



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 REPLY BRIEF

Dated: September 1, 2026

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

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REPLY ARGUMENT¹

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

Preliminarily, due process concerns undergird not just Rule 8’s notice pleading requirements but also Rule 9’s particularity mandate. Del. Ch. Ct. R. 8; Del. Ch. Ct. R. 9(b). Without invoking Rule 15, Plaintiffs cannot for the first time on appeal argue that StarTop’s principals knowingly participated in Soberal and Olguin’s fraud. *See GC Broadway, LLC v. AN SM 1925 Broadway Holdings, LLC*, 2026 WL 539233, at *11 (Del. Ch. Feb. 26, 2026) (analyzing Rule 15 and explaining that “[c]onsent [of the parties] is necessary for a Rule 15(b) motion to be granted ... [but] courts must also consider the existence of prejudice.”); *c.f. Kingsland Holdings, Inc. v. Bracco*, 1996 WL 104257, at *5 (Del. Ch. Mar. 5, 1996) (explaining that the defendant’s due process rights were not violated where a foreign court did not allow defendant to bring the fraud issue into evidence in the middle of trial “especially considering that Delaware requires a party to plead fraud with particularity.”). StarTop never expressly or implicitly consented to the introduction of Plaintiffs’ fraud claim. OB² at 31; A2113-A2114; A2118-A2119. Even if StarTop had consented, “prejudice will vitiate a claim if the opposing party

¹ Unless otherwise defined, capitalized terms shall have the same meaning as those set forth in the Opening Brief.

² “Opening Brief” or “OB” refers to StarTop’s Opening Brief. Dkt. 8.

was denied a fair opportunity to defend against the new theory or offer evidence in response.” *GC Broadway, LLC*, 2026 WL 539233 at *12. This requirement prevents “unfair surprise.” *Id.* (citing *Bellanca Corp. v. Bellanca*, 169 A.2d 620, 622 (Del. 1961)). Plaintiffs’ unpled fraud claim would have required “additional discovery[,]” “expand[ed] the scope of the trial[,]” and have caused a “change of tactics” as to StarTop. *Id.*

Worse yet, Plaintiffs prove less than circumspect in pointing broadly to two full pages of the Opinion for the proposition that the Trial Court opined that “StarTop’s principals and Soberal were partners in fraud.” AB³ at 15 (citing Op. at 17-19). It did not. Even a cursory review of the pages cited would have revealed that the Trial Court found that, in one instance, StarTop’s principals enlisted Soberal to assist in their misrepresentation of an interest rate to StarTop’s own participants, nothing more. There was no evidence presented, let alone claim raised, that the inverse was true: StarTop aided and abetted or conspired with Soberal to defraud Plaintiffs.⁴ The Trial Court could not have considered whether StarTop’s principals were partners in Soberal’s fraud against Plaintiffs.

³ Citations to “AB” refer to Plaintiffs’ Answering Brief. Dkt. 14.

⁴ See generally A2096-A2101; A2097 (citing AR31-AR32, ¶¶ 100-102 and explaining that “[t]he Criminal Complaint against Soberal and Olguin alleges that they made false representations to ‘**Lender One**’—StarTop.”) (emphasis added); A2123 (citing A4718 and A4733 and explaining that Soberal and Olguin’s pleas state that Soberal and Olguin “did knowingly conspire...**with each other**...in furtherance of a material scheme and artifice **to defraud**...investors and

Instead, the Trial Court found that StarTop’s principals would have been aware that Soberal (Wishon Row) lacked authority to bind NIC Wise and the SPEs. There is a distinction between StarTop being in on Soberal’s fraud against Plaintiffs—a finding the Trial Court did not make and was not asked to make—and StarTop being aware that Soberal lacked authority. That distinction is fatal to Plaintiffs’ argument on appeal and, ultimately, the Trial Court’s ruling.

Plaintiffs argue that the Loans were a product of fraud, and if at the time Soberal committed that fraud StarTop was aware that Soberal lacked authority, then StarTop cannot interpret Section 6.1 as a “fraud-free-for-all.” AB at 22-23. But a plain reading of Section 6.1, in the absence of an allegation (let alone finding) that StarTop was complicit in Soberal’s fraud against Plaintiffs, places the burden of risk on NIC Wise and its Manager (Wishon Row), not the third party, whom NIC Wise and, by extension, NICbyte itself agreed to “fully protect in relying upon [Wishon Row’s] confirmation of such authority.” A2356. That is to

lenders, ...and to obtain money...from them” and that they “agreed to alter, fabricate, and falsely and fraudulently represent financial information...that was presented to investors and ***lenders...to deceive and cheat them into making millions of dollars in loans...to the company.***”) (emphasis added); A2098 (citing AR44 explaining that Hardcastle’s expressly alleges, without reference to Soberal, that “Hardcastle and Andrew Adler did knowingly conspire...”); A2098 (citing B1698 and explaining that the Adler plea states that “Soberal and Olguin [] were recently convicted in the United States District Court for the Eastern District of California ***for defrauding Bitwise’s*** investors and ***lenders, including StarTop***, out of approximately \$115,000,000.”) (emphasis added).

say, NICbyte agreed to fully protect StarTop even if StarTop's principals were aware that Wishon Row lacked authority to enter into the Loans, provided that Wishon Row confirmed its authority, which it did repeatedly. OB at 34-35 (citing A4245-52; A4901; A1323:2-20; A4353-54; A1321:3-9; A1414:4-1014; A1610:18-A1612:21, A1645:9-17). That might not have been the case had Plaintiffs pled a fraud claim or a related secondary liability claim against StarTop and/or its principals and proved those claims at trial. They did not. And so, the Trial Court could not have made and cannot even on remand make a finding that StarTop was complicit in Wishon Row's fraud such that it would not be fully protected by NIC Wise as a third-party beneficiary under Section 6.1.⁵

And so, the absurd interpretation of Section 6.1 that Plaintiffs would foist on StarTop is that no reasonable party would have agreed to fully protect a co-conspirator in a Manager's fraud. That may be true, but that is not the case here. Perhaps that is why when Plaintiffs finally reach the punchline, they articulate the absurdity in this way:

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

⁵ See OB at 32-33 (citing Restatement (Second) of Contracts § 309 and explaining that a promisor's defenses to a third-party beneficiary claim would include situations where the JVA was void, voidable, or illegal. The illegality of the Loans does not create a viable defense for Plaintiffs because StarTop's third-party beneficiary rights arose out of the JVA, not the Loans).

without any protection whatsoever, simply because the lender claims it can rely on the Manager's "confirmation." AB at 24.

And yet, that is precisely what the two sophisticated parties represented by counsel to the JVA agreed to. *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *60 (Del. Ch. Oct. 1, 2018). The efficiency of protecting third parties relying on the Manager's confirmation of his authority coupled with the availability of ratification and shifting of risk to the minority member for running afoul of Sections 6.5 and 9.1 should the majority member refuse to ratify, illustrates a reasonable hypothetical that easily allows Startop's reading of Section 6.1 to escape the trial court's "absurd" label.⁶ *Akorn, Inc.*, 2018 WL 4719347 at *60.

Nonetheless, Plaintiffs continue to argue that Section 6.1 cannot be read in harmony with Section 6.5 citing to *In re Fox Hill Office Investors, Ltd.* for the assertion that Section 6.1 cannot "override" the more specific restrictions in Section 6.5. AB at 27 (citing on *In re Fox Hill Office Investors, Ltd.*, 926 F.2d 752, 754 (8th Cir. 1991)). That distinction is meaningless in the context of a third-party beneficiary analysis where NIC Wise agreed to "fully protect" third parties in

⁶ Contrary to Plaintiffs' arguments that this interpretation renders Section 6.5 superfluous and that the broader Section 6.1 should be constrained by the more precise Section 6.5, these provisions are distinct: the relevant language in Section 6.1 defines third-party beneficiary rights while Section 6.5 defines matters reserved for the Members. As such, neither provision is rendered superfluous nor constrained by the other.

relying upon Wishon Row’s confirmation of authority. A2356. The Eighth Circuit was wrestling with questions of “actual authority” not third-party beneficiary claims. *In re Fox Hill Office Investors, Ltd.*, 926 F.2d at 753. Moreover, *In re Fox Hill Office Investors, Ltd.* appears to be reconciling two separate provisions in the same agreement that grant conflicting authority to the same agent—provisions that are not cited in the opinion and, thus, are not before this Court to even evaluate whether the case is apposite. *Id.* at 754.

Plaintiffs also argue that Section 6.1 lacks the necessary “donative intent” required to render StarTop or any third party a third-party beneficiary of the JVA. AB at 32. *Comrie v. Enterasys Networks, Inc.* explains that “[i]n order to show *donative* intent, one must show that the promisee intended to make a gift of the promisor’s performance to a third party.” *Comrie v. Enterasys Networks, Inc.*, 2004 WL 293337, at *4 (Del. Ch. Feb. 17, 2004) (emphasis in original). It’s hard to imagine a clearer expression of the parties’ intent to permit a third party to rely on a Manager’s confirmation of its authority to bind the promisor’s performance. *See id.* (citing Williston on Contracts § 37:8, at 73; Corbin on Contracts § 774, at 5-6 (“The third person is a donee beneficiary if the promisee who buys the promise expresses an intention and purpose to confer a benefit upon him as a gift in the shape of the promised performance.”)). A “Person or firm doing business with [NIC Wise]” could only refer to a third party. That third party that has no

“obligation” to “inquire as to whether or not [Wishon Row] has exceeded its authority” because that “third person shall be fully protected” in relying on Wishon Row’s confirmation of such authority.

The analysis would not change if the trial court concluded that StarTop’s principals never read the JVA. *See* AB at 30. Indeed, the cases upon which Plaintiffs rely discuss principles of apparent authority, not third-party beneficiary claims. *See id.* (citing *Flaa v. Montano*, 2013 WL 5498045, at *11 (Del. Ch. Oct. 4, 2013) (discussing apparent authority); *Premcor Ref. Grp. v. Nat’l Fire Ins. Co. of Hartford*, 855 F. Supp. 2d 237, 240 (D. Del. 2012) (discussing apparent authority); *B.A.S.S. Grp., LLC v. Coastal Supply Co., Inc.*, 2009 WL 1743730, at *6 (Del. Ch. June 19, 2009) (discussing apparent authority)).⁷

It is ironic that Plaintiffs repeatedly assert that StarTop has waived arguments by not raising them at trial or in post-trial briefing when Plaintiffs assert, for the first time on appeal, that StarTop’s principals were participants in Wishon Row’s scheme to defraud Plaintiffs. In any event, Plaintiffs point to citations or rhetoric that are either found in the parties’ post-trial papers, supportive of issues raised below, or responsive to the Trial Court’s specific rationale. *See* AB at 23-33 (addressing StarTop’s lead argument that it is a third-party beneficiary of

⁷ Although these cases also discuss principles of actual authority, the pages that Plaintiffs cite discuss only apparent authority. None of these cases discuss third-party beneficiaries.

the JVA based upon a plain reading of the JVA). When additional support for a proposition argued below is cited, that is not a new argument that a litigant is raising for the first time on appeal. *See Mundy v. Holden*, 204 A.2d 83, 85 (Del. 1964) (“We will not permit a litigant to raise in this court for the first time matters not argued below where to do so would be to raise an entirely new theory of his case, ***but when the argument is merely an additional reason in support of a proposition urged below, there is no acceptable reason why in the interest of a speedy end to litigation the argument should not be considered.***”) (emphasis added).

Additionally, the Opinion cites to 12 Williston on Contracts § 35:69, which cites to Restatement (Second) of Contracts § 309. Op., n.140. Neither party cited to that section of Williston in their papers. Plaintiffs themselves cited to § 309 of the Restatement (Second) of Contracts but only in their post-trial answering brief. A2058. Nonetheless, neither has waived on appeal the right to rely on legal authority consistent with or contrary to the Trial Court’s conclusions of law. *In re Tesla, Inc. Derivative Litig.*, 2025 WL 3689114, at *10 (Del. Supr. Dec. 19, 2025) (declining to find an argument waived where “the Court of Chancery understood and addressed the argument being made on appeal” despite defendants not having addressed it in the “main post-trial briefs” and only addressing in a “supplemental submission directed at unrelated issues.”). There is a distinction between citing

additional authority to bolster existing arguments and raised in response to the Trial Court's reasoning and introducing an entirely new theory of the case on appeal. The principle that an argument is waived when not briefed is misplaced. *See Mundy*, 204 A.2d at 85.

II. The Trial Court misinterpreted the plain meaning of the JVA when it found that Wishon Row did not have express actual authority to enter into the Loans.

Plaintiffs' argument is unresponsive to the issue on appeal: whether the Trial Court erred as a matter of law in its interpretation of the JVA when it concluded that Wishon Row lacked express actual authority. First, the Trial Court made no finding as to the distinction between the September 15 Call and the September 26 Call. Instead, it focused only on the October 3 notice, which it concluded "was instead the same capital call for September 26, 2022, that Wishon Row ultimately withdrew." Op., 32; OB at 41. Plaintiffs echo that finding and, in so doing, admit that the September 15 Call remained outstanding and unanswered until October 3, rendering NICbyte a Defaulting Member. AB at 37; A2352, § 3.4 (If a Member fails to make Required Additional Capital Contributions, then that Member becomes a "Defaulting Member."). Plaintiffs rightly point out that the only other support in the record for the Trial Court ignoring the plain language of Section 3.4 of the JVA is expressed as doubt that Soberal made the capital calls for Tenant Improvements. AB at 38 (citing Op. at 32, n.146).⁸ Lastly, the Trial Court

⁸ To the contrary, NICbyte's witnesses testified at their depositions and at trial that NICbyte received a distribution from NIC Wise that was in line with BW paying its rent in February of 2023. A837:22-A838:7; A1785:2-17; A1846:15-20. BW made its rent payment on the heels of StarTop's January 17, 2023 disbursement under Loan One. B1262. Plaintiffs offer no alternative explanation for the source of those funds.

mentions that StarTop would not have known about the supposed Capital Call at the time that it was made. Both points are irrelevant. StarTop has standing as a third-party beneficiary to assert Wishon Row's rights under the JVA. *Crispo v. Musk*, 304 A.3d 567, 574, n.32 (Del. Ch. 2023) (citing *NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 434 (Del. Ch. 2007)).

III. The Trial Court erroneously found that Plaintiffs were prejudiced by the lost ESI that was irrelevant to StarTop's third-party beneficiary and actual authority claims.

By not raising the issue of apparent authority in its Opening Brief, StarTop has abandoned that issue as a theory of recovery on appeal. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (issues not raised in an opening brief are waived). In response, Plaintiffs insist on defending the Trial Court's factual findings and punitive adverse inference that Soberal lacked apparent authority. These arguments are a distraction. The only question before this Court as to spoliation is whether the Trial Court erred in finding that Plaintiffs were prejudiced by spoliated internal StarTop communications that would otherwise have been probative of StarTop's third-party beneficiary status and Soberal's (Wishon Row's) actual authority, not apparent authority.

First, internal StarTop communications could never have been probative of Wishon Row's actual authority. That is because actual authority is granted by the principal to an agent. *Billops v. Magness Constr. Co.*, 391 A.2d 196, 197 (Del. 1978). StarTop was neither the principal nor the agent.

Second, StarTop's third-party beneficiary status is entirely dependent upon a plain reading of Section 6.1. In fact, the Trial Court *found for Plaintiffs on this*

*issue based on a plain reading.*⁹ Op. at 29-30. And so, Plaintiffs could not have been prejudiced in their ability to argue contract construction. *Micron Tech., Inc. v. Rambus Inc.*, 917 F. Supp. 2d 300, 319 (D. Del. 2013) (explaining that prejudice requires a showing that the spoliation “materially affects the substantial rights of the adverse party and is prejudicial to the presentation of [its] case.”). Indeed, any parol evidence would have come from NICbyte and Wishon Row—the contracting parties—not StarTop. Therefore, the Trial Court erred in heightening the burden on StarTop’s third-party beneficiary defense.

On appeal, Plaintiffs strain to recast the Opinion as one that stripped StarTop of its third-party beneficiary rights because its principals were actors in Soberal’s scheme to defraud Plaintiffs. Even if that were true, the Trial Court imposed the first sanction (i.e., heightening the burden on StarTop’s third-party beneficiary defense) without identifying the prejudice to Plaintiffs in their ability to demonstrate that StarTop’s principals were participants in Soberal’s fraud. That is most likely because Plaintiffs never alleged that StarTop’s principals were participants in that fraud, despite having access to Soberal and Olguin’s ESI

⁹ It could be argued that the Trial Court’s interpretation of Section 6.1, applying contract construction principles, is unaffected by any burden of proof heightened or not.

(which would have yielded the best evidence of conspiracy had there been one).¹⁰

Nonetheless, the scope and scale of spoliation would not have related to StarTop's status as a third-party beneficiary or Wishon Row's actual authority. Having never stated its rationale for heightening the burden of proof on StarTop's third-party beneficiary and actual authority defenses, the Trial Court could not have expanded on its reasoning in the Opinion, and it didn't.

¹⁰ OB at 44 (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).

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: September 1, 2026

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

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