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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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NATURE OF PROCEEDINGS[1]

The Court of Chancery correctly held Alex Nerush – a proven fraudster – to his agreement. After accepting millions from GC Broadway, LLC ("Investor"), Nerush and AN SM 1925 Broadway Holdings, LLC ("Sponsor" and with Nerush, "Defendants") sought to avoid their obligations through unsupported usury and fraud claims. The Court correctly found it was Nerush who breached his obligations and committed fraud. As the Court explained, "defendants' attempts to avoid liability through post hoc counterclaims lack factual and legal support." (Mem.Op. 1, 24–27)

Investor and Bryan Gortikov (collectively, "Plaintiffs") brought this action to enforce the Amended and Restated Limited Liability Company Agreement ("LLC Agreement") of AN SM 1925 Broadway, LLC (the "Company") and Nerush's guaranties. The Court enforced the parties' choice of Delaware law and upheld the negotiated preferred-equity structure. The Court rejected Defendants' efforts to recast the investment as a usurious loan and held Nerush liable for breach of guaranty and fraud. (Mem.Op. 20–27, 33–56)

[1] Unless otherwise defined, capitalized terms have the meanings given in the Court's February 26, 2026 Memorandum Opinion in *GC Broadway, LLC v. AN SM 1925 Broadway Holdings, LLC*, C.A. No. 2024-1070-LWW ("Mem.Op." or "Memorandum Opinion"). The June 11, 2026 Final Judgment and Order is referred to as "Judgment." Appellants' Corrected Opening Brief on Appeal is referred to as "Opening Brief" or "OB."

After ruling for Plaintiffs on all liability issues, the Court examined whether Plaintiffs proved their damages. (Mem.Op. at 57-69) It awarded unreturned capital, recoverable expenses, the Exit Fee, and $300,000 in fraudulently diverted funds, while rejecting Plaintiffs' claim for "Accrued PIK" and certain other narrow damages for insufficient proof. That finding did not invalidate the contractual interest rates applicable to damages the Court did award. Defendants conflate unproven damages with pre- and post-judgment interest that accrues as a matter of law on proven damages. The Court properly awarded pre- and post-judgment interest at the applicable contractual or legal rates. (Mem.Op. 65–66; Judgment ¶6(a))

Defendants' characterization of post-judgment interest as imposed "sua sponte" also fails. Plaintiffs expressly requested continuing contract-rate interest until payment and the Court granted this request. (A1383–A1384; A1579–A1580; A1585; Mem.Op. 69; Judgment ¶6(a)) On June 11, 2026, the Court entered the Judgment after reviewing and reducing Plaintiffs' fee request. The Judgment reflects exacting scrutiny of Plaintiffs' claims and damages, and holds Defendants to their obligations. This Court should affirm.

SUMMARY OF ARGUMENT[2]

1. Denied. The Court properly awarded pre- and post-judgment interest on proven damages. (Mem.Op. 65–67) The $7,077,057 net unreturned capital damages award deducts reserve credits and excludes all "Accrued PIK" (unpaid Preferred Returns added to Investor's capital base). (A0167; Judgment ¶6(a)) The Court rejected PIK for insufficient proof of floating SOFR inputs and payment credits, not because the LLC Agreement's Enhanced Preferred Return rate was invalid. (Mem.Op. 61–62) Failure to prove PIK damages does not defeat Plaintiffs' right to interest on damages they proved. (Mem.Op. 65–66) This interest compensates for delayed payment without reinstating rejected damages. Moreover, Plaintiffs did not waive post-judgment interest at the contract rate. (Judgment ¶6(a))

2. Denied. Investor's investment is a "use of money" under Section 2301(c), exempting it from the statutory post-judgment interest cap. 6 *Del.C.* §2301(c). (Mem.Op. 65–66)

3. Denied. The Court correctly applied Delaware law, holding that the transaction is preferred equity exempt from usury. (Mem.Op. 33–42) Even as a loan,

[2] This Summary of Argument follows the order of the Opening Brief. The Argument section of this brief addresses liability first, then interest, then fees, an order which Plaintiffs believe is easier to follow and consistent with the historical approach of addressing liability before damages, interest, and fees.

it is exempt from Delaware's interest-rate limits. (A0157, A0218) California law likewise treats the investment as equity exempt from usury. (Mem.Op. 35–42)

4. Denied. The Court correctly rejected Defendants' funding-fraud claims. (Mem.Op. 51–56) The LLC Agreement disclosed a "deemed" $10.5 million investment, not a representation that the investment was held in cash. (A0157–A0160; B00340 (Gortikov) 62:15–24) Investor fully funded the closing and all Company-accessible reserves; only the reserve for Investor's own returns was incomplete at closing (those funds were raised later). (B00344-46 (Gortikov) 86:9–88:6) Regardless, leave to add Counterclaim VIII after trial should have been denied. (A1386; A1612)

5. Denied. This Court should affirm the fee award.

STATEMENT OF FACTS

A. The Parties, Non-Parties, and Representatives

Investor is a California limited liability company managed by Gortikov, a licensed real estate broker. (A1365, ¶5; B00294; B00334 (Gortikov) 10:4-21) In January 2023, Investor acquired preferred equity in the Company and became a member. (A0153-0160, Introduction, §2.2; Mem.Op. 6-7)

Sponsor was the Company's initial Managing Member; Nerush owns Sponsor. (A1365; A1370, ¶¶6, 24; Mem.Op. 7) Nerush negotiated the preferred equity transaction through his lawyer Thomas Gotfredson and his CPA Alex Polovinchik. (A1368, ¶¶17-18) Nerush is a "sophisticated California-based real estate investor," (Mem.Op. 3), and lender who has participated in over thirty real estate transactions, makes commercial loans at 21%, and reported owning fourteen properties worth over $56 million in December 2022. (B00017; B00301-302 (Nerush) 63:20–64:12; B00373 (Nerush) 462:1–11)

Before Investor's investment, the Company and 1925 Broadway, LLC ("10% Owner") acquired property at 1925 Broadway and 1450 20th Street in Santa Monica (the "Property") as 90% and 10% tenants-in-common. (A1364-A1367 ¶¶4, 12–13; Mem.Op. 3) WS Communities, LLC ("WS") managed 10% Owner on behalf of certain Nerush relatives. (B00349-350 (Gortikov) 94:1–22-95:13) Greg Proniloff ("Proniloff") represented 10% Owner as a WS employee. (A0292; A1762)

B. The Property and Term Sheet

In 2022, Nerush and WS began discussing the purchase and redevelopment of the Property. (A1364; A1366–A1367, ¶¶4, 8–12) WS approached Gortikov about investing in the Property. (A1366, ¶8; B00001; B00324 (Gortikov) 10:19-21)

On November 28, 2022, the parties signed a non-binding term sheet ("Term Sheet"). (A0087-89; A1366 ¶9; B00335-336, B00339 (Gortikov) 19:3-20:10, 33:5-8) The Term Sheet grants Plaintiffs the "exclusive right to make the Preferred Equity investment" on terms that included a preferred return, mandatory redemption, and application of Delaware law. (A0080-0088) Under the header "Alternative Structure," the Term Sheet provided that "Investor, at its discretion, may elect to structure the investment as a loan … evidenced by such loan documents as required by Investor, including a Promissory Note and a second lien Deed of Trust." (A0083-84) Had the Alternative Structure proceeded, Investor would not have been a member and the investment would have been exempt from California's usury laws under a well-established exception. (B00337-338 (Gortikov) 25:15-26:18)

On December 16, 2022, the Company and 10% Owner purchased the Property. (B00018) Nerush supplied some of the funds from a 1031 exchange, which provided Nerush tax benefits. (A1368 ¶15; B00383 (Nerush) 516:6–19; Mem.Op. 4)

C. Nerush's Representatives Negotiate Terms of the Deal

After 10% Owner and the Company purchased the Property, the parties retained counsel to document Investor's soon-to-be-completed investment. (A1368 ¶17; A0217–A0218 §16.14) Gotfredson reviewed and commented on drafts, remained in contact with Nerush, and obtained changes benefitting Defendants. (B00362, B00367 (Gotfredson) 425:1–18, 436:1–18) Gotfredson proposed two alternatives on Nerush's behalf:

> Alex's tax counsel and I have concluded the Second Deed of Trust in favor of GC Broadway, LLC securing the various guaranty obligations may violate the provisions of Section 6.14 of Revenue Procedure 2002-22 as being a loan secured by TIC property from a "related person" to a TIC owner and thereby imperil successful 1031 treatment for Alex's exchange.
>
> **On behalf of Alex we propose two possible alternatives for moving forward: 1. The second deed of trust is eliminated, and therefore the "related person" inquiry goes away and the parties can move forward with the Investor membership as proposed, or 2. the Investor participates as a second trust deed lender and is not included as an Investor Member in either TIC LLC Operating Agreement.**
>
> My expectation is the first alternative may be preferred, as it will allow the deal to proceed as currently structured absent the Second Deed of Trust. The guarantees are binding in and of themselves and the Investor Member retains significant rights under the Operating Agreement to provide protection in any default situation, without resort to the Second Trust Deed remedies. The second alternative will require a complete "re-set" and will push the closing into 2023.

(A0136 (emphasis in original); Mem.Op. 5) Nerush was concerned that making Investor both a member and a secured creditor could jeopardize his 1031 exchange.

(B00020; B00363 (Gotfredson) 427:5–17; Mem.Op. 5) Investor agreed to drop the proposed real-estate security in exchange for a pledge of membership interests and to structure the transaction as equity to address Nerush's concerns. (B00024; A0218 §17.1; A1788; B00361 (Gortikov) 397:1–13)

Despite the agreement to structure the investment as equity, on January 13, 2023, Nerush's lawyer proposed edits to the draft LLC Agreement that would treat Investor "as a creditor" and its payments as "interest and principal." (B00045, attachment §§4.1(a), 13.2 and A-3; Mem.Op. 6) Investor rejected the proposal. (A1369–A1370 ¶¶20–21; Mem.Op. 6) On January 16, 2023 Gotfredson withdrew his proposal, and Nerush signed the LLC Agreement on January 19, 2023, preserving Investor's status as a member. (B00154; A0153, A0210; A0220-A0227; A1370 ¶¶21-24)

D. The LLC Agreement and Guaranties

The parties signed the LLC Agreement on January 19, 2023. (A0153, A0220–A0222) Nerush also signed the Payment Guaranty and the Guaranty of Recourse Obligations ("Recourse Guaranty"). (A0220, A0222, A0308, A0325) At closing, Nerush personally received $4,993,806 invested by Investor. (A1370 ¶23; B00380-382 (Nerush) 497:2–499:8; Mem.Op. 6-7)

The LLC Agreement sets forth the "rights and obligations of the Members, [details] the procedures for managing and operating the Company and related

matters," defines Investor as the "Investor Member" and provides that Investor and Sponsor "constitute all of the Members of the Company." (A0153–A0154) Section 2.2 identifies Investor as the Preferred Equity Member that "has contributed or is deemed to have contributed" $9.45 million, subject to specified retained reserves. (A0157–A0160 §2.2) With its parallel investment in the 10% Owner, Investor's total investment was $10.5 million. (B00340 (Gortikov) 62:15–24; A0334 §3) The retained reserves covered senior-loan payments, preferred returns, development, taxes and insurance, refinancing, and Investor costs; the LLC Agreement credited retained amounts as contributions and specified their uses. (A0157–A0160 §2.2)

Investor had "voting and decision rights" and veto power over "Major Decisions." (A0153–A0154, A0171–A0172, A0246 §§1.2, 5.2–5.3, Ex. B(o), (s); Mem.Op. 38) Its fiduciary duties were eliminated. (A0201-A202 §10.1(b)) Section 13.2 accommodated debt treatment for tax and accounting purposes, but expressly characterized the membership as a "limited liability company interest of a member under the Delaware Act" for interpretation, enforcement, members' relative rights, and remedies. (A0210 §13.2)

The parties selected Delaware law to govern. (A0215 §16.5) Further, the agreement separately distinguished Company Loans from returns and distributions on equity, showing the parties distinguished debt from equity under the agreement. (A0161–A0162, A0166–A0169 §§2.4, 4.1)

The LLC Agreement required Sponsor to cause the Company to redeem Investor's membership interest no later than the Redemption Date, which became September 30, 2024, by paying the "Full Redemption Price." (A0168–A0169; Mem.Op. 13) That price included Investor's Unreturned Capital Contributions, accrued and unpaid returns, outstanding Company Loans and interest, unpaid Investor Member Expenses, the Exit Fee, and other specified amounts due to Investor. (A0168–A0169) Investor's capital carried a "Preferred Return" calculated at the greater of SOFR plus a 15-percentage-point spread or 19% annually, compounded monthly. (A0236, A0240) Specified triggering events, including a Removal Event, entitled Investor to an "Enhanced Preferred Return" five percentage points above the Preferred Return, also compounded monthly. (A0167, A0229)

To secure that redemption, Nerush guaranteed "punctual payment" of the Full Redemption Price. (A0312–A0313) Nerush also executed a Recourse Guaranty, covering losses arising from fraud and misappropriated rent. (A0296–A0298, A0309–A0310) Both guaranties select Delaware law. (A0305, A0321–A0322)

E. Investor Funds the Investment

The LLC agreements distinguished the $10.5 million "deemed" invested from cash disbursed at closing and retained reserves. (A0157–A0160; B00340 (Gortikov) 62:15–24) By closing, Investor raised approximately $8.35 million, funding the closing and paying Nerush nearly $5 million. (A1773; A1370 ¶23; B00344, B00360

(Gortikov) 86:2–21, 353:3–4; Mem.Op. 7) Only the Preferred Return Reserve was not fully funded. This reserve held funds to pay Investor's own return; neither the Company nor the 10% Owner could draw it for taxes, development, or other project expenditures. (B00344-346, B00356-357 (Gortikov) 86:22–88:6, 309:4–310:3; Mem.Op. 61 n.308) Reserve payments followed a contractual schedule as returns became due (B00357-358 (Gortikov) 310:20–311:5) and Investor could raise additional capital as needs arose. (A1787, B00360 (Gortikov) 353:9–15; B00358 (Gortikov) 311:6–19) Through September 2024, Investor had enough money to cover the reserves. (B00359 (Gortikov) 318:7–16) Ultimately, Investor raised approximately $10.6 million and has had to continue raising funds. (B00346 (Gortikov) 88:7–10)

In preclosing correspondence with Proniloff, Gortikov wrote that $10.5 million had been "sitting dormant in our account." (A0142; A1760–A1761; B00347-348 (Gortikov) 92:10–93:12; Mem.Op. 51) In a separate January 16 exchange, Gortikov asked Proniloff to tell Nerush, "I am giving him $10.5 million dollars;" the message did not say the entire amount was already in cash. (A2205–A2206)

Nerush provided no evidence of a preclosing discussion with Gortikov about the amount raised. (B00374-377 (Nerush) 479:15–482:5) Instead, Nerush asserted he understood that Investor already held $10.5 million based on what Proniloff allegedly told him. (A1807, A1812–A1814; B00388 (Nerush) 542:2–7; Mem.Op.

52) Although Nerush later claimed he would not have closed had he known less than $10.5 million was raised, Nerush also testified that one reason he agreed to proceed was to obtain cash for another project. (B00390 (Nerush) 545:10–23; A1805–A1806; B00384-385 (Nerush) 533:15–534:7)

The Court rejected Nerush's fraud claims, excluding Nerush's account of Proniloff's alleged out-of-court statements as hearsay and finding no justifiable reliance due to the LLC Agreement's language and Nerush's decision not to read the agreements. (Mem.Op. 51–54) Addressing the fraud claim, the Court found that Investor "never defaulted on a funding obligation" or capital call and that "[t]he project stalled due to defendants' leasing breaches, not a lack of available capital." (Mem.Op. 54–56)

F. Defendants' Wrongdoing

Although Sponsor agreed to manage the Company, Nerush admitted never reading the agreements. (B00377-378 (Nerush) 482:6–8, 483:15–24; B00303-319 (Nerush) 69:21–73:16, 82:14–83:16, 143:6–144:6, 150:12–151:21, 181:16–183:3, 194:10–196:14) He also admitted concealing his belief that Investor's investment was a loan. (B00368 (Nerush) 452:9–19) Further, although he represented that the Property was "vacant … and will be kept vacant permanently" (A0187, A0253 at Ex. D-2), Nerush testified that he intended to rent out part of the Property even before

signing the LLC Agreement. (B00372 (Nerush) 459:3-7; B00280) The Court correctly found fraud. (Mem.Op. 25)

Months later, Investor discovered Nerush had permitted Dandada, Inc. ("Occupant") to occupy the Property. (A1377–A1379 ¶¶38, 44(c); B00369 (Nerush) 456:6–15; Mem.Op. 10-12). Through his affiliate AN Properties, Nerush collected $20,000 in monthly rent which he diverted from the Company. (A1378 ¶39; B00370 (Nerush) 457:8–24). Occupant's principal confirmed rent checks went to AN Properties or Nerush. (B00330 (Moghadam) 45:16–21). Asked if he had ever deposited rent in a Company account, Nerush answered: "I did not." (B00371 (Nerush) 458:15–18) The Court found $300,000 in fraudulently diverted rents. (Mem.Op. 63–65)

The Court found Nerush's fraud hindered redevelopment that Investor's investment was meant to support. (B00341-343 (Gortikov) 72:1–9, 73:14–74:2; Mem.Op. 24–27, 54)

G. The LLC Agreement Amendments

Unaware of the diverted rent, Investor agreed to let Occupant temporarily occupy the Property in exchange for a commitment to surrender possession by a specified deadline. (A0561–A0562 §§1–2; B00351-352 (Gortikov) 108:5–8, 114:16–18; A0561; A1379 ¶¶43–45)

Investor later agreed to extend Defendants' time to deliver possession and redeem its investment. (A0333 §2(a)–(c)) The May 22, 2024 First Amendment extended the Redemption Date and the date to deliver possession to August 31, 2024, conditioned on a $1 million deposit. (A0332–A0333 §2) The parties agreed Investor's "outstanding capital contributions" to the Company and 10% Owner remained at $10.5 million, documented the reserve balances, and specified the deposit's allocation between reserves, the Exit Fee, and reduction of the Full Redemption Price. (A0333–A0334, A0338–A0339 §§2–3, Ex. A)

On August 30, 2024, Investor agreed to further extend the deadlines to September 30, conditioned on a $2 million deposit. (A0340–A0341 §2(a)–(c)) In exchange, Sponsor and Nerush acknowledged Investor was "not in default under the LLC Agreement" and they had "no set-offs, counterclaims, claims, defenses or other causes of action" against Investor arising from the preferred equity investment. (A0342 §4). Both amendments expressly "ratified and affirmed" the LLC Agreement, leaving it "in full force and effect." (A0334 §7; A0342 §8)

The Court used these agreements to determine the deposits by Nerush and the remaining Unreturned Capital Contributions underlying the damages award. (Mem.Op. 59)

H. Defendants' Breach

Despite two extensions, the September 30, 2024 deadline passed without compliance. (A1381 ¶¶53–56) Neither the Company nor Nerush paid Investor anything and Occupant failed to vacate. (A1381 ¶¶53–56) Instead, Nerush caused the Company to file suit in California against Investor, seeking to recast Investor's preferred equity investment as a usurious loan. (A1381–A1382 ¶¶57–58)

Investor delivered written notices on October 9 and November 14, 2024, removing Sponsor as the Company's Managing Member under the LLC Agreement, which Sponsor refused to acknowledge. (A1383 ¶¶65–66) Plaintiffs therefore sued to confirm Investor's right to manage the Company, enjoin prosecution of the California lawsuit, and enforce Nerush's guaranties. (A0363–A0367)

Defendants stipulated to judgment for Plaintiffs on Count I. (A0955) On June 9, 2025, the Court entered that judgment, removing Sponsor and confirming Investor as Managing Member. (A0954, A0956 ¶¶1–3)

Defendants voluntarily dismissed the California lawsuit on June 17, 2025, providing Plaintiffs' requested Count II relief. (A1382 ¶¶62–63) Resolving Counts I and II settled the control dispute, leaving Plaintiffs' requests for damages, attorneys' fees, costs, and interest. (A0956 ¶4) The case proceeded to trial on Plaintiffs' claims for breach of the Payment Guaranty and fraud, together with Defendants' counterclaims. (Mem.Op. 18)

I. The Court Enforces Defendants' Obligations

Following trial, the Court held Nerush liable for breaching his guaranties and for concealing the occupancy of the Property and diverting its rents. (Mem.Op. 1–2, 17–18, 20–27) The Court rejected the usury and fraud theories Defendants raised to avoid those obligations, including the funding fraud counterclaims Defendants added after trial. (Mem.Op. 28–32, 33–56) The Court summarized: "plaintiffs met their burden of proof; the defendants did not." (Mem.Op. 1)

After determining liability, the Court examined the requested damages components in detail. (Mem.Op. 58–62)

On Count III, the Court awarded $7,946,396 in Unreturned Capital, supported by the agreements and documented paydowns; $277,239 in third-party expenses incurred to cure Defendants' defaults; and the $79,464 contractual Exit Fee. (Mem.Op. 59–60) It then deducted $869,339 in remaining reserves and associated interest, reducing Count III damages. (Mem.Op. 61–62 & n.314.) Separately, the Court awarded $300,000 in fraud damages on Count IV, requiring Nerush to return rents he diverted and recognizing Investor's entitlement to that recovery under the Recourse Guaranty. (Mem.Op. 63–65)

The Court denied $3,506,820 in Accrued PIK damages finding Plaintiffs did not adequately prove the floating SOFR inputs or account for the reserves in

calculating PIK, creating a risk of double recovery. (Mem.Op. 61–62) The Court did not find the Enhanced Preferred Return rate (the "Contract Rate") unenforceable.

The Court also excluded $678,954 in senior-loan advances covered by the guaranty's express carve-out and rejected the separate $47,612 interest demand and projected future expenses for insufficient proof. (Mem.Op. 61–62)

The Court separately addressed pre- and post-judgment interest on damages. (Mem.Op. 62 n.310, 65–67) Explaining that "the parties bargained for specific rates of return," the Court applied the Contract Rate to certain of the proven damages. (Mem.Op. 65–66) The Unreturned Capital Contribution damages were $7,077,057: $7,946,396 in Unreturned Capital less the $869,339 reserve credit. That balance excluded the rejected Accrued PIK. (Mem.Op. 65–66) Interest on that net amount accrued at the Contract Rate, compounded monthly from the September 30, 2024 Redemption Date. (Mem.Op. 66) The recoverable third-party expenses bore interest at the contractual 21.5% Company Loan rate from the dates of the advances, while the Exit Fee and fraud damages bore statutory interest. (Mem.Op. 66–67)

The Court also held that Plaintiffs were entitled to reasonable attorneys' fees and costs after enforcing the guaranties, prevailing on the management claim, and defeating Defendants' counterclaims and defenses. (Mem.Op. 67–69)

On June 11, 2026, the Court entered the Judgment. Paragraph 6(a) of the Judgment provides for post-judgment interest at 24%—the Contract Rate under the

LLC Agreement—compounded monthly from and after February 26, 2026. (Judgment ¶6(a)) The Judgment separately applies the Company Loan 21.5% rate, compounded monthly, to the advances it found Investor made, and statutory interest, compounded quarterly, to the Exit Fee and fraud award (which had no applicable contract rate). (Judgment ¶¶6(b)–7)

Finally, although Defendants did not oppose Plaintiffs' fees, the Court independently reviewed them. (Judgment 10–11) The Court excluded $12,798.50 for bankruptcy work and awarded $2,087,377.59. (Judgment 10–11)

ARGUMENT

I. THE COURT CORRECTLY APPLIED DELAWARE LAW AND REJECTED USURY[3]

A. Question Presented

Whether the Court correctly enforced the parties' Delaware choice-of-law provisions and rejected usury where their negotiated agreements created a preferred membership interest whose redemption Nerush guaranteed. (Presented below at A1590–A1598, A1673–A1683; decided at Mem.Op. 33–42)

B. Scope of Review

Choice of law and unambiguous contract interpretation are reviewed de novo. *RSUI Indemnity Co. v. Murdock*, 248 A.3d 887, 896, 905 (Del. 2021). Factual findings and witness credibility are reviewed for clear error. *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 849, 861 (Del. 2015).

C. Merits of Argument

1. Delaware Law Governs

Delaware law governs the challenged equity interests in the Company, a Delaware LLC. (A0153, A0210, A0215; Mem.Op. 34–37) Section 16.5 of the LLC Agreement provides that "[t]his Agreement and the rights of the parties . . . shall be governed by the internal laws of the State of Delaware without regard to principles of conflict of laws." (A0215) Delaware law is clear: "[a] limited liability company

[3] Argument I of this brief responds to Argument III in the Opening Brief.

agreement that provides for the application of Delaware law shall be governed by and construed under the laws of the State of Delaware in accordance with its terms." 6 *Del.C.* §18-1101(i). California likewise applies the organizing jurisdiction's law to a foreign LLC's organization and internal affairs. Cal. Corp. Code §17708.01(a)(1). These statutes are consistent with the internal-affairs doctrine, which requires courts to adjudicate governance and internal relationship disputes under the laws of the state in which the entity is formed. *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1112–13 (Del. 2005).

The choice of law also satisfies the Restatement's test. Under Section 187(2)(b), the parties' choice of law controls unless it violates a "fundamental public policy" of a state whose law would otherwise govern and that has a "materially greater interest" than Delaware. (Mem.Op. 35) *Change Capital Partners Fund I, LLC v. Volt Electrical Systems, LLC*, 2018 WL 1635006, at *6–8 (Del.Super.); *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 465–67 (1992).

Defendants cannot meet this test. Delaware and California law[4] do not conflict, California public policy is not violated, and Delaware's interest is greater. The Court explained:

> California does not have a materially greater interest in this matter than Delaware. This dispute concerns the internal affairs of a Delaware

[4] *See Section* I(C)(2) below. Delaware and California apply the same standard to distinguish debt from equity, and California's usury laws do not apply to equity investments. (Mem.Op. 35-37)

> limited liability company—specifically, the classification of a member's capital contribution as debt or equity. The core issue is the definition of a membership interest under a limited liability company agreement. To that end, "[a] claim to enforce [an] entity's constitutive document necessarily implicates the special interest that a sovereign has in adjudicating cases involving the internal affairs of entities created under its laws." Delaware has a paramount interest in providing certainty and uniformity over the internal governance and capital structure of entities created under its laws.

(Mem.Op. 36 (citations omitted))

The Court's ruling is consistent with *Change Capital*, which recognized that another state's usury policy does not defeat the parties' choice of law. There, the Court enforced a Delaware choice-of-law provision in a commercial loan despite New York's and Texas's fundamental policies against usury. 2018 WL 1635006, at *2, *7–9. The defendants failed to demonstrate that another state had "a materially greater interest than Delaware in the enforcement or non-enforcement of the loan transaction[.]" *Id.* at *8. The court applied Delaware law and dismissed the counterclaims based on New York and Texas usury law. *Id.* at *9.

Delaware's interest is greater here than in *Change Capital* because this dispute concerns the capital structure and ownership rights of a Delaware entity and does not concern loans. *VantagePoint*, 871 A.2d at 1112–13; Mem.Op. 36–40. While Defendants argue that the internal affairs doctrine does not apply, "a claim to enforce the entity's constitutive document," as here, "necessarily implicates the special interest that a sovereign has in adjudicating cases involving the internal affairs of

entities created under its laws." *Terramar Retail Centers, LLC v. Marion #2-Seaport Trust U/A/D June 21, 2002*, 2017 WL 3575712, at *7 (Del.Ch.); *see Nedlloyd*, 3 Cal.4th at 467–68 (recognizing the organizing state's "keen and intimate interest in internal corporate affairs," including ownership and management).

Nerush's Payment Guaranty and Recourse Guaranty independently select Delaware law. (A0305 §5.3, A0312–A0313, A0321–A0322 §5.3) That choice and the guaranties' connection to Company obligations support applying Delaware law to both agreements. *Change Capital*, 2018 WL 1635006, at *2, *7–9.

Defendants incorrectly contend that "[t]he Court never performed [a conflict of law] analysis." (OB 29) The Court considered California's contacts, stated the §187 test, and explained Delaware's paramount interest in Company governance and capital structure. (Mem.Op. 34–37) The Court resolved this issue. (Mem.Op. 35–37) As in *Change Capital*, the Delaware choice-of-law provision controls and it defeats any foreign-law usury claims. This is true even if this equity investment were a loan because the investment exceeds $100,000 and repayment is not secured by a mortgage against a borrower's principal residence. *Change Capital*, 2018 WL 1635006, at *8–9; 6 *Del.C.* §2301(c). (A0157, A0218, A1369–A1370)

2. The Investment is Preferred Equity

While application of Delaware law resolves the usury claim, the Court further correctly held that Investor's preferred equity was not a disguised loan. (Mem.Op. 37–41)

Under Delaware law, whether an instrument creates owner or creditor rights "depends upon the terms of his contract" and the intent of the parties. *Wolfensohn v. Madison Fund, Inc.*, 253 A.2d 72, 75 (Del. 1969). California law applies the same standard. (Mem.Op. 35-37 and n.190) The contractual terms must be read as a whole, and "the plain meaning of clear and unambiguous language" must be enforced. *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023).[5]

The LLC Agreement identifies Investor as the Company's "preferred equity member" and credits $9.45 million in deemed-contributed capital as its "Preferred Equity Investment." (A0153–A0154 §1.2; A0157–A0158 §2.2) Membership carried

[5] Defendants' reliance on *In re HH Liquidation, LLC*, 590 B.R. 211 (Bankr.D.Del. 2018) does not show the Court used the wrong test. (OB 34–35) Following *In re SubMicron Systems Corp.*, 432 F.3d 448 (3d Cir. 2006), *HH Liquidation* treats certain factors as guides to determining the parties' actual intent, rejecting a "mechanistic scorecard." *Id.* at 290. Intent is assessed through the agreements, conduct, and circumstances. *SubMicron*, 432 F.3d at 455–57. The Court expressly applied that inquiry and considered Investor's rights, priority, redemption conditions, and the negotiations. (Mem.Op. 37–40)

substantive rights to call and vote at member meetings and approve Major Decisions, including leases and affiliate transactions. (A1371–A1372 ¶¶25(g), 26(a)–(c))[6]

The LLC Agreement treats loans differently. Section 3.1(a) authorizes seller's "Loan," while Section 2.4 permits Investor to make "Company Loans" with a separate interest rate and repayment before distributions. (A0161–A0163) Section 3.2(c) restricts borrowing to specified categories, without identifying the Preferred Equity Investment as an authorized loan. (A0164) Defendants' reading would convert capital authorized by Section 2.2 into debt that violates the agreement's borrowing provisions, making the LLC Agreement inconsistent.

Section 13.2 distinguishes tax and accounting treatment from enforceable membership: "notwithstanding" debt treatment for tax reporting, Investor retains a "limited liability company interest of a member under the Delaware Act" for interpretation, enforcement, and remedies. (A0210) Tax reporting and the absence of a capital account cannot erase that distinction. (OB 30–31; A0162 §2.7; A0210 §13.2) GAAP debt classification does not determine a security's legal character. *Harbinger Capital Partners Master Fund I, Ltd. v. Granite Broadcasting Corp.*, 906 A.2d 218, 226–27 (Del.Ch. 2006). Likewise, a fixed return and personal guaranty

[6] Defendants' argument that a limitation on fiduciary duties creates a loan is specious. (OB 35) Creditors owe no duties, members do, but parties also are permitted to limit or waive member duties. 6 *Del.C.* §18-1101(c).

do not require treating equity as debt.[7] The LLC Act permits a member entitled to a distribution to exercise creditor remedies "with respect to the distribution," subject to contractual and statutory restrictions. 6 *Del.C.* §18-606. Enforceable, mandatory payment rights can coexist with membership without making the capital contribution a loan. *Id.*; A0154, A0210; Mem.Op. 40 (mandatory redemption rights do not convert equity into debt).

The parties' rejection of debt treatment during negotiations, events the Opening Brief completely ignores, resolves any ambiguity. *Zayo Group, LLC v. Latisys Holdings, LLC*, 2018 WL 6177174, at *12–13 (Del.Ch.) (using drafting history to resolve ambiguity against obligations proposed but omitted).[8] Nerush's counsel proposed membership without a second deed of trust or a secured loan without membership. (A0136; A1369 ¶19) The parties elected membership.

[7] Defendants invoke the absence of a guaranty in *Harbinger* to argue that Nerush's guaranty requires debt treatment. (OB 32–33) But *Harbinger* did not hold that a payment guaranty necessarily converts LLC membership interest into debt. 906 A.2d at 220–21, 230. Here, Investor held substantial membership and management rights. (A0171–A0172; A1371–A1372) Nerush's guaranty added separate payment recourse without eliminating those membership rights. (A0312–A0313)

[8] California law produces the same result. Defendants must prove a loan or forbearance, and "[t]he creation of a debtor-creditor relationship does not, without more, constitute a loan." *Ghirardo v. Antonioli*, 8 Cal.4th 791, 798–99, 802 (1994). *Junkin* upheld an investment despite a secured note and unconditional repayment obligation, examining management rights and the entire transaction. *Junkin v. Golden West Foreclosure Service, Inc.*, 180 Cal.App.4th 1150, 1155–58 (2010). Nerush's guaranty defense fails because the underlying transaction is not a usurious loan, not because he waived an illegality defense.

Nerush's counsel later proposed treating Investor as a creditor and its contribution as "debt and not equity for all purposes." Investor rejected those changes and they were withdrawn. (A1369–A1370 ¶¶20–21) The parties ultimately chose equity to protect Nerush's 1031 exchange. Defendants cannot obtain through litigation the debt treatment they failed to negotiate. The Court correctly enforced the bargain. *Zayo*, 2018 WL 6177174, at *12–13; Mem.Op. 39–41.

Because the investment is equity, usury does not apply and no California public policy is violated. (Mem.Op 36-37)[9]

3. Nerush is Estopped From Claiming Usury

Estoppel independently supports affirming the Judgment. Defendants induced Investor to commit capital and surrender security by representing the transaction as equity, then sought to recast it as a usurious loan. (A0136; A0332–A0342; A1381–A1382; A1788) The Court held Defendants "contractually and equitably estopped from recharacterizing the transaction they intentionally structured as equity to secure tax benefits." (Mem.Op. 33) The record supports that finding.

First, Defendants repeatedly affirmed Investor's equity status while concealing Nerush's contrary belief. Equitable estoppel arises when the asserting party lacked knowledge and the means of knowing the true facts, reasonably relied

[9] Because the investment was equity, Defendants' arguments about Nerush's ability to assert usury and available remedies do not apply. Regardless, estoppel bars Defendants' usury arguments. (A1596–A1598; A1682–A1683)

on the opponent's conduct, and suffered a prejudicial change of position. *Wilson v. American Insurance Co.*, 209 A.2d 902, 903–04 (Del. 1965); *Nevins v. Bryan*, 885 A.2d 233, 249-50 (Del.Ch. 2005) (founder estopped from challenging defendants' status as board members when founder had consistently represented they held valid corporate positions).

After express negotiations over the nature of the investment, the parties' agreements identified Investor as a preferred equity investor. (A0153–A0158; A0272; B00282) Defendants reaffirmed Investor's equity when ratifying and amending the LLC Agreement in May and August 2024. (A0332–A0334; A0340–A0342 §§4, 8) Yet Nerush secretly believed the investment was a loan when he signed the LLC Agreement. (A1792; B00368 (Nerush) 452:9–19)

On September 30, 2024, after receiving nearly $5 million and obtaining two extensions, Defendants caused the Company to sue Investor seeking to recharacterize the investment as usurious debt. (A1370 ¶23; A0333; A0341; A1381–A1382 ¶¶57–58) Before then, Investor did not know and had no reason to know of Nerush's belief and, relying on the equity bargain, funded the investment without a deed of trust and granted two extensions. (A1370 ¶23; A1788; A0333–A0334; A0341–A0342) Investor committed capital, gave up security, and extended the deadlines in reliance on terms Defendants now disavow. (A0136; A1788; A0333–A0334; A0341–A0342) These changes of position support estoppel. (Mem.Op. 33)

Second, Defendants induced Investor to abandon a usury-exempt structure. Under California law, estoppel arises when a borrower's fraudulent conduct induces detrimental reliance. *Buck v. Dahlgren*, 23 Cal.App.3d 779, 787–91 (1972). That doctrine applies here because Defendants (i) solicited Investor to invest in the Company; (ii) proposed an investment structure for Nerush's tax benefit, and (iii) induced Investor to forgo a Second Deed of Trust by representing that the transaction was equity. Without that representation, the investment would have been structured as a loan with a Second Deed of Trust, a structure that would have exempted the investment from California's usury laws because Gortikov was a licensed real estate broker. Cal. Const. Art. 15, §1; Cal. Civ. Code §1916.1. Defendants' inducement supports estoppel.

Defendants' waiver authorities are inapposite. *Stock v. Meek*, 35 Cal.2d 809, 817–19 (1950), holds that payment of usurious interest does not automatically waive borrower protections. *WRI Opportunity Loans II, LLC v. Cooper*, 154 Cal.App.4th 525, 541–46 (2007), rejects a contractual waiver of an otherwise available usury defense. Neither forecloses estoppel based on a borrower's fraud. Plaintiffs rely here on Defendants' concealed position, inducement to surrender security, and resulting prejudice. *Buck*, 23 Cal.App.3d at 787–91. (A0136; A1788; A1792)

II. THE COURT CORRECTLY REJECTED DEFENDANTS' FRAUD CLAIMS[10]

A. Question Presented

Whether the Court correctly rejected Defendants' fraud counterclaims and defense based on Investor's alleged misrepresentation that it held $10.5 million in cash before closing, where the agreements and trial evidence defeated those claims; and whether excluding Nerush's hearsay testimony about Proniloff's statements warrants reversal. (Preserved at A1607–A1616, A1691–A1702; Mem.Op. 51–56)

Alternatively, whether this Court should uphold the rejection of Counterclaim VIII because the amendment after trial was improper. (Preserved at A1386, A1691–A1702; Mem.Op. 28–32)

B. Scope of Review

Interpretation of the parties' written agreements and application of fraud principles to established facts receive de novo review. *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999); *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 960 (Del. 2005). Factual findings concerning Investor's performance, materiality, and reliance must be accepted if supported by the record and logically derived. *Schock*, 732 A.2d at 224. Credibility determinations receive substantial deference. *Id.*

[10] Argument II of this brief responds to Argument IV in the Opening Brief.

Legal standards governing admissibility receive de novo review; discretionary evidentiary rulings receive abuse-of-discretion review. *Allen v. State*, 644 A.2d 982, 985 (Del. 1994). Reversal requires an evidentiary error affecting a substantial right. D.R.E. 103(a).

Amendment to conform pleadings to proof is reviewed for abuse of discretion. *Laird v. Buckley*, 539 A.2d 1076, 1079 (Del. 1988).

C. Merits of Argument

1. The Agreement and Evidence Defeat Funding-Fraud Claims

Defendants seek to avoid their obligations because Investor initially raised approximately $8.35 million toward a $10.5 million total "deemed" contribution. Their theory rests on two emails from Gortikov to Proniloff, rather than any representation made by Plaintiff to Defendants. (OB 40–48) The Court correctly rejected that theory and found no justifiable reliance. (Mem.Op. 51–54)

Fraud requires a false representation, knowledge or recklessness, intent to induce action, justifiable reliance, and resulting injury; partial disclosures must avoid misleading half-truths. *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983). Supported factual findings underlying materiality and reliance, including credibility determinations, receive substantial deference. *DCV*, 889 A.2d at 957–58, 960.

The LLC Agreement supports the Court's findings. Section 2.2's "deemed to have contributed" language undercuts any fraud claim premised on actual cash raised by Investor at the time of closing. The text states the parties' agreement, not a representation by Investor, and means that Investor is credited with that amount whether the cash is raised or not. In other words, it is true: Investor contributed or was deemed to have contributed $9.45 million, regardless of the cash raised.

Defendants argue that Section 2.5's cash-deposit provision required Investor to hold its entire deemed contribution in cash. (OB 45, 48; A0162) But Section 2.2 expressly makes Investor's deemed contribution "subject to Section 2.2(a)-(e)," which permits Investor to hold back and separately maintain $4,626,000 of its $9,450,000 "deemed" contribution. (A0157–A0160) Section 2.5 must be read with those provisions. *DCV*, 889 A.2d at 961. Section 2.5 specifies how contributions must be made; it does not represent that Investor already held the deemed contribution in cash. As the Court explained, the deemed contribution established the value of Investor's equity for calculating returns and ownership, not cash balance as of closing. (Mem.Op. 53–54)

The emails also do not establish fraud. Gortikov acknowledged exaggerating in his January 3, 2023 statement that $10.5 million was "sitting dormant in our account." Investor had raised approximately $8.35 million by closing and ultimately raised $10.6 million. (A0142; A1760–A1761; A1773; B00346 (Gortikov) 88:7–10)

Gortikov's January 16, 2023 request that Proniloff tell Nerush, "I am giving him $10.5 million dollars," accurately described the investment. (A2205–A2206; Mem.Op. 52) Neither email was sent to Nerush.

A misrepresentation *through an intermediary* may support fraud if the speaker intends or reasonably expects it to reach and influence the claimant. But Defendants must prove it. *Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 59, 61–62 (Del.Ch. 2015). They did not. The Court found that Proniloff was not Nerush's agent – he was a separate party. (Mem.Op. 45, 49)

Further, the Court found Defendants had not established reliance. Nerush testified that, even if the allegedly concealed facts were "written in bold letters on the first page of the investment documents," he would not have read them. (B00379 (Nerush) 484:1–8) Failure to read the agreements is no excuse. *Pellaton v. Bank of N.Y.*, 592 A.2d 473, 477 (Del. 1991); *Desert Outdoor Advertising v. Super. Ct.*, 196 Cal.App.4th 866, 872 (2011). On this record, Nerush's failure to read defeats his claim of justifiable reliance. *Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1050 (Del.Ch. 2006). Reliance is unreasonable when "a company more than adequately represented by counsel, failed to fully read its contracts and related documents[.]" *Liborio III, L.P. v. Artesian Water Co., Inc.*, 2023 WL 1981824, *7-8 (Del.Super.); *Kosachuk v. Harper*, 2002 WL 1767542, *2 (Del.Ch.).

Defendants also failed to establish materiality—whether truthful information would affect the decision to enter the contract or its terms. *Kronenberg v. Katz*, 872 A.2d 568, 586-87 (Del.Ch. 2004). Investor's initial fundraise covered the closing payment and every reserve the owners could access. Only the reserve paying Investor's own return on a contractual schedule (not at closing) was incomplete. (B00344-346, B00357-358 (Gortikov) 86:9–88:6, 310:20–311:5) The fundraising difference did not reduce project funds available to the owners. The Court found no funding default and attributed the project's failure to Defendants' leasing breaches. (Mem.Op. 54–56) Those findings warrant deference and support rejecting fraud.

Defendants' claim of asymmetric treatment also fails. (OB 39, 45–46) Investor proved Nerush fraudulently misrepresented his intent to lease the Property. (Mem.Op. 24–26) Those factual and credibility findings warrant deference. By contrast, the Court rejected Defendants' justifiable reliance given the LLC Agreement and Nerush's failure to read it. (Mem.Op. 53) Plaintiffs proved fraud; Defendants did not.

2. The Court Properly Excluded Hearsay

Nerush relies on Proniloff's supposed out-of-court statements to prove that Gortikov made the funding representations and that Proniloff conveyed them to Nerush before closing. The Court properly sustained Plaintiffs' hearsay objection to Nerush's testimony of Proniloff's supposed out-of-court statements to Nerush,

which Defendants offered as substantive proof of Gortikov's alleged fraud. (A1807–A1814)

Under D.R.E. 801(c), an out-of-court statement offered to prove the truth of the matter asserted is hearsay. Proniloff's statements meet that definition because Defendants offered them to prove that Gortikov made the alleged representation about fully raising $10.5 million in cash. Defendants nevertheless argue that Nerush's testimony was not hearsay because it was offered not to prove the truth of the matter asserted, but to show receipt of statements allegedly made by Gortikov. (OB 41–43) But Nerush admitted he did not discuss investment terms with Gortikov before closing. (B00375 (Nerush) 480:5–21) His testimony instead recounted what he claims Proniloff told him Gortikov said. To attribute those representations to Gortikov, Defendants needed the Court to accept Proniloff's out-of-court statements as true. Calling the testimony proof of "receipt" does not avoid the need to accept Proniloff's assertions as true.

Proniloff was neither a party nor an agent of a party. Even if Gortikov's statements to Proniloff were party admissions, Proniloff's separate statements to Nerush still needed an independent basis for admission. D.R.E. 805; *Demby v. State*, 695 A.2d 1152, 1162 (Del. 1997) ("If double hearsay is being offered into evidence, each aspect must qualify *independently* as an exception to the hearsay rule."). Defendants established no such basis. The Court properly sustained the objection.

Even if the exclusion was error (and it was not), Defendants must show it affected a substantial right. D.R.E. 103(a). They cannot. The two emails Nerush relies on contain different representations. The first email told Proniloff that $10.5 million already sat in an account; Gortikov acknowledged that statement was exaggerated, but that email was not sent to Nerush, and Gortikov did not direct Proniloff to send it to him. (A0142; A1760–A1761) The second email on January 16, 2023 states "I am giving him $10.5 million dollars," which the Court found accurately described the investment. (A2205–A2206; Mem.Op. 52)

Defendants must also overcome the Court's finding that Nerush lacked justifiable reliance. His testimony does not change the agreement's distinction among deemed contributions, retained reserves, and later disbursements. Those disclosures independently support the Judgment. (A0157–A0162; Mem.Op. 53–54) Reversal of one narrow evidentiary ruling does not change the ultimate decision.

3. Leave to Amend Should Have Been Denied

Leave to add Counterclaim VIII after trial should have been denied. Chancery Court Rule 15(b)(2) requires an unpled claim to have been tried with consent. *Laird*, 539 A.2d at 1079–80. Prejudice turns on whether the opponent lacked a "fair opportunity to defend and to offer additional evidence on that different theory."

Vichi v. Koninklijke Philips Electronics, N.V., 85 A.3d 725, 761–62 (Del.Ch. 2014).[11]

Plaintiffs opposed amendment in the pretrial order and at trial and objected to the asserted evidence. (A1386; B00386-391 (Tr.) 536:19–537:17, 544:1–18, 610:1–8) Although Defendants' pretrial brief mentioned funding "misrepresentation / concealment," Defendants' affirmative defense concerned alleged material omissions, not Gortikov's alleged direction to Proniloff to convey an affirmative false statement. (A1314; A1304–A1305; A1543–A1544)

While the Court found that the affirmative fraud claim was fully litigated (Mem.Op. 30–32), that overlooks Plaintiffs' lost opportunity to defend the claim. Plaintiffs explained that timely notice of the affirmative fraud claim would have allowed them to call Proniloff at trial to refute Nerush's claim and to conduct further discovery. (A1612) Allowing the new claim without that opportunity was an abuse and independently supports rejecting Counterclaim VIII.

[11] Plaintiffs may defend the Judgment on this alternative ground without a cross-appeal because they seek no change to the relief awarded, even though the Court rejected this argument. *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 67 (Del. 1995) (permitting an appellee to renew a ground rejected below as an alternative basis to affirm without cross-appealing); *Winshall v. Viacom Int'l Inc.*, 76 A.3d 808, 815 n.13 (Del. 2013).

III. THE COURT CORRECTLY AWARDED INTEREST AT THE CONTRACT RATE[12]

A. Question Presented

Whether the Court properly awarded interest at the Contract Rate on proven Unreturned Capital Contributions. (Preserved at A1383–A1384; A1579–A1580; A1585; Mem.Op. 59, 61–62, 65–66; Judgment ¶6(a))

B. Scope of Review

Prejudgment interest's legal basis and contractual formula receive de novo review; discretionary determinations receive abuse-of-discretion review. *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 42 (Del. 2005). Supported factual findings concerning capital and credits receive deference. *DCV*, 889 A.2d at 958.

C. Merits of Argument

1. Prejudgment Interest at the Contract Rate is Awarded as a Matter of Right

Plaintiffs are entitled as a matter of law to prejudgment interest on proven contract damages from the date payment was due. *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992). "When the parties have contractually expressed an interest rate, the Court will abide by that expressed interest rate." *Parexel International (IRL) Ltd.* v. *Xynomic Pharmaceuticals, Inc.*, 2021 WL 3074343, at *19 (Del.Super.).

[12] Argument III of this brief responds to Argument I in the Opening Brief.

Section 2301(a) supplies the statutory rate only "[w]here there is no expressed contract rate." 6 *Del.C.* §2301(a). This principle expressly applies to equity redemption obligations. In *Cont'l Inv'rs Fund LLC v. TradingScreen Inc.*, 2021 WL 3120860, at *26-*27 (Del.Ch.), the Court awarded pre- and post-judgment interest at the contractual 13% rate on unpaid preferred redemption, as here. The investment's equity status thus provides no basis to replace the Contract Rate with the statutory rate.

The LLC Agreement applies the Contract Rate to Unreturned Capital Contributions. The Contract Rate is the greater of 19% or SOFR plus 15%, plus five percentage points enhancement for Defendants' defaults, resulting in a minimum 24% rate, compounded monthly. (A0167; A0229; A0236; A0240) The Court correctly applied that Contract Rate to Plaintiffs' proven damages.

The Court applied the Contract Rate to the $7,077,057 in net Unreturned Capital Contributions, with interest accruing from the Redemption Date. That amount deducts retained reserves and excludes Accrued PIK as unproven. (Mem.Op. 61–62, 65–66) Had the Court awarded PIK as damages, that would have increased net Unreturned Capital damages, and the entire balance would have accrued interest at the Contract Rate. (A0167; A0227) Rejecting PIK reduced the damages subject to interest but did not eliminate Plaintiffs' right to pre- and post-judgment interest at the rate set by the LLC Agreement on the proven damages as a matter of law.

2. Using the Contract Rate Does Not Reinstate Accrued PIK

Damages measure economic harm; judgment interest compensates for delayed payment of proven damages. *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482, 486 (Del. 2011). Here, the Court awarded $7,077,057 in Unreturned Capital. (Mem.Op 65-66) Plaintiffs also separately sought $3,506,820 in unpaid additional returns called "Accrued PIK," which the Court rejected. (Mem.Op. 61-62) Awarding pre- and post-judgment interest at the Contract Rate on the $7,077,057 award does not restore the rejected PIK. The $3,506,820 PIK claim remains excluded.

Even if Plaintiffs never sought Accrued PIK as damages, the $7,077,057 awarded would bear prejudgment interest at the Contract Rate on the Unreturned Capital as of the Redemption Date. *Citadel*, 603 A.2d at 826. Failure to prove additional damages after the Redemption Date did not eliminate the right to interest at the Contract Rate on proven damages and awarding that interest did not restore the rejected PIK damages. (Mem.Op. 61–62, 65–66)

There is no risk of double recovery here. The Court excluded unproven damages, including the unproven PIK damages, and "[p]rejudgment interest is conceptually separate and distinct from the additional interest expenses" recoverable as damages. *Brandywine*, 34 A.3d at 486. The Court in *Brandywine* held that denying prejudgment interest was error—even where the underlying damages

included interest—because "[p]rejudgment interest serves two purposes: first, it compensates the plaintiff for the loss of the use of his or her money; and, second, it forces the defendant to relinquish any benefit that it has received by retaining the plaintiff's money in the interim." *Id.* Thus, had Plaintiffs proven PIK damages, they may have been entitled to judgment interest on both the Unreturned Capital and PIK, which gets added to Unreturned Capital. That principle defeats the claim that interest on proven capital reinstates PIK. In any event, the Court did not award interest on the Unreturned Capital accrued after the Redemption Date as damages at all. Therefore, there is no potential for double recovery here, as no interest after the Redemption Date was awarded as damages.

The Judgment correctly awards judgment interest on $7,077,057 in net capital as of the Redemption Date ($7,946,396 less $869,339 in credits) at the Contract Rate.[13] That award excludes PIK and interest on PIK damages. (Judgment ¶6(a)).

[13] Failure to prove the floating SOFR input for PIK damages does not defeat the right to judgment interest at the Contract Rate. Defendants agreed to the form of the Judgment, which specifies the applicable rates and amounts, notwithstanding their challenge to the LLC Agreement's enforceability. (Judgment at 5; *id.* ¶6) The Contract Rate on Unreturned Capital also has a 24% floor that applies without proof of SOFR. (A0229; A0236; Judgment ¶ 6(a)) Thus, any failure to establish SOFR does not justify denying interest on proven capital or substituting the statutory rate.

3. Plaintiffs Did Not Waive Post-Judgment Interest at the Contract Rate

Plaintiffs did not waive post-judgment interest[14] at the Contract Rate. Although paragraph 69(c) of the stipulated Pre-Trial Order requested legal-rate post-judgment interest, Plaintiffs also expressly sought continuing Preferred and Enhanced Preferred Returns accruing through payment and pursued that relief after trial. (A1383–A1384; A1579–A1580; A1585) The reference to legal-rate interest did not foreclose application of the contractual rate authorized by 6 *Del.C.* §2301(a), (c). Defendants' reliance on *Emerald Partners v. Berlin*, 726 A.2d 1215 (Del. 1999), is misplaced: that decision found waiver where an appellant omitted a challenge from its opening *appellate* brief; it did not address the rate governing a judgment on a fully litigated claim. Section IV(C)(1), below, further explains that the Court did not award post-judgment interest "sua sponte."

[14] As detailed in Argument IV, post-judgment interest also accrues as of right.

IV. THE COURT DID NOT "SUA SPONTE" AWARD POST-JUDGMENT INTEREST AT THE CONTRACT RATE[15]

A. Question Presented

Whether 6 *Del.C.* §2301(c) and the LLC Agreement's contractual return authorize the Judgment's 24% post-judgment rate. (Preserved at A1383–A1384; A1585; Mem.Op. 65–69; Judgment ¶6(a))

B. Scope of Review

Interpretation of statutes and contractual return provisions receives de novo review. *Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc.*, 269 A.3d 974, 977 (Del. 2021).

C. Merits of Argument

Defendants seek to replace the 24% Contract Rate on post-judgment interest with an 8.75% statutory rate, arguing that (i) the Court awarded unrequested relief sua sponte, (ii) Section 2301(c) cannot apply to an equity investment, and (iii) the Enhanced Preferred Return is punitive. (OB 17, 20–26) Each argument fails.

1. Post-Judgment Interest Accrues as of Right; the Court Did Not Award It "Sua Sponte"

The Court did not select the 24% rate sua sponte. The LLC Agreement establishes a Contract Rate of 24% to accrue on Unreturned Capital following Defendants' defaults, and provides for monthly compounding. Section 4.1(c)

[15] Argument IV of this brief responds to Argument II in the Opening Brief.

provides that the Contract Rate continues until fully paid. (A0167; A0229; A0236) The Court applied that 24% contractual floor to the proven net unreturned capital, after deducting credits and reserves. (Mem.Op. 65–66 & nn.327–328)

Defendants nevertheless argue that Plaintiffs waived contractual post-judgment interest by requesting legal-rate interest in the PTO. (OB 17, 25) That argument improperly isolates one part of Plaintiffs' request. PTO paragraph 69(c) sought the Full Redemption Price plus the Contract Rate on such amounts after the Redemption Date, as well as legal-rate interest on top of those amounts. (A1384) Plaintiffs' post-trial brief likewise sought a contractual per diem "for each day following October 15, 2025," at the Contract Rate, and demanded payment "plus per diem thereafter." (A1585 & n.10; A1586) The additional request for legal-rate interest did not abandon the claim for continuing Contract Rate returns.

Waiver must be assessed in light of the full record. In *Chrysler Corp. v. Chaplake Holdings, Ltd.*, the Court rejected an interest waiver where the pretrial order sufficiently placed the claim for interest at issue despite an omission in its wording. 822 A.2d 1024, 1037–38 (Del. 2003). Likewise, an argument is preserved when fairly presented to the Court in briefing. *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 59–60 (Del. 2019). Here, the PTO's request for legal-rate interest must be read alongside Plaintiffs' express demand for Contract Rate returns through full payment in the PTO and trial briefing. (A1384; A1585–

A1586) Those requests defeat the claim that Plaintiffs waived the Contract Rate. *Emerald Partners* does not establish otherwise. That decision found waiver of issues omitted from appellate briefing. 726 A.2d at 1224. Here, Plaintiffs expressly presented their claim for continuing Contract Rate returns to the Court.

Finally, the right to post-judgment interest does not depend on an express request in the complaint. *See Winklevoss Capital Fund, LLC v. Shaw*, 2024 WL 3888757, at *22 (Del.Ch.) (awarding post-judgment interest despite the absence of an express request because entitlement arises as of right); *Manti Holdings, LLC v. Authentix Acquisition Co.*, 261 A.3d 1199, 1228–29 (Del. 2021) (recognizing equitable authority to award prejudgment interest "even if the prevailing party has not demanded such relief in its pleadings.") Plaintiffs are entitled to post-judgment interest as a matter of law, and repeatedly sought Contract Rate returns until full payment. The Court did not award such interest sua sponte.

2. Section 2301(c) Permits Contract Rate for a "Use of Money"

Defendants seek an 8.75% statutory post-judgment rate instead of 24%, arguing Section 2301(a) caps the rate and that subsection (c)'s exception cannot apply because the Court found the investment was not a loan. (OB 21–24, 26) The Court should reject that argument because subsection (c) expressly covers a qualifying "use of money," as here, not just loans.

Section 2301(c) removes the post-judgment rate limit for a "loan **or** use of money" exceeding $100,000 when repayment is not secured by a mortgage against a borrower's principal residence. Investor supplied millions for the Company's use at the LLC Agreement's specified return. (A0157–A0160; A0218; A0229; A0236) Defendants' argument that subsection (c)'s exception is limited to loans renders the additional language "or use of money" superfluous.

Defendants invoke *Noranda* to impose a statutory post-judgment rate. (OB 21–24.) But *Noranda* recognizes that subsection (c) applies beyond loans. 269 A.3d at 978–79 & n.42. Specifically, the Court explained that the non-loan construction contract at issue in *Del. Tech. & Cmty. Coll. v. Emory Hill & Co.*, 116 A.3d 1243 (Del. 2015), fell within subsection (c)'s exception to the cap on interest. *Noranda*, 269 A.3d at 980–81. Defendants' attempt to distinguish *Del. Tech.* on waiver grounds is no answer. The party opposing contract-rate interest in *Del. Tech.* did object late, but *Noranda* explained that its challenge also failed on the merits because subsection (c) covered the non-loan use of money. 269 A.3d at 980–81. Thus, the absence of a loan does not make subsection (c) unavailable

Nor does the investment's equity character prevent an agreed rate from governing judgment interest. As discussed above, *Cont'l Inv'rs* awarded pre- and post-judgment interest at the contract rate on unpaid interest arising from preferred-

stock redemption. 2021 WL 3120860 at *26-*27. That application refutes Defendants' premise that an equity-related obligation carries only statutory interest.

Defendants' reliance on *Neem International CV v. Shulman*, 2025 WL 3778917 (Del.Ch.) does not establish a contrary rule. Its statutory-interest award accompanied equitable restitution to preferred stockholders whose liquidation entitlement had been diverted through another investor's improper assertion of creditor priority. It did not decide whether an express contractual rate governed an unpaid redemption obligation. *Neem*, 2025 WL 3778917, at *30.

Finally, Defendants invoke *Kroll v. City of Wilmington*, 276 A.3d 476 (Del. 2022), to seek a remand for consideration of Section 2301(a). (OB 25–26) *Kroll* involved conceded legal error and alternative grounds unaddressed by the trial court. *Id.* at 479. Here, the Court expressly addressed Section 2301 to impose the Contract Rate. (Mem.Op. 65 n.327) No unaddressed argument requires remand here.

3. The Contract Rate Does Not Violate §6.5

Defendants alternatively contend that LLC Agreement Section 6.5(b) (which generally bars consequential or punitive damages) precludes using the Contract Rate for post-judgment interest because it is "punitive." (A0193; OB 24–25) This argument ignores the express terms of the agreement.

Defendants' characterization of the Contract Rate as violating Section 6.5 cannot be reconciled with the LLC Agreement. Section 4.1(c) requires the Contract

Rate during specified defaults. (A0167) Reading Section 6.5(b) to prohibit that rate merely because it is triggered by default would negate the express payment obligation in the very circumstances for which the parties negotiated it. Moreover, Section 6.5(f) provides that nothing in Section 6.5 may "affect, restrict or otherwise impair" the obligations of Nerush, as Sponsor Principal, under any guaranty or Investor's rights to enforce that guaranty according to its terms. (A0194) Nerush's Payment Guaranty expressly guarantees punctual payment and Section 4.1 sets the rate. (A0167; A0229; A0236; A0313) Defendants cannot use Section 6.5(b) to eliminate an obligation the LLC Agreement expressly imposes.

Delaware courts "will not read a contract to render a provision or term meaningless or illusory." *Shorenstein*, 213 A.3d at 56. Defendants' interpretation would use a general damages exclusion to defeat the specific Contract Rate set by the agreement. Even if the general exclusion conflicted with the specific rate provision, "[s]pecific language in a contract controls over general language." *DCV*, 889 A.2d at 961. Section 6.5 is no reason to reject the Contract Rate.

V. THE COURT AWARDED REASONABLE ATTORNEYS' FEES

A. Question Presented

Whether the Court properly awarded Plaintiffs reasonable attorneys' fees after Plaintiffs prevailed, where Defendants seek to set aside the fee award only if this Court reverses on the merits. (Preserved at A1384; Judgment ¶¶8–9)

B. Scope of Review

Attorneys' fee awards and amounts are reviewed for abuse of discretion. *Mahani v. EDIX Media Group, Inc.*, 935 A.2d 242, 245–46 (Del. 2007).

C. Merits of Argument

Defendants seek to set aside the fee award only if this Court reverses on the merits. (OB 49) The reasons to affirm the Judgment also support Plaintiffs' contractual right to reasonable fees.

The Court independently reviewed the unopposed fee application, excluded $12,798.50, and awarded $2,087,377.59 in fees and expenses. (Judgment 10–11) Defendants identify no unreasonable charge or abuse of discretion. *Mahani*, 935 A.2d at 245–46; *TransPerfect Global, Inc. v. Pincus*, 278 A.3d 630, 656–58 (Del. 2022) (affirming fee award after noting that the court exercised discretion when it "rejected or reduced Pincus's requests in at least six areas").

The fee award should be affirmed.

CONCLUSION

The Court should affirm.

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