EFiled: Sep 04 2026 04:13PM EDT
Filing ID 80561224
Case Number 287,2026

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AN SM 1925 BROADWAY HOLDINGS, LLC, a Delaware limited liability company, and ALEX NERUSH, an individual, Defendants/Counterclaimants-Below, Appellants, v. GC BROADWAY, LLC, a California limited liability company, and BRYAN GORTIKOV, an individual, Plaintiffs/Counter-defendants-Below, Appellees. and AN SM 1925 BROADWAY, LLC, a Delaware limited liability company, Nominal Defendant-Below, Appellee.	No. 287, 2026 On Appeal from the Court of Chancery of the State of Delaware C.A. No. 2024-1070-LWW

APPELLANTS' CORRECTED OPENING BRIEF ON APPEAL

PIERSON FERDINAND LLP
Carl D. Neff (No. 4895)
Nathan D. Barillo (No. 5863)
CSC Station
112 S. French Street

Wilmington, Delaware 19801
Tel: (302) 482-4244

Attorneys for Defendants and Counterclaimants Below / Appellants, Alex Nerush and AN SM 1925 Broadway Holdings, LLC

Dated: September 4, 2026

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES v

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 3

STATEMENT OF FACTS 5

A. The Parties and the Property 5

B. The Pre-Closing Lending Terms. 5

C. The January 19, 2023 Agreements. 6

D. The Pre-Closing Funding Representations. 8

E. Post-Closing Communications and Default. 10

F. Trial Testimony on the Return. 11

G. The Memorandum Opinion. 11

H. The Final Judgment. 12

ARGUMENT 13

I. The Interest Award Adopts The Contractual Return The Court Refused To Award As Damages, Exceeding What Plaintiffs Requested 13

A. Question Presented 13

B. Scope of review. 13

C. Merits of the argument. 14

1. The Opinion refused to award the Enhanced Preferred Return as Damages. 14

2. The interest ruling, implemented in paragraph 6(a), awards the denied return relabeled as interest. 15

3. The Opinion's own distinction does not save the award. 15

4. Plaintiffs Requested Post-Judgment Interest at the Legal Rate and Waived Claims to a Higher Rate. 17

5. Defendants preserved the objection. 18

6. The remedy is recalculation. 18

II. The Court Erred By Awarding, *Sua Sponte*, Post-Judgment Interest At 24% Compounded Monthly. 20

A. Question presented. 20

B. Scope of review. 20

C. Merits of the argument. 20

1. Section 2301(a) governs post-judgment interest and caps it at the legal rate. 21

2. Section 2301(c) does not apply, because on the Court's own characterization no "expressed contract rate" on a debt obligation exists. 22

3. Delaware Technical and merger do not save the award. 24

4. Section 6.5(b) independently bars the default-triggered enhancement. 24

5. Defendants' challenge is properly presented; alternatively, the Court should reach it in the interests of justice. 25

6. Relief. 25

III. California law governs the characterization question, and the instrument is debt. 27

A. Question presented. 27

B. Scope of review. 27

C. Merits of the argument. 27

1. California has a materially greater interest, and its fundamental usury policy displaces the choice-of-law clause. 28

2. The internal-affairs doctrine does not displace the Section 187 analysis of a financing contract. 30

3. The substance of the transaction is debt. 32

4. The guarantor may assert the usury defense. 36

5. The usury remedy: principal only, no interest, and treble damages on interest paid. 37

IV. The Court of Chancery applied its fraud rulings asymmetrically and left the governing elements of Counterclaim VIII undecided. 39

A. Question presented. 39

B. Scope of review. 39

C. Merits of the argument. 40

1. The hearsay ruling misapplies Rule 801(c): the testimony was offered to prove the representation was made, not that it was true. 41

2. With the relay admissible, the no-representation holding fails: a statement directed through a chosen intermediary is made to its intended recipient. 42

3. The falsity and immateriality holdings cannot be reconciled with the record the Opinion cited or with the contract's text. 43

4. The reliance holding decides justifiability only, and does so asymmetrically. 46

5. Relief. 48

V. The Fee Award cannot stand if the Court grants relief on Argument III or Argument IV. 49

A. Question presented. 49

B. Scope of review. 49

C. Merits of the argument. 49

CONCLUSION 50

TABLE OF AUTHORITIES

Cases

Abry P'rs V, L.P. v. F & W Acq. LLC,
891 A.2d 1032 (Del. Ch. 2006) 47

Allen v. State,
644 A.2d 982 (Del. 1994).....39

Baldwin v. New Wood Res. LLC,
283 A.3d 1099 (Del. 2022).....13, 40

Cede & Co. v. Technicolor, Inc.,
884 A.2d 26 (Del. 2005).....13

Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.,
708 A.2d 989 (Del. 1998).....32

DCV Holdings, Inc. v. ConAgra, Inc.,
889 A.2d 954 (Del. 2005).....39, 46

Delaware Technical & Community College v. Emory Hill & Co.,
116 A.3d 1243 (Del. 2015) (TABLE) 24

E.I. DuPont de Nemours & Co. v. Fla. Evergreen Foliage,
744 A.2d 457 (Del. 1999).....46

Emerald Partners v. Berlin,
726 A.2d 1215 (Del. 1999).....17

Exelon Generation Acquisitions, LLC v. Deere & Co.,
176 A.3d 1262 (Del. 2017).....31

Express Scripts, Inc. v. Bracket Holdings Corp.,
248 A.3d 824 (Del. 2021).....46

Gatz v. Ponsoldt,
925 A.2d 1265 (Del. 2007).....28

Ghirardo v. Antonioli,
8 Cal. 4th 791 (1994).....36

Gibbo v. Berger,
123 Cal. App. 4th 396 (2004).....37

Harbinger Capital Partners Master Fund I, Ltd. v. Granite Broad. Corp.,
906 A.2d 218 (Del. Ch. 2006).....32-33

Hardwick v. Wilcox,
11 Cal. App. 5th 975 (2017).....37

Henry v. Nanticoke Surgical Assocs.,
2007 WL 3112480 (Del. Super. June 20, 2007).....41

In re AutoStyle Plastics, Inc.,
269 F.3d 726 (6th Cir. 2001).....35

In re HH Liquidation, LLC,
590 B.R. 211 (Bankr. D. Del. 2018).....34-35

Johnson & Johnson v. Fortis Advisors LLC,
352 A.3d 229 (Del. 2026).....18

Judicial Watch, Inc. v. Univ. of Del.,
267 A.3d 996 (Del. 2021).....20

Kroll v. City of Wilmington,
276 A.3d 476 (Del. 2022).....26

Kronenberg v. Katz,
872 A.2d 568 (Del. Ch. 2004).....45-46

Mahani v. EDIX Media Grp., Inc.,
935 A.2d 242 (Del. 2007).....49

Martin v. Ajax Constr. Co.,
124 Cal. App. 2d 425 (1954).....35, 36

Matrix Parent, Inc. v. Audax Mgmt. Co.,
319 A.3d 909 (Del. Super. 2024) 43

Neem Int'l CV v. Shulman,
2025 WL 3778917 (Del. Ch. Dec. 31, 2025) 23-24

Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc.,
269 A.3d 974 (Del. 2021) 20-24

Pellaton v. Bank of N.Y.,
592 A.2d 473 (Del. 1991) 47

Prairie Capital III, L.P. v. Double E Holding Corp.,
132 A.3d 35 (Del. Ch. 2015) 43

RBC Cap. Mkts., LLC v. Jervis,
129 A.3d 816 (Del. 2015) 27, 40

Rochester Cap. Leasing Corp. v. K & L Litho Corp.,
13 Cal. App. 3d 697 (1970) 36

RSUI Indem. Co. v. Murdock,
248 A.3d 887 (Del. 2021) 27

Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochem. Co.,
866 A.2d 1 (Del. 2005) 41

Sequoia Presidential Yacht Gp. LLC v. FE P'rs, LLC,
2014 WL 2610577 (Del. Ch. June 12, 2014) 23

Stock v. Meek,
35 Cal. 2d 809 (1950) 36, 37

Suber v. State,
2026 Del. LEXIS 13 (Del. Jan. 15, 2026) 25

Vill. Practice Mgmt. Co., LLC v. West,
342 A.3d 295 (Del. 2025) 49

Whittemore Homes, Inc. v. Fleishman,
190 Cal. App. 2d 554 (1961) 36

Winnett v. Roberts,
179 Cal. App. 3d 909 (1986) 37

WRI Opportunity Loans II, LLC v. Cooper,
154 Cal. App. 4th 525 (2007) 36

Other Authorities

6 *Del. C.* § 18-110 1

6 *Del. C.* § 2301 ..... *passim*

Cal. Civ. Code § 1916-3 37

Cal. Const. art. XV, § 1 29

Ct. Ch. R. 15(b) 2, 44

Ct. Ch. R. 15(c)(2) 38

D.R.E. 801(c) 39, 41

D.R.E. 801(d)(2) 42

Restatement (Second) of Conflict of Laws § 187 27

Restatement (Second) of Torts § 533 43

Supreme Court Rule 8 ..... 20, 25, 39

NATURE OF PROCEEDINGS

This appeal is from the Final Judgment ("Final J.") entered by the Court of Chancery (Will, V.C.) on June 11, 2026, after a three-day trial in C.A. No. 2024-1070-LWW. Plaintiffs GC Broadway, LLC (the "Investor") and Bryan Gortikov sued over a $10,500,000 Preferred Equity Investment in a Delaware limited liability company holding Santa Monica property. Defendant Alex Nerush guaranteed payment of the "Full Redemption Price" due on the September 30, 2024 Redemption Date, and defendant AN SM 1925 Broadway Holdings, LLC (the "Sponsor") served as managing member.[1]

Plaintiffs' October 18, 2024 Complaint asserted Counts I through III: declaratory relief under 6 *Del. C.* § 18-110 confirming the Sponsor's removal and Investor's installation as Managing Member, an anti-suit injunction, and Payment Guaranty breach. (A0348-A0581.) On March 27, 2025, the Court denied Defendants' motion to dismiss or stay the supplemented Complaint, stating that "defendants remain free to assert their California usury defense here," without resolving the choice-of-law question later presented at trial. (A0882-A0885.)

On June 9, 2025, the Court granted Plaintiffs partial summary judgment on Count I; Defendants then dismissed the California action, mooting Count II except

[1] The Memorandum Opinion dated February 26, 2026 ("Mem. Op.") and the Final Judgment dated June 11, 2026 are attached hereto as Exhibits A and B, respectively.

as to fees. Plaintiffs amended to add Count IV, and Defendants filed six counterclaims, including fraud, direct and derivative usury, and a California-law disguised-loan declaration; the Court deferred the partial-dismissal motion for Counterclaims IV, V, and VI until after trial and ultimately denied it as moot. (Letter to Counsel Regarding Mot. to Dismiss (Dkt. 262); Mem. Op. 28, 32.)

Trial proceeded October 15 through 17, 2025 on Counts III and IV and Counterclaims I through VI; post-trial briefing closed December 5; under Rule 15(b) the Court added Counterclaims VII and VIII and denied leave as to IX. (Mem. Op. 29-30, 32.)

On February 26, 2026, the Court issued a Memorandum Opinion, holding the Preferred Equity Investment was equity, not debt, and entered judgment for Plaintiffs on all counterclaims, as detailed below. The Final Judgment, entered June 11, 2026, memorialized the award. (Final J. ¶¶ 6(a)-(c).)

SUMMARY OF ARGUMENT

1. Paragraph 6(a) measures prejudgment and post-judgment interest by the same contractual Enhanced Preferred Return the Court refused to award as damages, delivering through the interest award what the damages ruling withheld. Plaintiffs only requested post-judgment interest "at the legal rate, compounded quarterly." (Joint Pre-Trial Stip. ¶ 69(c) (A1384).) It should be recalculated consistently. Section I, *infra*.

2. Section 2301(a) governs post-judgment interest on equity at the statutory rate compounded quarterly; replacing the Court's award of 24% monthly compounding would reduce first-year interest by approximately $1,767,300. Section II, *infra*.

3. Section 187(2)(b) requires California law because California has the materially greater interest and fundamental usury policy, and the instrument is debt in substance. The judgments on Counterclaims IV, V, and VI rest solely on the premise that no loan exists and should be reversed, with remand to determine what portion of the $3,000,000 Nerush paid constitutes interest subject to credit against principal and treble damages. Section III, *infra*.

4. The judgment on Counterclaim VIII and corresponding affirmative defense should be reversed and remanded for correct standards governing reliance in fact, falsity, and materiality. Section IV, *infra*.

5. Relief under Argument III or Argument IV requires vacatur and remand of the Fee Award. Section V, *infra*.

STATEMENT OF FACTS

A. The Parties and the Property.

In late 2022, Nerush invested in a mixed-use property at 1925 Broadway and 1450 20th Street in Santa Monica, California. (Joint Pre-Trial Stip. ¶¶ 4, 12 (A1363, A1367).) Gortikov, a licensed California real estate broker, was approached about providing funding for pre-development of the Property. (Joint Pre-Trial Stip. ¶¶ 8-9 (A1366); JX 107 (A0145).) On December 16, 2022, the property was acquired for $16,000,000, funded by an $8,000,000 loan from the seller, Carey — 20th and Broadway, LLC, and by funds Nerush provided through a Section 1031 exchange. (Joint Pre-Trial Stip. ¶¶ 14-15 (A1367-A1368).) Title was held as tenants in common by AN SM 1925 Broadway, LLC (the "Company"), a Delaware limited liability company holding a 90% interest, and 1925 Broadway, LLC (the "10% Owner"), which held the remaining 10% and served as Administrative TIC Owner responsible for day-to-day management of the Property. (Joint Pre-Trial Stip. ¶¶ 12-13 (A1367).)

B. The Pre-Closing Lending Terms.

On November 23, 2022, Gortikov circulated an offering memorandum to his investor group (the "Offering Memorandum", JX 011), whose payment structure reads: "Interest only. Principal repaid at expiration of Investment Term." (JX 011 (A0068).) It provides an "Unlimited Repayment Guaranty" (JX 011 (A0068)) with "[p]ersonal recourse to primary owners" (JX 011 (A0066)). Its security field reads:

"TBD (2nd trust deed, pledge of ownership, or preferred equity)." (JX 011 (A0066).) On November 28, 2022, WS Communities and Nerush signed the non-binding term sheet (the "Term Sheet", JX 013). The Term Sheet's Exhibit A sources-and-uses schedule lists "Interest Reserve (Subordinate) $3,420,000" and "Subordinate Loan Fee $95,000." (JX 013 (A0091).) The Term Sheet allows the Investor to assess commercially reasonable and customary processing fees in connection with "servicing of the loan." (JX 013 (A0084).) The Term Sheet's Tax Treatment provision required the Investment and Preferred Return to "be afforded treatment as debt ... under the Federal tax code," (JX 013 (A0084)), a month before Nerush's counsel raised the Section 1031 concern on December 27, 2022. (JX 088 (A0136).)

On January 13, 2023, six days before signing, Gortikov emailed Nerush (the "Risky Loan Email"): "We are making an incredibly risky *loan*." (JX 107 (A0145).) (emphasis added.) Nerush testified that Gortikov "was introduced as a lender. And we were going to get a loan from him to purchase Broadway." (Trial Vol. III at 515 (A1801).)

C. The January 19, 2023 Agreements.

On January 19, 2023, the parties executed the Amended and Restated Limited Liability Company Agreement for the Company (the "LLC Agreement", JX 125). (A0148-A0271.) Section 2.2 provides that GC Broadway "has contributed or is deemed to have contributed" (LLC Agreement § 2.2 (A0157)) $9,450,000 for the

Company's 90% tenancy-in-common interest, defined as the "Preferred Equity Investment" (LLC Agreement § 2.2 (A0157)); a parallel agreement for the 10% interest carries $1,050,000, "$10.5 million in aggregate among the two companies." (Trial Vol. III at 451-52 (A1791-A1792).) The Memorandum Opinion likewise found: "The LLC Agreement establishes the initial capital contribution of $10.5 million." (Mem. Op. 59.)

The agreement's economics are fixed, not performance-based. The Preferred Return is the greater of the SOFR Rate or 19.00%, compounded monthly on unpaid Preferred Return (including Accrued PIK) plus aggregate Capital Contributions, computed on an actual/360 basis. The Enhanced Preferred Return adds 5% and likewise compounds monthly. The Company Loan Interest Rate is 21.5%, compounded monthly. (A0236; A0229; A0228.)

Three provisions matter. Section 4.1(c) provides that unpaid returns constitute "Accrued PIK," "added to the balance of Investor Member's Unreturned Capital Contributions". (LLC Agreement § 4.1(c) (A0167).) Section 6.5(b) bars recovery of lost profits and consequential, special, or punitive damages, subject to a conjunctive exception quoted in Argument II. (LLC Agreement § 6.5(b) (A0192-A0193).) And Section 13.2, titled Allocations/Tax Treatment, states that the interest constitutes debt for U.S. federal tax purposes. (LLC Agreement § 13.2 (A0210).)

The same day, Nerush executed a Payment Guaranty, JX 129, an instrument between two California parties, guaranteeing "punctual payment . . . and not merely the collectability" of the Full Redemption Price. (Payment Guaranty § 1.2 (A0313).) Recital A refers to the Investor agreeing "to make an investment." (Payment Guaranty Recital A (A0312).)

The Gortikov Capital closing statement (the "GC Closing Statement", JX 134) uses lending terms: its columns are headed "BORROWER CHARGES" and "BORROWER CREDITS," and its line items include "Lender's and Loan Related Charges," "Loan Holdbacks," and "Stub Interest." (JX 134 (A0327).)

D. The Pre-Closing Funding Representations.

On January 3, 2023, Gortikov emailed Adam Shekhter and Scott Walter, copying Proniloff (the "January 3 Email"): "[s]ince [December 19, 2022] we have had $10.5 million of our investor funds sitting dormant in our account." (JX 099 (A0142).) The statement described funds already raised and held.

On January 11, 2023, eight days before closing, Proniloff emailed Nerush urging him to close (the "January 11 Email"): "I understand that you are hesitant to close this but we really need your green light to move forward and get this done right away." (JX 104 (A0143).) The same email states: "We gave Bryan the green light to raise the capital because we needed the money to close Cloverfield" (JX 104 (A0143)) and "Bryan has delivered on his commitment." (JX 104 (A0143).) Nerush

confirmed at trial that he was hesitant, that "multiple communications with Mr. Proniloff" changed his mind, and that he closed eight days later. (Trial Vol. III at 530-31, 533-34 (A1802-A1803, A1805-A1806).)

On January 16, 2023, three days before closing, Gortikov emailed Proniloff (the "January 16 Email"): "Can you please tell him that I am giving him $10.5 million dollars ...." (Supp. A2205-A2206.) Gortikov testified that "him" meant Nerush, and both emails preceded signing and concerned present funding. (Trial Vol. I at 196 (A1767).)

Gortikov called the January 3 statement an "exaggeration." (Trial Vol. I at 92 (A1760).) Plaintiffs' interrogatory responses identified $8.35 million as the total investment, a $2.15 million difference. (JX 310 (A1258-A1259).) Nerush testified that he understood $10.5 million had already been raised and held in Gortikov's account based on Proniloff's communication. (Trial Vol. III at 535 (A1807).)

Gortikov described Proniloff as "a representative for the 10 percent owner" and as a liaison for Nerush. (Trial Vol. I at 103, 104-05, 186-87 (A1762, A1763-A1764, A1765-A1766).)

Sections 2.1 and 2.2 use materially identical "has contributed" formulations (LLC Agreement § 2.2 (A0157)); Section 2.5 requires cash contributions wired to or deposited in the Company's Operating Account (LLC Agreement § 2.5 (A0162).)

Neither Section 16.1, the Entire Agreement clause the Opinion cites as Section 16.2, nor Section 6.5 disclaims reliance on representations outside the writing. (A0215, A0192.)

E. Post-Closing Communications and Default.

An August 2023 email chain (the "August 2023 Emails"), refers to "additional collateral for the loan," states that "our loan is repaid," and discusses steps to "bring[] the loan back into conformance." (JX 166 (A0329-A0330).)

Before the Redemption Date, Nerush paid the Investor $3,000,000 in two installments in connection with extensions of that date. The First Amendment to the LLC Agreement, dated May 22, 2024, required a $1,000,000 deposit, which Nerush paid on June 6, 2024. (JX 193 § 2(b) (A0333); JX 349 at GC030511 (A1886).) The Second Amendment, dated August 30, 2024, was accompanied by a $2,000,000 payment. (JX 219 (A0341); JX 349 at GC030518 (A1893).) Plaintiffs asserted they applied $2,553,604.02 of the $3,000,000 to reduce the Preferred Equity Investment, $305,637 to the Preferred Return Reserve, $115,222.23 to replenish the Loan Reserve, and $25,536.04 to the contractual Exit Fee. (JX 341-N Tab 3 (A1446).) Gortikov testified that "there was roughly a half a million dollars set aside for other purposes contractually pursuant to those agreements." (Trial Vol. II at 299 (A1779).)

The Redemption Date of September 30, 2024 passed without payment of the Full Redemption Price. (Trial Vol. III at 463 (A1795).) On June 9, 2025, the Sponsor was removed and the Investor was installed as Managing Member. (A0954-A0958.)

F. Trial Testimony on the Return.

Gortikov conceded that the 19% floor was uncorrelated to profits, that the enhanced return was default-triggered, and that the return did not decrease upon default. (Trial Vol. II at 288, 290, 321 (A1775, A1777, A1782).)

On redirect, Gortikov testified: "The parties decided to proceed with a preferred equity investment but eliminate the deed of trust that secured the guaranty." (Trial Vol. II at 397 (A1788)), adding "loans are not redeemed; they're paid." (Trial Vol. III at 461-62 (A1793-A1794)). He also confirmed Payment Guaranty's Recital A. (Trial Vol. III at 464 (A1796)).

G. The Memorandum Opinion.

The Court held that the Preferred Equity Investment was equity rather than debt, applied Delaware law without a Section 187(2)(b) analysis, and rejected the documentary lending evidence as informal "lender" colloquialisms. It entered judgment for Plaintiffs on Counterclaims VII and VIII, finding no representation made to Defendants, no falsity, and no justifiable reliance, and excluding the Proniloff relay as hearsay. (Mem. Op. 38-42, 52-55.)

On damages, the Court awarded $7,946,396 in Unreturned Capital Contributions, $277,239 in recoverable third-party expenses, and a $79,464 Exit Fee, less $869,339 in credits, for $7,433,760 in Count III principal damages, plus $300,000 in fraud damages. It denied $678,954 in senior loan payments as excluded from the Payment Guaranty. (Mem. Op. 59-62.)

The Court denied Plaintiffs' $3,506,820 Accrued PIK request for failure of proof. (Mem. Op. 61-62.)

The Court awarded interest on $7,077,057 in Net Unreturned Capital at the 24% Enhanced Preferred Return, compounded monthly from September 30, 2024; applied 21.5%, compounded monthly, to $277,239 in expenses; and the statutory rate, compounded quarterly, to the Exit Fee and fraud award. (Mem. Op. 65-69.)

H. The Final Judgment.

Paragraph 6(a) awards $7,077,057 in Unreturned Capital damages, $2,861,410.94 in prejudgment interest, and post-judgment interest on a $9,938,467.94 base at 24%, compounded monthly. (Final J. ¶ 6(a).)

Paragraph 6(b) applies 21.5% annual interest, compounded monthly, to $317,136.61. Paragraphs 6(c) and 7 apply the statutory rate, compounded quarterly, to $90,580.20 and $360,410.75, respectively. (Final J. ¶¶ 6-9.)

ARGUMENT

I. The Interest Award Adopts The Contractual Return The Court Refused To Award As Damages, Exceeding What Plaintiffs Requested.

A. Question presented.

Whether the Court erred by measuring prejudgment and post-judgment interest on the Unreturned Capital award by the contractual Enhanced Preferred Return, compounded monthly, after denying Plaintiffs recovery of that same contractual return as a component of damages. (Mem. Op. 61-62, 65-66.) Defendants preserved this issue in their post-trial briefs. (A1718-A1721; A1635-A1636.)

B. Scope of review.

Whether an interest award may use the same contractual return the Court denied as a damages component raises questions of law and contract interpretation reviewed *de novo*. *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 42 (Del. 2005) (legal questions embedded in an interest award are reviewed *de novo*); *Baldwin v. New Wood Res. LLC*, 283 A.3d 1099, 1115 (Del. 2022).

C. Merits of the argument.

The Court denied the contractual return as damages, then adopted it as the measure of interest. The rate cannot stand; Argument II, *infra*, supplies the replacement.

1. *The Opinion refused to award the Enhanced Preferred Return as Damages.*

Under the LLC Agreement, any Preferred Return or Enhanced Preferred Return not paid when due is "added to the balance of Investor Member's Unreturned Capital Contributions to the Company on each Distribution Date and shall constitute 'Accrued PIK.'" (LLC Agreement § 4.1(c) (A0167).) Accrued PIK was one component of the contractual Full Redemption Price. (LLC Agreement § 4.1(e)(i) (A0168-A0169).)

Plaintiffs sought $3,506,820 in Accrued PIK; the Court denied it in full for failure of proof. It identified unauthenticated SOFR inputs, unexplained credits for Preferred Return Reserve payments, and the risk of double recovery from retained reserves, noting the absence of third-party bank statements or validated schedules. (Mem. Op. 61-62.) Both returns were denied—"The request for 'Preferred Returns' and 'Enhanced Preferred Returns' is denied"—so no reduced contractual rate survives as a measure of interest. (Mem. Op. 61-62.) The Court therefore fixed Count III principal damages at $7,433,760 without a preferred-return component;

the $7,946,396 Unreturned Capital figure supplied the interest base. (Mem. Op. 61-62.)

2. *The interest ruling, implemented in paragraph 6(a), awards the denied return relabeled as interest.*

The Court nonetheless awarded that return as interest in paragraph 6(a): "post-judgment interest on $9,938,467.94 calculated at a rate of 24% (which is the minimum Enhanced Preferred Return rate under the LLC Agreement), compounded monthly, from and after February 26, 2026." (Final J. ¶ 6(a); *see* Mem. Op. 65-66.) Three features are dispositive.

First, paragraph 6(a) uses 24% as "the minimum Enhanced Preferred Return rate under the LLC Agreement," whose non-payment constitutes Accrued PIK. (Final J. ¶ 6(a); LLC Agreement § 4.1(c) (A0167).) Second, only paragraph 6(a) compounds monthly, other damages compound quarterly. (Final J. ¶¶ 6(c), 7, 9; Mem. Op. 66.) That monthly compounding is the Accrued PIK mechanism: the Preferred Return is "compounded monthly on each dollar of previously accrued but unpaid Preferred Return (including any Accrued PIK)." (LLC Agreement Ex. A, definition of "Preferred Return" (A0236); LLC Agreement § 4.1(c) (A0167).) Third, the base includes accrued return: $9,938,467.94 equals the $7,077,057 damages award plus $2,861,410.94 in prejudgment interest. (Final J. ¶ 6(a).) The Agreement's "Capital Contributions" definition deems Accrued PIK a capital contribution for all

purposes, folding unpaid return into the capital balance bearing the award's interest and thereby recapturing it. (LLC Agreement Ex. A, definition of "Capital Contributions" (A0227).)

3. *The Opinion's own distinction does not save the award.*

Footnote 310 distinguishes contractual damages from prejudgment interest, but does not authorize using the denied return as the rate. Paragraph 6(a) applies the same 24% rate and monthly mechanism whose damages component was denied. (Mem. Op. 62 n.310; Final J. ¶ 6(a).)

Nor did the damages ruling cure the double-recovery concern. The $869,339 credit reduced the award by the balance remaining in the reserves; it did not reach the amounts Plaintiffs had already drawn from the Preferred Return Reserve to pay themselves, which Defendants quantified at no less than $572,000 in July 2024 and $1.5 million in September 2024. (Mem. Op. 61-62; Defs.' Opening Post-Trial Br. 13-14 (A1635-A1636).) The Court found that the record did not show how those draws were credited against the claimed balance. That gap does not close when the same return is applied as interest.

The denial of Accrued PIK is not challenged. The difficulty is one of reconciliation. The Opinion found the contractual return insufficiently proven to support an award of damages, yet paragraph 6(a) adopts that same return,

compounded on the same monthly basis, to measure interest on the award that remained. Paragraph 6(a) cannot stand on a rate the damages ruling rejected.

4. *Plaintiffs Requested Post-Judgment Interest at the Legal Rate and Waived Claims to a Higher Rate.*

Compounding matters further, Plaintiffs did not seek *post-judgment* interest at the Preferred Return or Enhanced Preferred Return rate. Plaintiffs sought *damages* equal to the Full Redemption Price plus additional Preferred Return and Enhanced Preferred Return accrued since the Redemption Date, plus fees and costs, plus interest accruing on those amounts calculated at the legal rate, compounded quarterly. (Joint Pre-Trial Stip. ¶ 69(c) (A1384).) Thus, they proposed contractual returns as damages and the legal rate as interest; they never requested a contractual *post-judgment* rate in the Pre-Trial Order or post-trial briefing.

The Court awarded significantly more post-judgment interest than Plaintiffs requested, 24% monthly compounding under paragraph 6(a). (A1384; Mem. Op. 65 n.327, 65-67.) Plaintiffs waived the right to seek an enhanced post-judgment interest rate. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (issues not briefed are deemed waived).

5. *Defendants preserved the objection.*

Defendants preserved objections to the Preferred Return calculation and reserve credits. (Post-Trial Closing Br. 6-9 (A1718-A1721); Defs.' Opening Post-Trial Br. 13-14 (A1635-A1636).)

Defendants' principal position below was that the transaction was a usurious loan carrying no interest, but they preserved the proof objection the Court sustained. The pairing first appeared in the Opinion's remedies analysis and the implementing Judgment. The Opinion deferred the interest question to remedies, stating that the denial of contractual interest is "separate from whether the plaintiffs are entitled to prejudgment interest at the contractual rate, which I address below." (Mem. Op. 62 n.310.) That sequencing confirms no earlier objection was available.

6. *The remedy is recalculation.*

In *Johnson & Johnson v. Fortis Advisors LLC*, 352 A.3d 229, 275 (Del. 2026), this Court reversed in part and "remanded to the Court of Chancery to recalculate the interest award based on a damages calculation that excludes the Milestone 1 payment." Here the Court excluded the Accrued PIK from the damages base; the interest ruling has never been reconciled with that exclusion.

Defendants therefore ask the Court to reverse paragraph 6(a), as to both the $2,861,410.94 prejudgment-interest component and the 24% post-judgment rate,

and to remand for recalculation of interest on the Unreturned Capital award at no more than the legal rate established by 6 *Del. C.* § 2301(a), compounded quarterly.

II. The Court Erred By Awarding, *Sua Sponte*, Post-Judgment Interest At 24% Compounded Monthly.

A. Question presented.

Whether the Court erred as a matter of law by awarding post-judgment interest at the contractual Enhanced Preferred Return rate of 24%, compounded monthly, where Plaintiffs' Statement of Relief Sought asked for "interest accruing on those amounts calculated at the legal rate, compounded quarterly" (Joint Pre-Trial Stip. ¶ 69(c) (A1384)), the Court held that instrument is equity, denied Plaintiffs' request for damages tied to preferred or enhanced rates, and 6 *Del. C.* § 2301(a) caps post-judgment interest at the lesser of the legal rate and any expressed contract rate. The Court adopted the contractual rate *sua sponte*. Preservation is addressed in Sections II.C.5 and II.C.6, *infra*; alternatively, Supreme Court Rule 8 permits review.

B. Scope of review.

The interpretation of a statute and the application of a post-judgment interest rate to a final judgment are questions of law reviewed *de novo*. *Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc.*, 269 A.3d 974, 977-980 (Del. 2021); *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021).

C. Merits of the argument.

If the holding that the Preferred Equity Investment is equity stands, then the 24% award cannot stand. Section 2301(a) governs post-judgment interest and caps it at 5% above the Federal Reserve Discount Rate (3.75% as of June 11, 2026), and

Section 6.5(b) of the LLC Agreement independently bars the default-triggered enhancement.

1. *Section 2301(a) governs post-judgment interest and caps it at the legal rate.*

In *Noranda*, this Court stated: "we have consistently held that Section 2301(a) directly controls the calculation of judgment interest outside the loan context." (*Noranda*, 269 A.3d at 978.) The Court held that this instrument is not a loan, so Section 2301(a) controls.

Noranda reversed a Superior Court award that carried the pre-judgment rate into the post-judgment period, holding: "it was therefore error for the Superior Court to award Noranda post-judgment interest at the pre-judgment rate." (*Noranda*, 269 A.3d at 982.) Entry of judgment begins a distinct statutory interest period; the Final Judgment instead carries the contractual Enhanced Preferred Return across that line.

The statutory text confirms the result. Section 2301(a) provides that "[w]here there is no expressed contract rate, the legal rate of interest shall be 5% over the Federal Reserve discount rate including any surcharge as of the time from which interest is due." It continues:

> any judgment entered on agreements governed by this subsection, whether the contract rate is expressed or not, shall, from the date of the judgment, bear post-judgment interest of 5% over the Federal Reserve discount rate including any surcharge thereon or the contract rate, whichever is less.

(6 *Del. C.* § 2301(a).) The statute caps post-judgment interest at the lesser of the legal rate and the contract rate. *Noranda* involved an agreement in which the parties had not agreed to an interest rate. *Noranda*, 269 A.3d at 979, n. 42. Similarly, here, the Court rejected damages based on a preferred or enhanced rate, and Plaintiffs nonetheless requested "interest accruing on those amounts calculated at the legal rate, compounded quarterly" (Joint Pre-Trial Stip. ¶ 69(c) (A1384)). Thus, even if the Enhanced Preferred Return qualified as a contract rate, the judgment could bear no more than the legal rate. The legal rate here, as of June 11, 2026, was 8.75%. The Final Judgment could not impose 24% compounded monthly unless Section 2301(c) applies, and it does not.

2. *Section 2301(c) does not apply, because on the Court's own characterization no "expressed contract rate" on a debt obligation exists.*

The Court invoked Section 2301(c) to remove the lesser-of cap, describing it as "removing the cap on post-judgment interest at the lower of the legal or contractual rate for commercial transactions exceeding $100,000." (Mem. Op. 65 n.327.) Subsection (c) lifts any limitation on the rate charged "for the loan or use of money" for amounts exceeding $100,000 without a mortgage against any borrower's principal residence. (6 *Del. C.* § 2301(c).) But those are debt terms; the Court held this instrument is equity and "no loan exists." (Mem. Op. 42.)

In footnote 42, *Noranda* explained that Section 2301(a) "does not limit the interest rate when it is established in a contract 'where the amount of money loaned or used exceeds $100,000, and where repayment thereof is not secured by a mortgage against the principal residence of the borrower.'" (*Noranda*, 269 A.3d at 979 n.42.) There, the amount exceeded $100,000 but no contract rate of interest had been agreed, so Section 2301(a) supplied the legal rate. (*Noranda*, 269 A.3d at 979 n.42.) Here, the 19% floor and 5% enhancement are equity returns, so Section 2301(a) likewise supplies the legal rate.

The cited *Sequoia Presidential Yacht Gp. LLC v. FE P'rs, LLC*, 2014 WL 2610577 (Del. Ch. June 12, 2014), held that "for any loan under subsection (a) providing contractually for a particular interest rate, the interest rate post-judgment *shall* be the contract rate, so long as that rate is lawful (that is, 5% over the Federal Reserve discount rate or less)." *Id.* at *2. Because that loan qualified under subsection (c), which reaches only the "loan or use of money," *Sequoia* lifted the lawfulness limitation. *Id.* at *2. A 24% rate is not lawful under that standard; the Court here held "no loan exists" (Mem. Op. 42), so the 24% equity return cannot qualify under *Sequoia*.

The Opinion applied quarterly compounding to the Exit Fee and fraud damages, but paragraph 6(a) uses monthly compounding for the contractual equity return. (Mem. Op. 66-67; Final J. ¶ 6(a).) *Accord Neem Int'l CV v. Shulman*, 2025

WL 3778917, at *30 (Del. Ch. Dec. 31, 2025) (applying the statutory rate to a judgment arising from advances recharacterized as equity).

3. *Delaware Technical and merger do not save the award.*

Nor does *Delaware Technical* support the award. In *Noranda*, this Court held reliance on *Delaware Technical & Community College v. Emory Hill & Co.*, 116 A.3d 1243 (Del. 2015) (TABLE), misplaced because the objection came too late and the contract fell under Section 2301(c). *Noranda*, 269 A.3d at 980-81 & n.55. *Delaware Technical* involved a negotiated rate of interest on a commercial obligation, not an equity return. Entry of judgment begins a distinct statutory period into which the obligation merges, governed by Section 2301(a). If, as the Court held, no loan exists, Section 2301(c) cannot carry the 24% return into the judgment period.

4. *Section 6.5(b) independently bars the default-triggered enhancement.*

Gortikov conceded: the 19% minimum "had no correlation to whatever profits the 'company' earned" (Trial Vol. II at 288 (A1775)); the enhanced return was "triggered by a default" and "had no correlation to the amount of profits being earned by the company" (Trial Vol. II at 290 (A1777)); and "certainly the LLC agreement doesn't reduce our return upon a default" (Trial Vol. II at 321 (A1782)).

Section 6.5(b) bars Plaintiffs from recovering "any lost profits or consequential, special or punitive damages except if such damages are actually paid to an unaffiliated third party due to fraud, bad faith, gross negligence or willful

misconduct." (LLC Agreement § 6.5(b) (A0192-A0193).) Its exception fails because the Enhanced Preferred Return was retained by the Investor, not paid to a third party. Section 6.5(a) imposes a mirror-image limitation, and the Memorandum Opinion never analyzed the exception beyond an ellipsis. (A0192; Mem. Op. 59.) A default-only, performance-unrelated, non-abatable charge is a punitive sanction.

5. *Defendants' challenge is properly presented; alternatively, the Court should reach it in the interests of justice.*

Because the Court adopted the rate *sua sponte* (exceeding Plaintiffs' requested relief below), Defendants' first opportunity to challenge it was this appeal.

Alternatively, Defendants invoke Supreme Court Rule 8. Review is available where the record is adequate, the error is plain under current law, and substantial rights are affected. *Suber v. State*, 2026 Del. LEXIS 13, at *9-*12 (Del. Jan. 15, 2026). Plaintiffs sought interest "at the legal rate" but never requested the contractual rate for post-judgment interest; their only post-trial interest computation rested on the denied Accrued PIK. The Court, *sua sponte*, deviated from the legal rate; requires no factual development, and concerns approximately $1,767,300. Plaintiffs, who requested the legal rate, face no prejudice.

6. *Relief.*

Primary relief is remand for the Court to address Section 2301(a) in the first instance, reconciling the statutory text, the equity characterization, and the Final

Judgment's rate provision. *Kroll v. City of Wilmington*, 276 A.3d 476, 479 (Del. 2022). Alternative relief is reversal directing application of the legal rate of 8.75%, compounded quarterly, in place of the 24% contractual rate.

III. California law governs the characterization question, and the instrument is debt.

A. Question presented.

Whether the Court of Chancery erred by applying Delaware law to the characterization of the Preferred Equity Investment when Section 187(2)(b) of the Restatement (Second) of Conflict of Laws requires application of California law, and whether the instrument is debt in substance under California's usury law. If it is, whether the judgments on Counterclaims IV, V, and VI must be reversed and the matter remanded to determine what portion of the $3,000,000 Nerush paid constitutes interest subject to credit against principal and treble damages. This issue was preserved at A1653-A1657.

B. Scope of review.

The application of choice-of-law principles is a question of law reviewed *de novo*. *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 896 (Del. 2021). The characterization of a transaction as debt or equity is a mixed question, reviewed for clear error as to findings of fact and *de novo* as to legal conclusions. *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 861 (Del. 2015).

C. Merits of the argument.

This argument is independent of Arguments I and II and seeks materially greater relief: no interest at all, credit against principal for interest paid, and treble damages. Under Section 187(2)(b), California law governs, and under any law that

examines substance, this instrument is debt: a fixed minimum return, monthly compounding, mandatory redemption, and an unconditional personal guaranty of payment, all documented in the parties' own lending vocabulary. *See Gatz v. Ponsoldt*, 925 A.2d 1265, 1278-80 (Del. 2007) (looking to substance over form).

1. *California has a materially greater interest, and its fundamental usury policy displaces the choice-of-law clause.*

Under Section 187(2)(b), a contractual choice-of-law provision will not be enforced if "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue." The issue-specific inquiry concerns the financing's legal character and whether its return is subject to usury limits, not the Delaware LLC's validity or the allocation of management power. The Court found no conflict because California and Delaware both look to substance over form. (Mem. Op. 34-35.) That conflates method with consequence: both may ask a similar question, but only California provides a constitutional ceiling on the permitted return and a forfeiture remedy; Delaware supplies no comparable limit. A shared interpretive approach does not eliminate a conflict when outcomes diverge.

California's contacts predominate: the property is in Santa Monica; the Investor is a California limited liability company; Nerush resides in California; closing occurred in California on a California closing statement; none of Gortikov's

entities owns Delaware real property; and Delaware's only connection is LLC formation. (JX 134 (A0327); Trial Vol. II at 282 (A1774); A0326.) Proniloff asked the Investor's counsel whether the entity "really need[ed] to be a Delaware entity" when "[w]e literally just formed it in CA, the property is in CA, the lender is in CA, and this isn't a super large loan." (JX 021 (A0093).) Investor's counsel answered that "if the transaction is going to be preferred equity, whether now or later, it will have to be Delaware." (JX 021 (A0093).) Delaware accommodated the preferred-equity label, not the financing. Formation is a legitimate contact for internal governance, but carries far less weight on whether a return charged on California property is usurious.

California's usury policy is fundamental in the strictest sense: it is enshrined in Article XV of the California Constitution, which caps non-exempt loans at the greater of 10% or 5% over the Federal Reserve Bank of San Francisco discount rate. The Preferred Equity Investment carries a minimum 19% return, compounded monthly. (A0236.) If the instrument is debt, the charge exceeds California's constitutional ceiling by a wide margin. Applying Delaware law would permit the form of a Delaware LLC to determine the protection afforded a California property transaction. Section 187(2)(b) exists to prevent exactly that result.

The Court never performed this analysis. Its March 27, 2025 order stated that "defendants remain free to assert their California usury defense here" (A0882-

A0885). Defendants raised choice of law at trial and in post-trial briefing. (A1653-A1657.) Yet the Memorandum Opinion applied Delaware law to characterization without conducting a Section 187(2)(b) analysis on the developed trial record.

2. *The internal-affairs doctrine does not displace the Section 187 analysis of a financing contract.*

The internal-affairs doctrine governs an entity's governance, including voting rights, fiduciary duties, and removal of a manager. Whether a transaction is a loan or equity investment concerns the payment obligation and applicable legal protection, not who may vote, owe fiduciary duties, or manage the LLC.

LLC Agreement Section 13.2 does not displace that analysis. It states the parties' intention that the Membership Interest "and any preferred return thereon constitutes debt for U.S. tax purposes, including all federal, state and local U.S. tax purposes, to the maximum extent permitted by applicable U.S. federal, state and local laws." (A0210.) The Delaware Act carve-back is confined by its own terms to characterization "for purposes of interpreting or enforcing this Agreement and the relative rights and obligations of the parties hereto as Members hereunder or exercising any right or remedy hereunder." (A0210.) That governs the parties' contractual relationship; it does not address whether the economic obligation is a loan under California usury law.

Section 13.2 treats interest as debt: Payments to the Investor Member "shall be treated as payments of interest or principal, as applicable"; the Company must furnish a Form 1099-INT "showing all payments of interest"; fees are treated as fees rather than as guaranteed payments under Section 707; "no income, gain, loss, or expense of the Company will be allocated to Investor Member"; and the Investor Member "will not otherwise be treated as a Member of the Company for U.S. tax or accounting purposes." (A0210.) Cross-references confirm a non-tax-only label: Section 2.7 provides that the Investor Member "shall have no capital account" (A0162); Section 12.1 requires books kept "in accordance with GAAP" (A0207); Exhibit A ties "Membership Interest" (A0233) to Article 13's allocations, which allocate none to the Investor Member; and Section 13.1 provides that the Investor Member "shall not be characterized as a 'partner'" (A0210) under Section 761(b). An instrument lacking a capital account, allocations, or partner status, with payments reported as interest, does not carry equity's accounting attributes.

The Opinion reduced this to the statement that Section 13.2 treated the investment as debt for tax purposes only to effectuate Nerush's 1031 exchange goals. The word "only" and stated purpose appear nowhere in the provision. The provision also reaches "tax or accounting purposes," not tax alone. (LLC Agreement § 13.2 (A0210).) Contract interpretation is reviewed *de novo*. *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1267-68, 1272-75 (Del. 2017);

Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co., 708 A.2d 989, 992-93 (Del. 1998).

3. *The substance of the transaction is debt.*

The Court's characterization rested on the premise that "payment depends on the entity's business fortunes." (Mem. Op. 39.) Gortikov's concessions, quoted in Argument II.C.4, establish the opposite. (Trial Vol. II at 288, 290, 321 (A1775, A1777, A1782).) A fixed payment floor, monthly accrual, and default-triggered increase describe compensation for use or withholding of money, not a performance distribution tied to business success.

The Court relied on *Harbinger Capital Partners Master Fund I, Ltd. v. Granite Broad. Corp.*, 906 A.2d 218, 225-27 (Del. Ch. 2006), for the proposition that mandatory redemption does not convert preferred equity into debt. (Mem. Op. 40.) But *Harbinger* found the redemption feature "has not and never will give rise to a right to payment against the corporation," 906 A.2d at 220-21, so payment remained contingent on the issuer's fortunes. Here the return is fixed, compounds monthly regardless of performance, and is backed by an unlimited personal guaranty. (A0236; A0312-A0325.) That contingency is absent. Indeed, *Harbinger* treated an instrument as equity precisely because it supplied "no guaranteed right of payment" and left the holder's "fate ... tied directly to [the corporation's] business

fortunes," 906 A.2d at 230, which is the opposite of the fixed, guaranteed, personally secured return here.

The Term Sheet's Alternative Structure clause lets Investor (Gortikov), at its discretion, convert the same economics to a loan "on substantially the same terms and conditions as the preferred equity, including loan amount, interest rate and maturity date," documented by a Promissory Note and a second lien Deed of Trust. (JX 013 (A0083); Joint Pre-Trial Stip. ¶ 11 (A1367).) That option, with unchanged economics, shows the label does no economic work. The Risky Loan Email calls it an "incredibly risky loan" (JX 107 (A0145)); a December 13, 2022 email records Gortikov's offer to "play the big bad lender card" (JX 048 (A0132)); the January 11 Email, from Proniloff, the 10% Owner's vice president of finance, describes "a subordinate land loan" (JX 104 (A0143)) and states "[o]n a blended basis our rate on this loan is 12.75%" (JX 104 (A0143)); the GC Closing Statement is captioned in borrower-and-lender terms; and the August 2023 Emails call the obligation "the loan." (JX 166 (A0329-A0330).) Three weeks before closing, Investor transaction counsel Steve Fein wrote to counsel for all three parties, with Nerush copied: "preferred equity will most likely be treated as a form of debt and accordingly such debt can be secured by collateral." (JX 090 (A0137).) The email was Investor counsel's characterization in the negotiation exchange the Opinion called dispositive. (Mem. Op. 39-40.) The Payment Guaranty's punctual-payment

obligation, testimony that the deed of trust was eliminated while payment protection remained, and Gortikov's "loans are not redeemed; they're paid" reinforce this understanding; the record does not support calling this evidence occasional colloquialisms. (Payment Guaranty § 1.2 (A0313); Trial Vol. II at 397 (A1788); Trial Vol. III at 461-62 (A1793-A1794)).

The senior lender's own instrument treats the two structures as interchangeable. The Carey deed of trust the Opinion relies on elsewhere (the "Carey Deed of Trust", JX 042) records the senior lender's consent to the Trustor "obtaining an additional loan or obtaining preferred equity" (JX 042 § 1.12 (A0109)) from a "Second DOT Lender" (JX 042 § 1.12 (A0109)), creating a "Second DOT Loan" (JX 042 § 1.12 (A0109)), and provides that the Second DOT "may secure any guaranties or indemnities" (JX 042 § 1.12 (A0109)) given in connection with it. (*see* Mem. Op. 64 n.323.) That is operative contract language, not an informal colloquialism.

Proniloff testified that the deal was structured as preferred equity to avoid usury laws, though he later qualified that testimony. (Proniloff Depo. at 194:14-18, 194:21-195:1 (A0919-A0920).) The documents do not depend on his credibility. (JX 021 (A0093); JX 090 (A0137).)

Defendants also presented the Court of Chancery with a convergent multi-factor framework, analyzing the transaction under the eleven factors of *In re HH*

Liquidation, LLC, 590 B.R. 211, 292-96 (Bankr. D. Del. 2018) (drawing on *In re AutoStyle Plastics, Inc.*, 269 F.3d 726, 749-50 (6th Cir. 2001)), plus certainty of repayment in bankruptcy and voting rights. (A1645-A1652.) The substantial majority favored debt, converging with California's substance-focused inquiry under *Martin v. Ajax Constr. Co.*, 124 Cal. App. 2d 425, 431 (1954).

The strongest factors favored debt: a fixed maturity date, a monthly payment obligation, and a fixed return of no less than 19%. (A0168-A0169; A0236.) It was secured by a pledge of Nerush's membership interests and the Payment Guaranty. (A0218; A0312-A0325.) Payment did not depend on the Company's success; Gortikov added that it did not matter to him whether the LLCs used the investment for their own benefit. (Trial Vol. II at 288, 290, 295, 321 (A1775, A1777, A1778, A1782).) The LLC Agreement also eliminated fiduciary duties among the Members. (JX 125 § 10.1(b) (A0201).) A mutual waiver, coupled with a fixed return, fixed maturity, and personal guaranty leaves a relationship governed by contractual entitlement, not shared enterprise risk. The Memorandum Opinion did not engage this framework. It nowhere cites *In re HH Liquidation, LLC* and cites *AutoStyle* only in passing parentheticals. (Mem. Op. 38 n.195, 39 n.200.) It rested instead on labels, voting rights, and the negotiation history it called "dispositive." (Mem. Op. 38-41.)

Nor does the estoppel holding supply the missing characterization. California's usury policy is a statutory protection that private parties cannot waive

by agreeing on a label. *Stock v. Meek*, 35 Cal. 2d 809, 817-18 (1950); *WRI Opportunity Loans II, LLC v. Cooper*, 154 Cal. App. 4th 525, 540-42 (2007). California determines whether a transaction is a loan from its economic substance, not its label, and an "investment" designation is not inconsistent with a loan. *Ghirardo v. Antonioli*, 8 Cal. 4th 791, 798 (1994); *Whittemore Homes, Inc. v. Fleishman*, 190 Cal. App. 2d 554, 557-60 (1961). Treating the agreed equity form as a bar to asking whether the transaction was debt in substance puts the label ahead of the characterization. And Section 13.2's terms, detailed above, point toward debt; estoppel cannot replace the required choice-of-law and substance analysis.

4. *The guarantor may assert the usury defense.*

A guarantor may assert usury when the guaranty is coextensive with the underlying obligation. *Martin*, 124 Cal. App. 2d at 431; *WRI Opportunity Loans II, LLC*, 154 Cal. App. 4th at 540-42. The Payment Guaranty guarantees "punctual payment . . . and not merely the collectability" of the Full Redemption Price, including its 19% minimum return, monthly compounding, and default-triggered enhancement. (Payment Guaranty § 1.2 (A0313).) A lender cannot evade usury law by suing the guarantor instead of the borrower. *See Rochester Cap. Leasing Corp. v. K & L Litho Corp.*, 13 Cal. App. 3d 697, 704-05 (1970).

5. *The usury remedy: principal only, no interest, and treble damages on interest paid.*

California's usury remedy is severe: a usurious lender forfeits all interest and recovers only principal. *Winnett v. Roberts*, 179 Cal. App. 3d 909, 921 (1986). A borrower may recover treble the amount of interest actually paid during the applicable limitations period. *Gibbo v. Berger*, 123 Cal. App. 4th 396, 403-04 (2004). Nerush paid Plaintiffs approximately $3 million. (A1779; A1886; A1893.) Defendants sought interest paid plus treble damages under Cal. Civ. Code § 1916-3. *Gibbo*, 123 Cal. App. 4th at 404; *Stock*, 35 Cal. 2d at 816-18. Usurious payments also credit against principal. *Hardwick v. Wilcox*, 11 Cal. App. 5th 975, 992-94 (2017).

The allocation of that $3 million was litigated but never resolved. Plaintiffs applied $2,553,604.02 to principal, and Gortikov testified that $305,637 was applied to the Preferred Return Reserve. (JX 310, Interrogatory 14 (A1236-A1237); Trial Vol. II at 300, 301 (A1780-A1781).) On a loan characterization the Preferred Return Reserve is an interest reserve, and the ledger shows drawdowns immediately following Nerush's June and August 2024 payments, so that sum was interest paid. (JX 322 (A1816-A1817).) Plaintiffs' own accounting allocates the remainder of the $3 million to a $25,536.04 exit fee and a $115,222.23 loan-reserve replenishment. (JX 341-N Tab 3 (A1446).) The exit fee is likewise compensation exacted for the use of money and counts toward the usurious charge, bringing the interest

component to at least $331,174. Defendants sought treble damages on the Preferred Return Reserve portion and addressed the one-year limitations period through relation back under Court of Chancery Rule 15(c)(2). (Defs.' Opening Post-Trial Br. 36 & n.16 (A1658).) The Court made no finding on any of it, because its equity holding removed the premise. (Mem. Op. 42.) What portion of the $3 million is properly characterized as interest, and what credit against principal follows, are questions for the trial court in the first instance.

Defendants sought this remedy below. (Counterclaim VI (A0959-A0976); Defs.' Opening Post-Trial Br. (A1618-A1662); Post-Trial Closing Br. (A1707-A1757).)

Accordingly, if the transaction is usurious, judgment should be reversed on Counterclaims IV, V, and VI, which were resolved solely on the premise that "no loan exists." (Mem. Op. 42) and remanded to limit Plaintiffs' recovery to unreturned principal without interest, to determine what portion of the $3 million Nerush paid constitutes interest and credits against principal, and to determine Defendants' entitlement to treble damages on interest paid, as Counterclaim VI requested.

IV. The Court of Chancery applied its fraud rulings asymmetrically and left the governing elements of Counterclaim VIII undecided.

A. Question presented.

Whether the Court of Chancery erred in entering judgment on Counterclaim VIII where it excluded testimony offered to prove that Gortikov's written funding representations were conveyed to Nerush and rested its no-representation holding on the resulting gap; found the funding emails "neither false nor misleading" without addressing the "has contributed" half of Section 2.2 or the $2.15 million shortfall Defendants identified; and treated reliance asymmetrically—finding that the same agreement lacks an anti-reliance provision for Plaintiffs but applying one against Defendants. (Mem. Op. 26 & n.139, 52-55.) The issues were preserved. (Tr. 538-44 (A1808-A1814); Defs.' Opening Post-Trial Br. 2-3, 5-6, 10-11, 15-16 (A1624-A1625, A1627-A1628, A1632-A1633, A1637-A1638); Post-Trial Closing Br. 36-38 (A1748-A1750).) Alternatively, Supreme Court Rule 8 permits review in the interests of justice.

B. Scope of review.

Whether the Court applied the correct legal standards to reliance, including reliance in fact and justifiability, and to a half-truth theory are questions of law reviewed *de novo*. *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 960 (Del. 2005). So is the classification of the purpose for which evidence was offered under D.R.E. 801(c). *Allen v. State*, 644 A.2d 982, 985 (Del. 1994). The construction of

Sections 2.1, 2.2, 2.5, 6.5, and 16.1 is reviewed *de novo*, *Baldwin*, 283 A.3d at 1115, and subsidiary factual findings for clear error, *RBC Cap. Mkts., LLC*, 129 A.3d at 861.

C. Merits of the argument.

Counterclaim VIII is a claim for fraudulent inducement. Before closing, Gortikov represented in writing that the Investor had already raised and was holding $10.5 million and asked Proniloff to convey that to Nerush to induce him to close. This was untrue; the Investor had in fact raised only approximately $8.35 million. Nerush closed on January 19, 2023 without learning of the approximately $2.15 million shortfall. (JX 099 (A0142); Trial Vol. I at 196 (A1767); JX 310 (A1258-A1259).)

The Opinion rejected Counterclaim VIII on an evidentiary exclusion, a no-representation holding, a falsity finding, and a justifiability ruling. The Opinion states the connection: "Without competent evidence linking Gortikov's email to a statement made to the defendants, the chain of representation is broken." (Mem. Op. 52.) The exclusion creates the gap; the gap supplies the no-representation holding; and the reliance ruling never reaches reliance in fact. Each link fails. (Mem. Op. 26 & n.139, 49-55.)

1. *The hearsay ruling misapplies Rule 801(c): the testimony was offered to prove the representation was made, not that it was true.*

Counsel stated the purpose at trial: "We are offering the information to prove that Mr. Proniloff communicated that information to Mr. Nerush, which originated from Mr. Gortikov," and again that "it's the communication, it's the representation . . . being offered, not that it was true." (Tr. 538-39 (A1808-A1809).) The Court ruled, "It's for the truth of the matter asserted," and expressly invited briefing: "I would love to see you brief why this isn't hearsay." Defendants briefed the question. (Tr. 539, 541, 544 (A1809, A1811, A1814); A1627-A1628; A1748-A1750.)

D.R.E. 801(c) defines hearsay by the purpose for which an out-of-court statement is offered, and a statement offered to prove that it was made, rather than for its truth, is not hearsay. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochem. Co.*, 866 A.2d 1, 21 (Del. 2005); *Henry v. Nanticoke Surgical Assocs.*, 2007 WL 3112480, at *2 (Del. Super. June 20, 2007). A fraud claimant offers the misrepresentation precisely because it is false; the ruling inverted the rule.

The emails themselves are not the out-of-court problem. The January 16 Email ("Can you please tell him that I am giving him 10.5 million dollars") (Supp. A2205-A2206; Trial Vol. I at 92-93, 196 (A1760-A1761, A1767)) and the January 3 Email ("we have had $10.5 million of our investor funds sitting dormant in our account") (JX 099 (A0142)) are Gortikov's own writings, opposing-party statements under D.R.E. 801(d)(2); Gortikov authenticated them, testified that "him" meant

Nerush, and called the January 3 email an "exaggeration." (Trial Vol. I at 92-93, 196 (A1760-A1761, A1767); Mem. Op. 52 n.260.) The only out-of-court link is the relay from Proniloff to Nerush, the fact for which Nerush's recipient testimony was offered.

The Opinion ruled: "Nerush's testimony on what Proniloff told him about Gortikov's statements is inadmissible hearsay. Proniloff did not testify at trial to corroborate that the message was conveyed." (Mem. Op. 52.) Corroboration goes to weight, not admissibility, and the ruling never answers the purpose-of-offer distinction. Nor was the error harmless: the Opinion's next sentence rests the no-representation holding on the gap the exclusion created.

2. *With the relay admissible, the no-representation holding fails: a statement directed through a chosen intermediary is made to its intended recipient.*

The Court held that "the defendants failed to show that a false representation was made to them" because Gortikov never spoke to Nerush directly. (Mem. Op. 52 & n.259.) But the Opinion's own recitation records that Gortikov "asked Proniloff to tell Nerush" that "I am giving him $10.5 million." (Mem. Op. 52.) Gortikov described Proniloff as a "conduit" whose job was "to convey information" and as a "liaison" for Nerush. (Trial Vol. I at 104-05, 186-87 (A1763-A1764, A1765-A1766).) A speaker who makes a false statement to an intermediary, intending or having reason to expect that its substance will be communicated to the claimant and

influence the claimant's conduct, is liable to the claimant. *Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 59-61, 64-65 (Del. Ch. 2015) (applying Restatement (Second) of Torts § 533); *Matrix Parent, Inc. v. Audax Mgmt. Co.*, 319 A.3d 909, 943 (Del. Super. 2024). In the Risky Loan Email, Gortikov wrote directly to Nerush on January 13, 2023, calling the transaction "an incredibly risky loan" (A0145), refuting the premise that he never communicated directly. With the relay evidence admitted, the chain the Opinion found "broken" is complete.

The January 11 Email contemporaneously corroborates that Proniloff relayed Gortikov's funding position to Nerush, recording "Bryan has delivered on his commitment." (JX 104 (A0143).) Defendants made the same inference below. (A1626; A1750). As admitted evidence of that link, the January 11 Email makes the error nonharmless. It does not state the $10.5 million figure and corroborates the relay rather than replacing the excluded testimony.

3. *The falsity and immateriality holdings cannot be reconciled with the record the Opinion cited or with the contract's text.*

The Court found: "As for the emails, they are neither false nor misleading. They accurately represent that the Investor would be investing $10.5 million in the Company and the 10% Owner." (Mem. Op. 52.) That description rewrites the January 3 email, stating: "we have had $10.5 million of our investor funds sitting

dormant in our account" since December 19, 2022: a fact statement, not a forward-looking statement of intent. (JX 099 (A0142).)

The finding also cannot be reconciled with the record the Opinion itself cited: Gortikov acknowledged that the January 3 email was an "exaggeration." (Mem. Op. 52 n.260; Trial Vol. I at 92 (A1760).) Plaintiffs' interrogatory responses identified the initial investment as $8.35 million, a $2.15 million shortfall from the amount represented; Gortikov likewise conceded the $8.35 million figure on cross-examination, and the Rule 15(b) motion placed that figure before the Court. (JX 310 (A1258-A1259); Trial Vol. II at 280 (A1773); Defs.' Mot. to Amend, ¶ 7 (A1488).)

The Ticor borrower closing statement ("Ticor Closing Statement", JX 133) shows a $10.5 million credit and inflated reserve debits, although only $8.35 million had been raised; Gortikov supplied the input figures from which the title company generated the statement. (JX 133 (A0326); Trial Vol. II at 273-75 (A1770-A1772).)

The Investor's bank records supply documentary support beyond Plaintiffs' Interrogatory responses: only approximately *$7,942,000* had been raised before closing, and the bulk of the shortfall was not addressed until a July 2025 capital call. (JX 349 at GC030472-73 (A1847-A1848)). (Trial Vol. II at 333-34 (A1783-A1784).)

Defendants also argued that Section 2.2's representation was a half-truth. (Defs.' Opening Post-Trial Br. 10-11 (A1632-A1633).) The Opinion answered only

half: Section 2.2 "accurately defined the 'deemed' value of the equity" and "was not a representation of liquidity." (Mem. Op. 54.) That addresses "deemed"; it never addresses "has contributed," which Section 2.5 defines as a cash contribution "wired to or deposited in the Operating Account." (LLC Agreement § 2.5 (A0162).) A dispositive argument the Opinion never decided cannot sustain the judgment, and a finding contradicted by the record the Court itself cited cannot survive even clear-error review.

The immateriality reasoning likewise fails. Addressing the same funding facts, the Court observed that the Investor "ultimately contributed over $10.5 million to the project and never defaulted on a funding obligation" (Mem. Op. 54), and that "[a] dispute over when the funds were raised is immaterial where the consideration was actually delivered" (Mem. Op. 56). That is a performance standard, not an inducement standard. Gortikov's admission confirms knowledge and materiality: the spread between the return the TICs paid on $10.5 million and GC Broadway's own investors' return on $8.35 million "was by design," a "critical component, a premeditated, known component fundamental to the economics of this transaction." "If that wasn't the case, we wouldn't have proceeded." (Trial Vol. II at 280, 351-53 (A1773, A1785-A1787).) Materiality is measured when the representation induces the contract; a statement that $10.5 million had already been raised is material to the decision to close even if the money was assembled afterward. *Kronenberg v. Katz*,

872 A.2d 568, 586-87 (Del. Ch. 2004); *see E.I. DuPont de Nemours & Co. v. Fla. Evergreen Foliage*, 744 A.2d 457, 461-62 (Del. 1999). The Court applied the inducement standard for Plaintiffs on Count IV, finding the vacancy representation material and crediting testimony that the Investor would not have closed had it known the truth. (Mem. Op. 26.) The same standard governs Defendants' claim, and the remand should encompass it.

4. *The reliance holding decides justifiability only, and does so asymmetrically.*

The Opinion's entire reliance analysis was one sentence: "Nerush cannot credibly justify his reliance on oral representations that differ from the terms of a written contract he chose not to read." (Mem. Op. 53.) That holding cannot stand on the contract's terms: the same agreement has no anti-reliance clause for Plaintiffs but functions as one against Defendants; its terms do not contradict the funding representation; failure-to-read cases bind signers to terms, not disclaimers. *DCV Holdings, Inc.*, 889 A.2d at 960-61.

The January 11 Email bears on relief: the Opinion did not reach reliance in fact; reversal requires a remand to decide it, not judgment either way here. *Express Scripts, Inc. v. Bracket Holdings Corp.*, 248 A.3d 824, 837 (Del. 2021). It is contemporaneous documentary evidence of inducement: Proniloff's January 11 email acknowledged Nerush's hesitancy and urged him to close; Nerush confirmed

that hesitancy at trial; and he closed eight days later after further communications from Proniloff. (JX 104 (A0143); Trial Vol. III at 530-31, 533-34 (A1802-A1803, A1805-A1806).) That evidence is for the trial court on remand under the correct standard.

It also cannot be squared with the Court's Count IV holding: "The integration clause in Section 16.2 of the LLC Agreement does not bar this claim, as the fraudulent representation is contained within the contract itself and the agreement lacks an anti-reliance provision disclaiming such representations." (Mem. Op. 26 & n.139 (citing *Abry P'rs V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1059 (Del. Ch. 2006)).) Under *Abry*, a standard integration clause without "unambiguous anti-reliance language" does not bar a fraud claim based on representations outside the contract's four corners. *Abry*, 891 A.2d at 1059. The Court's first reason, that Plaintiffs' representation sat within the contract, narrows its own holding, not the finding Defendants invoke: without unambiguous anti-reliance language, extra-contractual representations remain actionable. The same agreement cannot lack an anti-reliance provision for Plaintiffs yet function as one against Defendants.

The failure-to-read authorities the Opinion cited bind a signer to the contract's terms. *See, e.g.*, *Pellaton v. Bank of N.Y.*, 592 A.2d 473, 477 (Del. 1991). (Mem. Op. 21 n.116, 53-54.) They do not create a reliance disclaimer, and the terms do not contradict the funding representation: Section 2.1 uses a materially identical "has

contributed" formulation for the Sponsor's own contribution; Section 2.5 requires cash contributions wired to the Operating Account; Section 6.5 covers claims arising from negotiations and representations before or after execution yet contains no reliance disclaimer; and Section 16.1 likewise does not disclaim reliance. (LLC Agreement §§ 2.1, 2.5, 6.5, 16.1 (A0157, A0162, A0192-A0193, A0215).) The notice holding therefore rests on a meaning the contract does not state. (Mem. Op. 53-55.)

5. Relief.

Defendants request reversal of the judgment on Counterclaim VIII and affirmative defense of fraudulent inducement, with remand to apply the governing standards to reliance in fact, falsity, and materiality.

If the Court concludes that the record permits no conclusion other than fraudulent inducement, Defendants alternatively request avoidance of Nerush's obligation under Section 1.2 of the Payment Guaranty.

V. The Fee Award cannot stand if the Court grants relief on Argument III or Argument IV.

A. Question presented.

Whether the Fee Award can stand if the Court grants relief under Argument III or Argument IV, where the award rests on contractual prevailing-party fee shifting and reversal would eliminate the predicate for prevailing-party status. (Mem. Op. 67-69; Final J. ¶¶ 8-9.)

B. Scope of review.

Fee awards are reviewed for abuse of discretion. *Mahani v. EDIX Media Grp., Inc.,* 935 A.2d 242, 245-46 (Del. 2007). Whether an award survives reversal of the judgment supplying prevailing-party status is a question of law reviewed *de novo. Vill. Practice Mgmt. Co., LLC v. West*, 342 A.3d 295, 322 (Del. 2025).

C. Merits of the argument.

The Fee Award rests on Section 16.13 of the LLC Agreement (A0217) and Section 1.7 of the Payment and Recourse Guaranties. (A0314.) (Mem. Op. 67-68.) Plaintiffs prevailed on Counts I, III, and IV. (Mem. Op. 68-69.) Relief on Argument III or IV removes the largest grounds for the award. Defendants request vacatur and remand for a fresh prevailing-party determination.

CONCLUSION

For the foregoing reasons, Defendants respectfully request reversal of paragraph 6(a) of the Final Judgment and remand for recalculation of prejudgment and post-judgment interest under 6 *Del. C.* § 2301(a), compounded quarterly.

Defendants further request reversal of the equity holding, application of California law, and reversal of the judgments on Counterclaims IV, V, and VI. If usury is found, Plaintiffs' recovery should be limited to unreturned principal without interest, with remand to determine what portion of the $3,000,000 Nerush paid constitutes interest subject to credit against principal and Defendants' entitlement to treble damages.

Defendants further request reversal of the judgment on Counterclaim VIII, with remand to apply the correct standards governing reliance in fact, falsity, and materiality or, if the record compels fraudulent inducement, avoidance of Nerush's obligation under Section 1.2 of the Payment Guaranty.

If relief is granted under Arguments III or IV, Defendants respectfully request vacatur of the Fee Award and remand for a new prevailing-party determination.

Respectfully submitted,

/s/ Carl D. Neff
Carl D. Neff (No. 4895)
Nathan D. Barillo (No. 5863)
PIERSON FERDINAND LLP
CSC Station
112 S. French Street
Wilmington, Delaware 19801
Tel: (302) 482-4244

Attorneys for Defendants and Counterclaimants Below / Appellants, Alex Nerush and AN SM 1925 Broadway Holdings, LLC

Dated: September 4, 2026