B1254; B1267 B1341; B404; A1745:18–A1747:13 (Adler)). Adler later deleted the falsified term sheets from the deal room during discovery. B1677-A1678, ¶ 37; B1627; B1625; A1745:18–A1747:13 (Adler).

When investors began asking about the stated interest rate—not the undisclosed, even higher 60% rate—Hardcastle and Adler arranged a call with an investor (Long Angle) and coached Soberal to falsely confirm the 24% rate and explain why Bitwise would borrow despite its claimed financial health. B1409; B1397; B1399; A1585:9-A1726:8 (Hardcastle). The Trial Court found this conduct, and Hardcastle’s attempted rationalization of how it *wasn’t* deceitful, devastating to StarTop’s credibility. Op. at 17-18 (citing B1409); *id.*, at 18 n.97; *see also* A1588:8-A1590:6. During trial, Vice Chancellor Cook told Hardcastle from the bench: “I, frankly, think you’re lying to me right now.” A1586:9-87:8.

Adler stated that a “use of funds” clause was necessary to convince investors to participate. Op. at 15 (citing B842). StarTop therefore included a “use of funds” clause for its investors’ reliance even though its principals knew it was a “farce.” When Soberal asked to remove it, Hardcastle responded: “We can’t tell where it’s going anyway. Just for our lenders in case they ask.” Op. at 35 (citing B830; B839). This admission confirms that StarTop’s principals *knew* the funds would not benefit NIC Wise or its subsidiaries, yet proceeded because the clause provided a veneer of legitimacy to their investors.

StarTop also covered for Soberal when Bitwise missed loan payment deadlines so that investor confidence would remain unshaken and StarTop could

continue to raise funds for the second loan. Op. at 19 (citing B1431; B1439; B1442); B1445; B1448; B1422; A1728:11–A1730:3, A1730:4–14.

Simply put, StarTop and Bitwise enabled each other; neither would have succeeded for as long as they did without the other. Hardcastle and Adler made almost \$3 million on these fraudulent, nonperforming loans in less than a year while passing most of the risk of loss to investors. B1263, B1460, B1569. Reciprocally, Bitwise’s co-CEOs recognized that StarTop was the “jenga piece” that kept everything afloat. B1436.

F. Discovery of the fraud and criminal consequences.

On May 26, 2023, NICbyte discovered the fraudulent scheme after news articles revealed Bitwise was behind on its taxes. Op. at 20 (A1649:10–18, A1787:10–20 (McCormick)). NICbyte conducted title searches that uncovered the unauthorized StarTop loans that had been concealed. Op. at 20; A1649:10–18, A1787:10–20; A1787:6–A1788:2 (McCormick).

After learning about the loans, NICbyte immediately filed suit in California against Wishon Row, and Bitwise and obtained a TRO. Op. at 20; A1788:3–A1789:5; B1615. After litigation began, Adler texted Hardcastle instructing him to “not communicate with [Soberal] in writing anymore . . . no text or email . . . We’re in lawsuit mode and he can use against us.” A4689. This contemporaneous

communication foreshadowed StarTop's eventual mass spoliation after NICbyte served its litigation hold notice on June 16, 2023. B1618.

On June 1, 2023, NICbyte sent Wishon Row notice that: (1) Wishon Row had breached the JVA; (2) NICbyte was exercising rights under the JVA to remove Wishon Row as Manager; and (3) NICbyte appointed itself as Manager. B1573; B1610; B1613.

BW ceased all operations shortly after NICbyte discovered the fraud and filed for bankruptcy on June 28, 2023. A85, ¶ 13. Soberal and Olguin pled guilty to criminal charges of wire fraud and conspiring to commit wire fraud. A4705, A4720. They are serving prison terms of eleven and nine years, respectively. A85, ¶ 32. Adler and Hardcastle have pled guilty to conspiracy to commit wire fraud. B1729; B1686.

G. StarTop's spoliation of evidence.

The surviving metadata and records revealed a massive campaign of deletion and attempted deletion during the litigation, including the following:

- Adler deleted 101,979 text messages during the relevant time period, none of which have been recovered. Op. at 24; B1634; B1666-67; B1679-82 ¶¶42-49; B1649 n.43.
- At least 700 emails matching court-ordered search terms were deleted and proved unrecoverable.⁵

⁵ Op. at 22 (quoting A1231:8-15 ("I have basically zero confidence that no deletions occurred prior to November of 2023"))).

- On four separate occasions, Hardcastle and Adler attempted to delete Dropbox files including the falsified term sheet.⁶
- Hardcastle failed to reconfigure phone retention settings despite the Litigation Hold. Op. at 24; B1665-66.

Op. at 23-24; B1663-64; B1665-67; B1648. The record demonstrates this destruction of evidence was intentional and done in bad faith.⁷

NICbyte moved for sanctions as a result of the spoliation. During the October 18, 2024 pretrial conference, the Trial Court heard the motion for sanctions. B1720. Due to the “unusual and troubling” evidence presented, the Trial Court postponed trial and appointed a Special Discovery Neutral to investigate the scope of StarTop’s spoliation. B1794:21-B1796:15 (finding “uncontroverted evidence that Mr. Hardcastle and/or Mr. Adler actively deleted documents -- clicked that delete button, responsive documents, and a whole lot of them -- during the course of discovery in this action.”).

⁶ Op. at 24; B1648 (“DLS [Discovery] identified four attempts to delete DropBox files: (a) an attempt on May 16, 2022 by Mr. Hardcastle to delete records; (b) the existence of 15 DropBox records in Mr. Adler’s Recycle Bin (13 of which have been produced to NICbyte); (c) Mr. Adler’s November 11, 2023 movement of Bitwise Term Sheet - Startop Investments (Bakersfield Trio signed) to Trash; and (d) Mr. Adler’s October 10, 2023 movement of Bitwise Term Sheet - Startop Investments (final signed) to Trash.”) (internal quotes omitted).

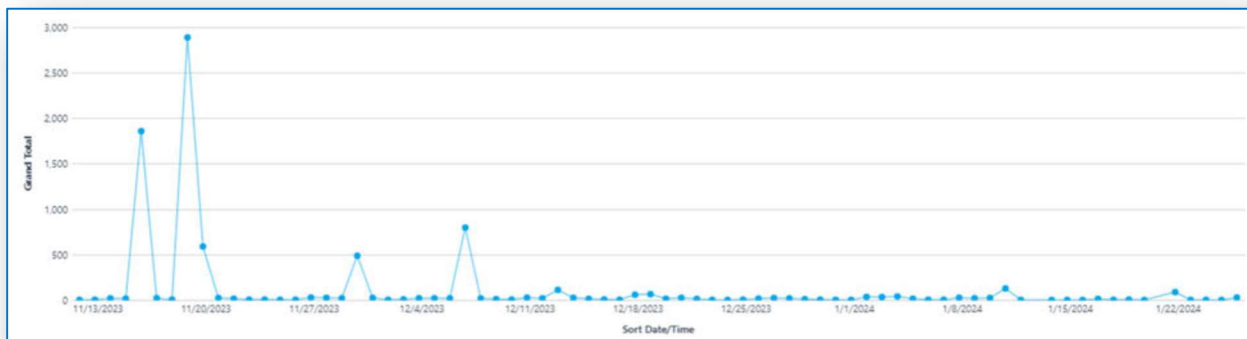
⁷ Op. at 38. Adler testimony regarding reasons for deletions. A568:1–13; A571:1-3 (“internal struggle, fear, panic”); A1745:18–A1747:13 (“knee-jerk, freak-out reaction”); A569:19-A571:11.

As a result of the Special Discovery Neutral’s investigation, the Trial Court concluded StarTop destroyed evidence on a massive scale.⁸ The investigation also revealed that the timing of StarTop’s deletions coincided with key litigation events, such as NICbyte’s service of discovery requests, a hearing, or a motion to compel, and targeted the very categories of evidence most likely to establish StarTop’s knowledge of Soberal’s lack of authority. Op. at 23.



⁸ Op. at 38. A1231:8–15 (“I have basically zero confidence that no deletions occurred prior to November of 2023. The discovery neutral’s report noted that Microsoft only introduced its Graph Activity Logs feature in October of 2023. This feature was responsible for providing users with access to action audits like the email deletion notifications.”).

Op. at 38; A65 at 6 (chart showing deletion activity created by NICbyte and attached to NICbyte’s Oct. 2, 2024 Motion for Sanctions).



Op. at 38; B1681-82 (chart created by Special Discovery Neutral confirming deletion activity and timing).

The Trial Court imposed initial, pretrial spoliation sanctions consisting of burden-shifting and elevating StarTop’s burden to clear and convincing evidence on matters for which StarTop already bore the burden of proof. B1725, ¶ 4. The Trial Court reserved ruling on other requested sanctions until there was a full trial record. Op. at 1, 25.

After trial, the Trial Court found that “the record shows that Adler and Hardcastle engaged in wide-ranging spoliation of critically important data after delivery of the Litigation Hold” and imposed a second spoliation sanction: an adverse inference that Soberal lacked apparent authority and StarTop’s principals knew it. *Id.* at 37-41. The Trial Court also awarded Plaintiffs \$423,781 in fees and expenses as a consequence of StarTop’s discovery misconduct. Op. at 45.

ARGUMENT

I. The Trial Court correctly held that StarTop cannot invoke § 6.1 of the JVA to enforce loan documents procured through fraud when StarTop’s principals knew Soberal lacked authority.

A. Question Presented.

Did the Trial Court correctly hold that StarTop cannot rely on § 6.1 of the JVA where: (a) StarTop was deemed to already know the Manager lacks authority; (b) StarTop’s reading would produce a “fraud-free-for-all” rendering § 6.5’s Major Decision restrictions surplusage; (c) the Trial Court independently found, based on surviving evidence and surrounding circumstances, that it was “extraordinarily likely” StarTop’s principals knew Soberal lacked authority; and (d) StarTop cannot establish that it is a third-party beneficiary of the JVA? Op. at 27-30, 39-41.

B. Scope of Review.

Contract interpretation is reviewed *de novo*. *Boardwalk Pipeline Partners, LP v. Bandera Master Fund LP*, 288 A.3d 1083, 1111 (Del. 2022). Factual findings—including the Trial Court’s determination that StarTop’s principals had actual knowledge of Soberal’s lack of authority—are reviewed for clear error. *Id.* A party cannot obtain *de novo* review of a fact-bound determination simply by labeling it a question of law. *See Backer v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 94-95 (Del. 2021). The clear-error standard will not disturb findings that are “sufficiently supported by the record and are the product of an orderly and logical

deductive process.” *Johnson & Johnson v. Fortis Advisors LLC*, 352 A.3d 229 (Del. 2026).

The knowledge finding warrants particular deference because it turned substantially on the credibility of StarTop’s principals. *AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC*, 268 A.3d 198, 200 n.34 (Del. 2021) (citing *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 491 (Del. 2000)). The Trial Court’s decision to impose an adverse inference under Court of Chancery Rule 37(e) is reviewed for abuse of discretion. *SARN SD3, LLC v. Czechoslovak Grp. A.S.*, 326 A.3d 1170, 1194 (Del. 2024).

C. Merits of Argument.

StarTop asks this Court to use § 6.1 of the JVA as a license to enforce loan documents procured through fraud, forgery, and concerted deception—even though the Trial Court found that StarTop’s principals knew Soberal lacked authority. The Trial Court properly rejected StarTop’s reading as “frankly absurd” and as permitting a “fraud-free-for-all.” Op. at 30. StarTop’s arguments on appeal fail for multiple independent reasons.

- 1. The Trial Court’s ruling—that StarTop cannot rely on § 6.1 to enforce contracts it knows are unenforceable—was correct.**
 - a. The Trial Court was correct when it found StarTop’s reading of § 6.1 “absurd.”**

StarTop argues that the Trial Court erred in finding its reading of § 6.1 “absurd.” But the Trial Court's conclusion was sound. Under StarTop’s reading, any third party—regardless of actual knowledge that the Manager is exceeding its authority, regardless of complicity in fraud, and regardless of the forged nature of the authorizing documents—would be “fully protected” in enforcing transactions against the 95% equity holder.

An interpretation is unreasonable if it “produces an absurd result or a result that no reasonable person would have accepted when entering the contract.” 8908 *Kanis RemainCo LLC v. Gastroenterology & Surgery Ctr. of Arkansas, P.A.*, 2026 WL 1022300, at *6 (Del. Ch. Apr. 15, 2026). No rational investor—let alone one investing \$35.5 million—would agree to a provision that permits a 5% minority partner to pledge 100% of the joint venture's assets to a fraudulent lender at usurious interest rates without any protection whatsoever, simply because the lender claims it can rely on the Manager’s “confirmation.”

StarTop argues that § 6.1’s “fully protected” language was necessary so that Wishon Row could “be nimble” in dealing with “third-party lenders and contractors” and that the parties “envisioned” that lenders would need to rely on the Manager’s confirmation without further investigation. The JVA refutes that theory. It contemplated a sale-leaseback transaction involving the acquisition and

management of property—not secret, usurious lending that bypassed the 95% member’s consent.

StarTop’s “nimbleness” rationale also cannot overcome the JVA’s express consent requirement for the very transactions at issue. Had the parties intended to permit unilateral encumbrance of the Properties without NICbyte’s consent, they would not have enumerated financing, pledges, transfers, and security interests as “Major Decisions” requiring both Members’ approval.

As the Trial Court stated, where a party “already knows the Manager has no such authority, it makes no sense to speak of a duty to inquire into circumstances of which one is already aware.” Op. at 30. StarTop cannot convert a clause designed to protect reasonable reliance into immunity for a party that knew the confirmation was false and participated in the underlying scheme.

b. Section 6.1 Must Be Read in Harmony with § 6.5

StarTop selectively reads the JVA’s provisions in isolation to retrofit its litigation theories. But, Delaware law mandates that a court construe the agreement as a whole, giving effect to every provision. *See, e.g., Estate of Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010); *Terrell v. Kiromic Biopharma, Inc.*, 338 A.3d 1272 (Del. 2025); *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1208 (Del. 2021); *Johnson & Johnson*, 352 A.3d at 253. Furthermore, where a general and a specific provision pertain to the same subject, “courts ordinarily

qualify the meaning of the general provision according to the meaning of the more specific provision.” *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005).

Here, § 6.1 is titled “In General” and governs “the management and control of the business and affairs of the Company.” It expressly and repeatedly makes the Manager’s authority subject to the JVA’s other provisions.

- “Subject to any express limitations set forth in this Agreement, the management and control of the business and affairs of *the Company* shall be vested solely in Manager”;
- “Without limitation to the foregoing, *but subject to the provisions of Section 6.5* and any other express limitations set forth in this Agreement, the Manager shall have the power” to pledge or transfer interests in real estate, obtain financing, or grant security interests in the SPEs membership interests or NIC Wise’s assets ;
- “Subject to any express limitations herein all actions, decisions and determinations to be made or performed by the Manager may be made in its good faith judgment.”

A2356-57 (emphasis added).

Section 6.5 is titled “Major Decisions” and begins: “*Notwithstanding the provisions of Section 6.1*, the following matters shall be applicable to both the Company and its Subsidiaries (‘Major Decisions’) . . . and shall require the approval of the Members.” (emphasis added). Section 6.5 enumerates Major Decisions that require NICbyte’s approval, including: obtaining financing (§ 6.5(a)(i)); any pledge or transfer of any interest in any project or the Company's or any Subsidiary's assets

(§ 6.5(a)(iv)); and pledging, hypothecating, or granting a security interest in the membership interests or assets of the Company or any Subsidiary (§ 6.5(a)(v)).

The StarTop Loans—with a combined principal amount of \$20.4 million and secured by deeds of trust on the Properties and pledge agreements encumbering 100% of NIC Wise’s membership interests in the Plaintiff Subsidiaries—are quintessential “Major Decisions” requiring NICbyte’s consent. StarTop’s reading of § 6.1 would render § 6.5 meaningless, because under StarTop’s theory no third party could ever be bound by the § 6.5 restrictions regardless its knowledge—a result that violates the cardinal rule of contract construction.

Examining a provision nearly identical to § 6.1, the Eighth Circuit squarely rejected the same argument StarTop advances here. In *In re Fox Hill Office Investors, Ltd.*, 926 F.2d 752, 754 (8th Cir. 1991), the court held that “[t]he authority granted by section 7.01 is not sufficient to override the lack of authorization clearly apparent from other provisions of the partnership agreement.” The Trial Court correctly followed the same reasoning. A general provision conferring broad management authority on a manager cannot override the specific restrictions elsewhere in the agreement that expressly limit that general authority.

As the Restatement confirms, “[a] third party who is aware of restrictions imposed on the general partner's authority by the partnership agreement would not

act reasonably in relying on broad language elsewhere in the agreement.”
Restatement (Third) of Agency § 3.03 cmt. (e)(2).

c. StarTop’s New “Compound” Sentence Argument is Waived and Fails on the Merits.

StarTop argues that the single sentence (one of five) in § 6.1 upon which it relies is a “compound” sentence containing “two independent clauses” that can each “stand alone” and are not grammatically interdependent. OB, at 33-34. As a threshold issue, this argument is waived because it was not presented below. *Emerald P’rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (“Issues not briefed are deemed waived.”). In its post-trial briefing, StarTop argued to the Trial Court that § 6.1 is a unified provision, stating: “[t]he JVA imposed no obligation on StarTop to ‘inquire as to whether or not the Manager has exceeded its authority in executing’ the StarTop Loans because, as the JVA states, StarTop is ‘*fully protected* in relying upon [Soberal’s] confirmation of such authority.’” A1947 at 56 (emphasis in original).

This argument also fails on the merits. It is a species of hyper-technical parsing that defies the fundamental rule of Delaware contract interpretation: that a contract must be “construed as a whole and give each provision and term effect.” *Kemp*, 991 A.2d at 1159; *Iron Branch Assocs., LP v. Hartford Fire Ins. Co.*, 559 F. Supp. 3d 368, 378 (D. Del. 2021).

Even accepting StarTop’s grammatical argument, the sentence in question—like all of Section 6.1—remains expressly subject to “the provisions of Section 6.5 and any other express limitations set forth in this Agreement.” The phrase “fully protected in relying upon Manager’s confirmation of such authority” necessarily refers to authority that the Manager actually possesses after application of the Section 6.5 restrictions. Section 6.1 cannot bootstrap authority that § 6.5 expressly withholds.

d. Section 6.1 applies only to the “Company,” not the subsidiaries.

A further textual problem with StarTop’s reading is that § 6.1 applies only to the “Company” (i.e., NIC Wise), whereas the StarTop Loans encumbered the Properties held by the Plaintiff Subsidiaries. Section 6.5, which applies to “both the Company *and its Subsidiaries*,” is the operative provision governing transactions affecting the Subsidiaries and their assets. StarTop’s attempt to extend the “fully protected” language of § 6.1 to transactions encumbering the Subsidiaries’ real property is textually unsupported and structurally untenable.

2. StarTop cannot rely on a document it never read.

StarTop does not challenge and has therefore waived any challenge to the Trial Court’s finding that StarTop possessed a copy of the JVA and knew that Soberal lacked authorization to enter into the loan transactions without NICbyte’s consent. Op. at 40. Its failure to challenge that fact-bound finding waives any

argument that the finding was clearly erroneous. At trial, StarTop claimed that it never read the JVA before entering into the StarTop Loans. A1338:20–A1339:23. Hardcastle testified that he did not read it. A1320:20–A1323:3, A1493:7–A1495:16; B1702. Adler likewise claimed that he “did not even know about the JV agreement” during due diligence. A1618:16–A1619:1, A1667:9–22; A270:11–A271:12.

A party cannot retroactively invoke protections from a contract it chose to ignore at the time of the transaction. *Flaa v. Montano*, 2013 WL 5498045, at *11 (Del. Ch. Oct. 4, 2013); *Premcor Refining Group v. Natl. Fire Ins. Co. of Hartford*, 855 F. Supp. 2d 237, 240 (D. Del. 2012) (“These statements, however, were not communicated to Premcor. Premcor cannot argue that it relied upon statements it never received.”); *B.A.S.S. Gp., LLC v. Coastal Supply Co.*, 2009 WL 1743730, at *6 (Del. Ch. June 19, 2009) (noting that a third party who has not examined a copy of the LLC Agreement prior to a transaction will have a “difficult time proving a defense of apparent authority at trial”).

As stated in *Caribbean Sun Airlines Inc. v. Halevi Enterprises LLC*, 2025 WL 250787, at *9 (Del. Jan. 21, 2025)—a decision of this Court—“[w]hen ordinary prudence and reasonable diligence dictate that further inquiry be made—for example, when due diligence uncovers conflicting information concerning the role of an agent and identity of key corporate actors—a third party cannot reasonably believe that the agent is authorized to bind a principal without undertaking such

investigation.” The Trial Court’s conclusion that StarTop could not reasonably rely on § 6.1 is fully consistent with, and indeed compelled by, this Court’s holding in *Halevi*. Op. at 24, 33 (citing *Halevi*, 339 A.3d at 35-36).⁹

StarTop’s after-the-fact invocation of § 6.1 is thus purely a litigation strategy, not a reflection of any contemporaneous reliance. The Trial Court was well within its authority to reject this bootstrapped claim.

3. StarTop is not a third-party beneficiary of the JVA.

Although the Trial Court did not address it, all of StarTop’s arguments regarding § 6.1 also fail because they are based on StarTop’s contention that it is an “intended third-party beneficiary” under the JVA. StarTop cannot satisfy any of the three required elements to support such a claim, let alone by clear and convincing evidence—the standard imposed by the pretrial Spoliation Order.

To qualify as a third-party beneficiary, StarTop must prove: “(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

⁹See also *Rudnitsky v. Rudnitsky*, 2000 WL 1724234, at *5-6 (Del. Ch. Nov. 14, 2000) (“It is an established principle of Delaware law that apparent authority cannot be asserted by a party who knew, at the time of the transaction, that the agent lacked actual authority.”).

must be a material part of the parties' purpose in entering into the contract.” *Bako Pathology LP v. Bakotic*, 288 A.3d 252, 270–71 (Del. 2022).

First, StarTop presented no evidence—no documents and no witness testimony—that the contracting parties, NICbyte and Wishon Row, intended for StarTop to benefit through the JVA. StarTop had no relationship with NICbyte or Wishon Row at the time of contracting; it appeared months later as an opportunistic lender offering predatory 60% loans.

Second, StarTop offered no evidence of donative intent—that at the time of contracting, Wishon Row and NICbyte intended to make a “gift” of the Manager’s performance to StarTop or to any future lender. To establish a gift, StarTop must show that “the promisee intended to make a gift of the promisor's performance to [it].” *Comrie v. Enterasys Networks, Inc.*, 2004 WL 293337, at *4 (Del. Ch. Feb. 17, 2004). No rational basis exists for concluding that NICbyte, having invested approximately \$35.5 million in the joint venture, intended to confer an unrestricted gift upon unknown future third parties to encumber its assets without its knowledge or consent.

Third, StarTop cannot prove that conferring a benefit on third parties was a “material part” of the parties’ purpose in entering the JVA. *Madison Realty Partners 7, LLC v. Ag ISA, LLC*, 2001 WL 406268, at *5 (Del. Ch. Apr. 17, 2001). To the contrary, § 2.3 of the JVA states that the JVA’s purpose was to form a joint venture

to directly or indirectly acquire, invest in, and manage real properties as part of a broader sale-leaseback transaction. This stated purpose is also further evidence that a gift was not intended. There is no evidence whatsoever that a material purpose of the JVA was to benefit StarTop or any other third-party lender.

4. StarTop’s Restatement § 309 and “silence is a chosen term” theories are waived and, in any event, meritless.

StarTop invokes Restatement (Second) of Contracts § 309 for the first time on appeal, arguing that a promisor’s defenses “cannot be employed against the beneficiary’s claim.” OB at 32-33. In post-trial briefing, StarTop invoked only § 302’s “gift” element and never raised § 309 below. A2110-11 (citing Restatement (Second) Contracts § 302 (1981)). StarTop’s new Restatement (Second) of Contracts § 309 argument that attacks the Trial Court’s use of the adjective “innocent” as an improper heightening of the third-party beneficiary standard of proof is waived. *Emerald P’rs*, 726 A.2d at 1224; *see also In re Tesla, Inc. Derivative Litigation*, 2025 WL 3689114, at *9 (Del. Dec. 19, 2025).

StarTop’s related contention that the absence of a good-faith qualifier in § 6.1 was an affirmative contractual choice (in other words, that “silence” was the parties’ “chosen term”) was likewise never presented below and is waived on the same authority.

If the Court nonetheless considers these unpreserved legal theories, both fail on their merits.

Restatement § 309 addresses a promisor's defenses on the underlying contract. *See* 304 A.3d at 573 (citing Restatement (Second) of Contracts § 309) (a third-party beneficiary's rights are "absolutely defined by the terms of the contract")). Restatement § 309 does not speak to whether a party *qualifies* as a third-party beneficiary in the first place nor does it displace the Trial Court's threshold findings that StarTop's principals knew Soberal lacked authority. *See Bako Pathology*, 288 A.3d at 271. As discussed above, StarTop cannot demonstrate it is a third-party beneficiary under the JVA, period. So, even if the Court did improperly add an "innocence" element to the third-party beneficiary standard as StarTop claims, it is immaterial because StarTop did not prove that it was a third party beneficiary in any event.

As for StarTop's new theory that the parties' purported failure to "condition a lender's protection on its good faith belief or ignorance of Soberal's artifice or exaggeration" in the plain terms of the JVA was a conscious choice, § 6.1's silence on good faith cannot be read to override the express consent requirements of § 6.5. To do so would be to grant "carte blanche" to a party that already possessed actual knowledge of the Manager's lack of authority.

For these reasons, the Trial Court's ruling rejecting StarTop's attempt to use § 6.1 as a "fraud-free-for-all" is correct.

II. The Trial Court correctly found that Wishon Row lacked actual authority to enter into the StarTop Loans

A. Question Presented.

Did the Trial Court correctly hold that Wishon Row (through Soberal) lacked actual authority to enter into the StarTop Loans where: (a) the JVA § 6.5(a) provides that loans, pledges, and collateral agreements are “Major Decisions” requiring NICbyte’s consent; (b) NICbyte never approved the Loans; (c) any unauthorized transfer or encumbrance is deemed “void and ineffective” under JVA § 9.1; (d) the Trial Court found “there is no evidence to suggest a default occurred” that could have stripped NICbyte’s consent right; and (e) StarTop waived any argument based on implied authority? Op. at 30-32, n.147.

B. Scope of Review.

The existence and scope of authority is a mixed question. Factual findings are reviewed for clear error; contract interpretation is reviewed *de novo*. *Boardwalk Pipeline Partners*, 288 A.3d at 1111. Actual authority is determined by examining the relationship between the principal and agent. *Harmon v. State, Del. Harness Racing Comm’n*, 62 A.3d 1198, 1201 (Del. 2013) (quoting Restatement (Third) of Agency § 2.01 (2006)). Because StarTop was sanctioned for spoliation, it bore the burden of proving actual authority by clear and convincing evidence.

C. Merits of Argument.

1. The JVA expressly restricts Wishon Row's authority over loans and pledges.

Soberal, through Wishon Row, did not have actual authority to enter the loan documents with StarTop. *See Harmon*, 62 A.3d at 1201 (“An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act.”)¹⁰

As discussed above, Section 6.5 of the JVA expressly precluded Wishon Row from entering into a financing, pledging NIC Wise’s interests, or encumbering its properties without NICbyte’s consent. JVA § 6.5(a)(i), (iv), (v), (xxx). NICbyte never approved any of these transactions. Op. at 31. Such transactions are expressly prohibited without that consent.

2. Unauthorized transactions are “void and ineffective” under JVA § 9.1.

Pursuant to § 9.1, the JVA further provides that any unauthorized transfer, assignment, or other disposition of a member’s “right, title or interest in the Company,” or encumbrance, hypothecation, or pledge of such interest would be

¹⁰ StarTop does not challenge the Trial Court’s ruling that there was no implied authority. Op. at 32, fn. 147. In fact, the Trial Court found that StarTop waived any argument that Soberal had implied authority by failing to raise it in its post-trial briefs. *Id.* (citing *Emerald P’rs*, 726 A.2d at 1224).

deemed “void and ineffective, and shall not bind, or be recognized by, the Company.” A2375-A2376; Op. at 7.

Section 9.1 is not merely a restrictions-on-transfer provision. It is an express voidness clause that independently bars StarTop from claiming enforceable rights acquired through unauthorized transactions. *CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 816-17 (Del. 2018); *Holifield v. XRI Investment Holdings LLC*, 304 A.3d 896, 921-936 (Del. 2023) (affirming ruling that transfer of membership units was void *ab initio* because the transfer violated the LLC agreement stating, “[n]othing in Delaware law or public policy prohibits parties to an LLC agreement from contracting for incurable voidness.”).

3. The Trial Court’s “no default” finding is entitled to deference.

StarTop’s sole theory for circumventing § 6.5’s requirement is that NICbyte purportedly became a “Defaulting Member” under § 3.4(a) because it failed to fund a September 15, 2022 capital call. OB, at 39. StarTop now challenges the Trial Court’s express factual finding that “there is no evidence to suggest a default occurred.” Op. at 32. The Trial Court found that the October 3, 2022 submission “was instead the same capital call for September 26, 2022, that Wishon Row ultimately withdrew.” Op. at 32 (citing A1772:20-A1775:16 (McCormick) and

A4154).¹¹ StarTop responds that the Trial Court “ignores that NICbyte’s corporate designee admitted to having no first-hand knowledge of the capital call process” and claims the record is devoid of any evidence that NICbyte funded the September 15 Call. OB at 40.

The Trial Court did not clearly err. It identified multiple, independent reasons to reject StarTop’s theory:

[T]he entity that supposedly made the call was managed by Soberal, a person with a proven record of fraud. Soberal did not testify at trial, and there is no evidence StarTop ever knew about the supposed capital call. I also note that StarTop claims the capital call was for tenant improvements, but even that is highly suspect given the debt needs Wishon Row was concealing.

Op. at 32 n.146.

These factual findings, based on multiple witnesses and more than 1,300 joint trial exhibits, are entitled to clear-error deference. Where two views of the evidence are permissible, “the factfinder’s choice between them cannot be clearly erroneous.” *Palisades*, 246 A.3d at 95. StarTop asks this Court to reweigh the evidence and credit its competing inference. But this Court approaches a trial judge’s credibility

¹¹ StarTop characterizes the trial testimony from NICbyte, on which the Trial Court bases this finding, as “self-serving” and “meaningless.” OB, at 41. Even if StarTop’s aspersions of NICbyte’s trial witnesses were based on fact, which they undeniably are not, this invective is the model of projection when compared to characterizations of StarTop’s own trial witnesses *by the Trial Court, itself*. Op. at 30 (“StarTop asks that the Court credit the testimony of witnesses that the Court found to be dubious and wholly lacking credibility[.]”).

and factual determinations with substantial deference and will reverse only in the rare circumstance where those findings are clearly erroneous. The Trial Court here supported its findings with the record, and they should not be disturbed.

Moreover, StarTop's "Defaulting Member" theory is simply a *post hoc* litigation construct. At the time of the StarTop Loans, StarTop had no contemporaneous awareness of the purported capital call, let alone rely on any alleged resulting default status, and therefore could not have relied on it. A party cannot claim actual authority based on a factual predicate it neither knew about nor relied upon contemporaneously. *Premcor*, 855 F.Supp.2d at 240 ("Premcor cannot argue that it relied upon statements it never received."); *B.A.S.S.*, 2009 WL 1743730, at *6 (a third party who has not examined a copy of the LLC Agreement prior to a transaction will have a "difficult time proving a defense of apparent authority at trial").

4. StarTop's ratification and modification-by-conduct theory is waived and, in any event, unsupported.

StarTop's opening brief argues for the first time on appeal that NIC Wise's members could have ratified or acquiesced in Soberal's conduct through modification by conduct under 6 *Del. C.* § 18-106. That theory was absent from StarTop's post-trial briefs and is therefore waived. *Emerald P'rs*, 726 A.2d at 1224; *In re Tesla*, 2025 WL 3689114, at *9; Supr. Ct. R. 8. In any event, the Trial Court affirmatively found no evidence that NICbyte, whose consent § 6.5 required, ratified

or acquiesced in Soberal's unauthorized borrowing. Op. at 31-33, n.147. To the contrary, NICbyte discovered the loans only after Bitwise's collapse and immediately commenced litigation to void them. Op. at 20.

For all these reasons, the Trial Court correctly held that Soberal lacked actual authority to enter into the StarTop Loans. The Trial Court's rulings should be affirmed.

III. The Trial Court did not abuse its discretion in imposing spoliation sanctions, and the post-trial adverse inference is independently sufficient to support the judgment.

A. Question Presented.

Did the Trial Court abuse its discretion in: (a) imposing pretrial burden-shifting and burden-elevation sanctions under Court of Chancery Rule 37(e)(1) following a finding of intentional spoliation of over 101,979 text messages, thousands of emails, and Dropbox files; and (b) imposing a separate, post-trial adverse inference under Rule 37(e)(2) that Soberal lacked authority to enter the loans and that StarTop's principals knew it? Op. at 37-41.

B. Scope of Review.

Spoliation and sanctions rulings are reviewed under the highly deferential abuse of discretion standard. *SARN SD3*, 326 A.3d at 1194; *Genger v. TR Invs., LLC*, 26 A.3d 180, 190 (Del. 2011). Abuse of discretion occurs only where the Trial Court “exceeded the bounds of reason in view of the circumstances” or “so ignored recognized rules of law or practice so as to produce injustice.” *Id.*

C. Merits of Argument.

1. The Trial Court imposed two separate and independent spoliation sanctions.

The Trial Court imposed two distinct sanctions for StarTop's spoliation, each operating under a different subsection of Court of Chancery Rule 37(e) and each independently supporting the judgment below.

First Spoliation Sanction (February 21, 2025 Pretrial Sanctions Order)¹²:

The Trial Court shifted the burden to StarTop on claims and elements where NICbyte bore the burden of proof, and heightened StarTop’s burden to clear and convincing evidence in situations where it already bore the burden of proof. This was a Rule 37(e)(1), prejudice-based remedy designed to cure the evidentiary gaps caused by StarTop’s destruction of relevant evidence.¹³ Sanctions Order ¶ 4; Op. at 24-25.

Second Spoliation Sanction (April 8, 2026 Post-Trial Sanctions Order in Opinion): After having reserved judgment on potentially harsher sanctions until a full trial record could be developed, the Trial Court later drew a post-trial, adverse inference that Soberal did not have apparent authority to enter the loans and that StarTop’s principals knew it. Op. at 27, 32. This second spoliation sanction was based on a post-trial, factual finding that StarTop “acted recklessly or with the intent to deprive [NICbyte] of the information’s use in the litigation” pursuant to Rule 37(e)(2).¹⁴ Op. at 37.

¹² OB, Ex. C.

¹³ Ct. Ch. R. 37(e)(1) (“[U]pon finding prejudice to another party from loss of information, [the Court] may order measures no greater than necessary to cure the prejudice[.]”).

¹⁴ Ct. Ch. R. 37(e)(2) (“[O]nly upon finding that the party acted recklessly or with the intent to deprive another party of the information’s use in the litigation, may [the Court], among other things: (A) presume that the lost information was unfavorable to the party; or (b) dismiss the action or enter a default judgment.”).

Despite there being two, separate sanctions rulings by the Trial Court, in its opening brief, StarTop only challenges the First Spoliation Sanction (OB, at 43-46), which the Trial Court ordered based on a finding of prejudice to NICbyte pursuant to Court of Chancery Rule 37(e)(1).¹⁵ StarTop does not challenge the Second Spoliation Sanction based on the Trial Court’s post-trial factual finding that StarTop acted recklessly or intentionally in its destruction of evidence under Rule 37(e)(2). Op. at 38-40. The Second Spoliation Sanction’s adverse inference—that Soberal had no apparent authority, and StarTop knew it—independently supports the apparent-authority ruling. Thus, this Court could and should affirm on that basis alone. Nevertheless, as described *infra*, the Trial Court’s pre- and post-trial sanctions rulings were proper exercises of the Trial Court’s discretion.

2. The Trial Court did not err by imposing sanctions for StarTop’s vast and prejudicial spoliation.

The scope of StarTop’s document destruction effort was staggering. StarTop’s principals destroyed over 101,979 text messages, more than 700 emails, made four separate attempts to delete Dropbox files, including the falsified term

¹⁵ OB at 43-46 (quoting *Goldstein v. Denner*, 310 A.3d 548, 557 (Del. Ch. 2024) (“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.’”).

sheet that constituted evidence of StarTop's own fraud on its investors, and all Slack messages relating to the loans. Op. at 24, 39.

StarTop does not challenge the Trial Court's factual findings that this rampant spoliation occurred. StarTop's sole challenge is an assertion that its spoliation caused NICbyte no prejudice because whatever evidence StarTop destroyed was irrelevant to the case. OB at 44-46 ("The trial court erred when it concluded that relevant ESI was lost resulting in prejudice to Plaintiffs."). But, as the Trial Court correctly found, this destroyed evidence was directly relevant to due diligence, underwriting, and the central authority questions in this case. Op. at 24, 39-41. Notwithstanding this, the Trial Court also noted that "a spoliating party 'should not easily be able to excuse the misconduct by claiming that the vanished documents were of minimal import.'" A1230:11-18 (quoting *Micron Technology, Inc. v. Rambus, Inc.*, 917 F. Supp. 2d 300, 319 (D. Del. 2013)).

NICbyte made an initial showing of prejudice through identified gaps in the evidentiary record, and StarTop failed to carry its "heavy burden" of demonstrating that the destroyed evidence was not relevant or prejudicial. A1227:3-A1233:11; *Micron Technology*, 917 F. Supp. 2d at 318-19.

The Trial Court did not abuse its discretion when it imposed burden shifting and burden elevation sanctions for StarTop's spoliation under Court of Chancery Rule 37(e)(1). *SARN SD3*, 326 A.3d at 1194. Notably, the Trial Court declined the

more severe dispositive sanction (default judgment) that Plaintiffs also sought. The Trial Court chose burden-shifting as the “least harsh sanction” sufficient to cure the prejudice caused by StarTop’s destruction of evidence—a measured exercise of discretion that falls well within the bounds of reason. A1233:12-18; A1236:17-24.

CONCLUSION

For the foregoing reasons, NICbyte respectfully requests that this Court affirm the Trial Court's April 8, 2026 Post-Trial Memorandum Opinion, the April 30, 2026 Implementing Order Granting Declaratory Judgment and Injunctive Relief, and the 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, in all respects.

Respectfully submitted,

Dated: August 17, 2026

OF COUNSEL:

Stephen H. Sutro (*pro hac vice*)
Suzanne R. Fogarty (*pro hac vice*)
DUANE MORRIS LLP
One Market, Spear Tower
Suite 2200
San Francisco, CA 94105
Telephone: (415) 957-3000
shsutro@duanemorris.com
srfogarty@duanemorris.com

DUANE MORRIS LLP

/s/ Richard L. Renck
Richard L. Renck (#3893)
Brandon R. Harper (#6418)
1201 North Market Street, Suite 501
Wilmington, DE 19801-1659
Telephone: (302) 657-4900
Facsimile: (302) 657-4901
rlrenck@duanemorris.com
bharper@duanemorris.com

*Counsel for Plaintiffs/Counterclaim
Defendants Below / Appellees*