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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 REPLY BRIEF ON APPEAL

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PRELIMINARY STATEMENT

Plaintiffs open by calling Nerush "a proven fraudster." (AB 1.) The $300,000 rent finding is not on appeal and bears on none of the questions. As to each of those questions, the Answering Brief confirms the error.[1]

Interest. The Court denied Plaintiffs' $3,506,820 Accrued PIK claim in full, then measured interest on the surviving award by the same Enhanced Preferred Return, at 24%, compounded monthly. (Mem. Op. 61-62, 65-66; Final J. ¶ 6(a).) Plaintiffs now defend that rate as the "continuing Contract Rate returns" they requested under Section 4.1(c). (AB 42-43.) Section 4.1(c) is the provision that makes an unpaid return "Accrued PIK." (A0167.) Either way, whether paragraph 6(a) grants the return Plaintiffs requested or something no one requested, it cannot stand. And having won a holding that the investment is not a loan, Plaintiffs cannot recast the same return as payment for the "use of money" to escape Section 2301(a)'s cap. (Mem. Op. 37, 41-42; AB 44-45.)

Characterization. Plaintiffs rest on the internal-affairs doctrine. But the judgment against Nerush rests on the Payment Guaranty, a contract between California parties about California property, which the Court found to be "an

[1]Appellees' Answering Brief is cited "AB __," Appellants' Corrected Opening Brief "OB __," the Memorandum Opinion "Mem. Op. __," and the Final Judgment and Order "Final J." Capitalized terms have the meanings given in the Opening Brief. Arguments I through V below reply to Arguments I through V of the Opening Brief.

absolute and unconditional guaranty." (Mem. Op. 19.) The Court chose Delaware law by reasoning that the usury argument "assumes that the instrument is a loan; it is not." (Mem. Op. 36.) California asks whether repayment is absolute. The Court's own guaranty finding answers that question.

Fraud. Plaintiffs do not defend the finding that Gortikov's January 3 email was "neither false nor misleading." (Mem. Op. 52.) They acknowledge he was "exaggerating" and that the Investor "had raised approximately $8.35 million by closing". (AB 31.) The shortfall fell on the Preferred Return Reserve (AB 11), the same reserve whose unexplained draws defeated the Accrued PIK claim. (Mem. Op. 61-62.) What remains is a hearsay ruling that excluded testimony for a purpose for which it was not offered, and a reliance holding that cannot be squared with the Opinion's own statement that Plaintiffs' representations were not "inconsistent with" the contract's terms. (Mem. Op. 53.)

Plaintiffs offer no independent defense of the fee award. (AB 48.) It should be vacated if the Court grants relief on Argument III or IV.

ARGUMENT ON REPLY

I. PARAGRAPH 6(a) AWARDS AS INTEREST THE RETURN THE COURT REFUSED TO AWARD AS DAMAGES.

A. Plaintiffs defend the 24% rate as the "continuing" Section 4.1(c) return, which is Accrued PIK.

Plaintiffs' answer to the charge that the Court selected the 24% rate on its own proves the point. They say the Court did not act sua sponte because Section 4.1(c) "provides that the Contract Rate continues until fully paid," and because Plaintiffs "did not abandon the claim for continuing Contract Rate returns." (AB 42-43.) Section 4.1(c) is the provision that adds any unpaid Preferred Return or Enhanced Preferred Return to the Investor's capital balance as "Accrued PIK." (LLC Agreement § 4.1(c) (A0167); Mem. Op. 57 n.281.) The "continuing" returns Plaintiffs requested were therefore the Accrued PIK claim, and the Court denied that claim in full: "The request for 'Preferred Returns' and 'Enhanced Preferred Returns' is denied." (Mem. Op. 61.)

Plaintiffs cannot have it both ways. If paragraph 6(a) grants the continuing return they requested, it awards through interest the Accrued PIK the Court refused as damages. If it awards something else, no one requested it. Plaintiffs acknowledge that paragraph 69(c) of the Pre-Trial Order "requested legal-rate post-judgment interest." (AB 41.) Their only other request was for the contractual returns

themselves, as components of damages. (Joint Pre-Trial Stip. ¶ 69(c) (A1384).) On either reading, the 24% rate has no footing.[2]

Nor does it matter that interest accrues as of right. (AB 37-39, 42.) Appellants agree. The question is not whether interest accrues, but at what rate. Plaintiffs' entitlement cases establish that interest is owed, not that the rate may be a return the Court refused to award. *See Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992); *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482, 486 (Del. 2011).

B. The defect that defeated Accrued PIK follows the return wherever it is applied.

Plaintiffs' central theme is that the Court rejected Accrued PIK "for insufficient proof of floating SOFR inputs and payment credits, not because the LLC Agreement's Enhanced Preferred Return rate was invalid." (AB 3.) Appellants do not contend that the Court held the rate invalid. The point is why the proof failed. Plaintiffs "admitted to using the 'Preferred Return Reserve' to pay themselves

[2] Plaintiffs note that Defendants agreed to the form of the Final Judgment. (AB 40 n.13.) The Opinion directed the parties to submit an implementing order "consistent with this opinion, including a proposed interest calculation" (Mem. Op. 69), and paragraph 6 recites that it is entered "Consistent with the Memorandum Opinion." Submitting a form that implements the Court's ruling is not a request for the rate the ruling selected. The issue is in any event one of law on an undisputed record, and Supreme Court Rule 8 permits review.

returns," and "the record does not show how these payments were credited," so an award "could result in a double recovery." (Mem. Op. 61-62.)

Plaintiffs' own footnote sharpens the point. The 24% floor, they say, "applies without proof of SOFR." (AB 40 n.13.) If so, the missing SOFR data never prevented an award of Accrued PIK at the floor, and the Court denied it anyway. The unreconciled reserve draws were an independent defect. Defendants quantified them at no less than $572,000 in July 2024 and $1.5 million in September 2024, and the record shows those draws came immediately after Nerush's June and August 2024 payments. (A1635-A1636.) The $869,339 credit reached only the balance remaining in the reserves. (Mem. Op. 61.)

Plaintiffs' assurance that "no interest after the Redemption Date was awarded as damages" (AB 40) misses the problem. The double recovery the Court identified was returns Plaintiffs had already paid themselves from the reserve. Paragraph 6(a) charges the same 24% return, compounded monthly as the Preferred Return compounds, on a capital balance that never accounted for those draws. (Final J. ¶ 6(a); LLC Agreement Ex. A (A0236).) A defect that barred the return as damages does not disappear when the return is relabeled as interest.

II. SECTION 2301(a) CAPS POST-JUDGMENT INTEREST, AND AN EQUITY RETURN IS NOT A CHARGE FOR THE "USE OF MONEY."

A. Having won an equity holding, Plaintiffs cannot recast the return as payment for the use of money.

"[W]e have consistently held that Section 2301(a) directly controls the calculation of judgment interest outside the loan context." *Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc.*, 269 A.3d 974, 978 (Del. 2021). It caps post-judgment interest at the lesser of the legal rate and the contract rate, and in *Noranda* it was "error" to carry a pre-judgment rate into the post-judgment period. *Id.* at 982. The Court held here that "no loan exists." (Mem. Op. 42.) Plaintiffs therefore rest on Section 2301(c), which lifts the cap "where the amount of money loaned or used exceeds $100,000." *Noranda*, 269 A.3d at 979 n.42 (quoting 6 *Del. C.* § 2301(c)); AB 44-45.

Appellants' interest argument accepts, for its purposes, the holding Plaintiffs won. The Court held the investment "is not subject to usury restrictions" because usury law reaches only "loan[s] or forbearance[s]." (Mem. Op. 37, 41.) Plaintiffs persuaded the Court that the Investor was an owner whose return "is tied to the success of the 'Project,'" not a lender charging for the use of its money. (Mem. Op. 38-39.) They now say the same return is compensation for the "use of money." (AB 44-45.) A return that is not a charge for a loan or forbearance when usury is the question cannot become a charge for the use of money when the statutory cap is the

question. If a preferred return on equity were a "use of money," so would be every preferred dividend, and the line between debt and equity that Plaintiffs drew below would vanish under Section 2301.

The Court of Chancery never found the statutory predicate. Its footnote invoked Section 2301(c) 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.) Section 2301(c) does not speak of commercial transactions. It speaks of money "loaned or used." *Noranda*, 269 A.3d at 979 n.42.

B. Plaintiffs' authorities do not reach an equity return.

Delaware Technical does not help Plaintiffs. The challenge there came "too late in the game," and the $1.2 million construction contract stipulated a 12% post-judgment rate. *Noranda*, 269 A.3d at 980-81 & nn.54-55 (discussing *Del. Tech. & Cmty. Coll. v. Emory Hill & Co.*, 116 A.3d 1243 (Del. 2015) (TABLE)). Interest on a sum owed under a construction contract is a charge for withholding money. An equity return, on the Court's own holding, is not.

Continental Investors is no closer. *Cont'l Inv'rs Fund LLC v. TradingScreen Inc.*, 2021 WL 3120860, at *27 (Del. Ch. July 23, 2021). It was decided five months before *Noranda*, and it awarded interest at a contract rate without addressing Section 2301(a)'s post-judgment cap. *Sequoia* applied subsection (c) to an actual loan carrying an 8.75% rate. *Sequoia Presidential Yacht Grp. LLC v. FE Partners, LLC*,

2014 WL 2610577, at *2-3 (Del. Ch. June 12, 2014). Neither case addressed whether a return the court had held was not a charge for a loan is money "loaned or used." As to Section 6.5(b), the enhancement is independently barred. Gortikov agreed that the enhanced return was "triggered by a default" and "had no correlation to the amount of profits being earned by the company," and he conceded that "the LLC agreement doesn't reduce our return upon a default." (Trial Vol. II at 288-90, 321 (A1775-A1777, A1782).) A default-only charge untethered to performance and retained by the Investor is a punitive sanction barred by Section 6.5(b), whose exception reaches only amounts "actually paid to an unaffiliated third party." (LLC Agreement § 6.5(b) (A0192-A0193); OB 24-25.) Section 6.5(f) preserves the enforceability of the guaranties, not the measure of interest.

C. The remedy is recalculation at the legal rate.

The question is one of law on an undisputed record. The Court should reverse paragraph 6(a), both its $2,861,410.94 prejudgment-interest component and its 24% post-judgment rate, and direct recalculation of interest on the $7,077,057 Unreturned Capital award at the legal rate, compounded quarterly, as the Court of Chancery did for the Exit Fee and the fraud award. (Final J. ¶¶ 6(c), 7.) As of June 11, 2026, the Federal Reserve Discount Rate was 3.75 (OB 20); as such, the legal rate was 8.75%. *See* 6 *Del. C.* § 2301(a). Against the 24% monthly rate, the difference is roughly $1,767,300 in the first year of post-judgment interest alone.

III. CALIFORNIA LAW GOVERNS WHETHER NERUSH MUST PAY A GUARANTEED 24% RETURN, AND UNDER IT THE INSTRUMENT IS DEBT.

A. The judgment rests on a guaranty between California parties; no Delaware entity's internal affairs are at stake.

Plaintiffs' choice-of-law argument rests on the internal-affairs doctrine. (AB 19-22.) That doctrine governs "those matters which are peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." *McDermott Inc. v. Lewis*, 531 A.2d 206, 214 (Del. 1987); *see VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1112-13 (Del. 2005). The money judgment against Nerush rests on no such relationship. It rests on the Payment Guaranty (Final J. ¶¶ 4, 6), a contract between Nerush, a "California-based real estate investor" (Mem. Op. 3), and GC Broadway, a California limited liability company (A1365 ¶ 5), concerning California property. Whether Nerush must personally pay a 19%-minimum return, compounded monthly, implicates no Delaware entity's voting, management, or fiduciary relationships. The guaranty's own Delaware clause (AB 22) is subject to the same Section 187(2)(b) analysis. Plaintiffs' reliance on *Nedlloyd* does not extend that clause to the guaranty. *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 467 (1992). Its "keen and intimate interest" language describes a State of incorporation's interest in a corporation's internal affairs, not a payment guaranty between two California citizens. And *Nedlloyd*'s scope holding asked only whether a choice-of-law clause reaches

noncontractual claims arising from the same contract; it did not hold that one agreement's clause governs a separate guaranty. *Id.* at 469-70.

B. The Court chose Delaware law only by first deciding that the instrument was not a loan.

Plaintiffs say the Court "resolved this issue." (AB 22.) It reached the issue by assuming the answer. As to the fundamental-policy prong, the Opinion reasoned that Defendants' argument "assumes that the instrument is a loan; it is not." (Mem. Op. 36 & n.187.) The Court thus answered the choice-of-law question with the characterization that choice of law was supposed to govern. Section 187(2)(b) requires the opposite order: identify the law that governs "the particular issue," then decide the issue under that law. Restatement (Second) of Conflict of Laws § 187(2)(b).

Focus Financial supplies the analysis the Court omitted. Applying the Restatement, the Court of Chancery held that "it is not reasonably conceivable that Delaware could be the default state," determined that California was the default state, and applied Section 187(2)(b) to displace a Delaware choice-of-law provision in favor of California's fundamental policy. *Focus Fin. Partners, LLC v. Holsopple*, 241 A.3d 784, 814, 821-22 (Del. Ch. 2020). California's interest in protecting its residents from usurious lending is at least as weighty as the employee-protection policy there. Chancery reached the same result in *Ascension*, displacing a Delaware clause because Delaware's general interest in freedom of contract could not defeat

California's specific, fundamental policy. *Ascension Ins. Holdings, LLC v. Underwood*, 2015 WL 356002, at *2-5 (Del. Ch. Jan. 28, 2015). And California courts applying Section 187 reach the same result in the lending context, displacing a sister-state clause where the State's borrower-protection policy was fundamental and nonwaivable and California had the materially greater interest. *Brack v. Omni Loan Co.*, 164 Cal. App. 4th 1312, 1323-29 (2008).

The Opinion's reliance on *NuVasive* confirms the error. The Opinion read that decision as finding no materially greater California interest "where the parties were sophisticated and represented by counsel." (Mem. Op. 36 n.184 (citing *NuVasive, Inc. v. Miles*, 2018 WL 4677607, at *3, *5 (Del. Ch. Sept. 28, 2018)).) Sophistication and counsel do not matter to California's usury law, whose protections "cannot be waived." *G Companies Mgmt., LLC v. LREP Arizona, LLC*, 88 Cal. App. 5th 342, 353 (2023). "A public policy that cannot be waived qualifies as fundamental." *Id.* Nor do the statutory exemptions dilute it: "The complexity of the law does not imply a lack of commitment to the policy." *Id.* at 347.

Change Capital is not to the contrary. There the court assumed that usury offended the fundamental policy of New York and Texas, but held that the defendants "failed to identify a 'default state'" and "failed to demonstrate that either New York or Texas has a 'materially greater interest' in the Agreement than does Delaware." *Change Capital Partners Fund I, LLC v. Volt Elec. Sys., LLC*, 2018 WL

1635006, at *6-8 (Del. Super. Apr. 3, 2018). Here the default state is California, and every contact points there: the Property is in Santa Monica, the Investor and Nerush are Californians, and the transaction closed in California. (A1653-A1657; OB 28-29.) The Investor's counsel chose Delaware only because "if the transaction is going to be preferred equity, whether now or later, it will have to be Delaware." (JX 021 (A0093).)

C. California asks whether repayment is absolute, and the Court found this guaranty "absolute and unconditional."

Plaintiffs say there is no conflict because both States "apply the same standard to distinguish debt from equity." (AB 20 n.4; *see* Mem. Op. 35.) But the Court applied only Delaware's contract-first inquiry. Under California law, an element of usury is that "the loan and interest must be absolutely repayable by the borrower," and courts "look to the substance of the transaction rather than to its form." *Ghirardo v. Antonioli*, 8 Cal. 4th 791, 798 (1994). A label is no answer: "Neither is the term 'investment' in any way contradictory of a 'loan.'" *Whittemore Homes, Inc. v. Fleishman*, 190 Cal. App. 2d 554, 558 (1961).

The Opinion's own findings answer California's question. The Court found that "Nerush executed an absolute and unconditional guaranty" of "punctual payment . . . and not merely the collectability" of the Full Redemption Price. (Mem. Op. 19-20.) Yet its characterization analysis described the return as "[u]nlike a loan with a guaranteed repayment schedule" and dependent on "the entity's business

fortunes." (Mem. Op. 38-39.) That analysis never mentions the guaranty. Gortikov agreed that the 19% floor "had no correlation to whatever profits the 'company' earned" and conceded that "the LLC agreement doesn't reduce our return upon a default." (Trial Vol. II at 288-89, 321 (A1775-A1776, A1782).) Under California's test, an obligation that is guaranteed absolutely and does not vary with performance is repayable absolutely. That is a conflict in outcome, not merely in method.

Junkin does not hold otherwise. *Junkin v. Golden West Foreclosure Serv., Inc.*, 180 Cal. App. 4th 1150 (2010). It applied California's joint-venture exception because the investor shared the venture's risk: he co-signed the institutional financing, took title with the borrower, and could lose his investment. *Id.* at 1155-57. Plaintiffs do not invoke that exception, and the Investor bore no comparable risk. Its return was fixed, its redemption date was fixed, and Nerush guaranteed payment personally.

D. The negotiation history explains the label, not the substance.

Plaintiffs say the Opening Brief "completely ignores" the negotiation history. (AB 25.) It does not; that history explains the label, not the substance. The parties chose the equity form to protect Nerush's Section 1031 exchange. (Mem. Op. 39-40.) That is a reason for a label, and California looks through labels. *Ghirardo*, 8 Cal. 4th at 798. Rejecting a draft that would have made the contribution "debt and not equity for all purposes" (Mem. Op. 40) shows that the Investor wanted the equity

form. It does not show what the instrument was. The Term Sheet confirms the point: its Alternative Structure clause let the Investor elect to recast the same investment as a loan "on substantially the same terms and conditions as the preferred equity, including loan amount, interest rate and maturity date." (JX 013 (A0083); OB 33.) Plaintiffs' own quotation of that clause omits those words. (AB 6.) Only the label, not the economics, turned on the choice. The Investor's own transaction counsel wrote that "preferred equity will most likely be treated as a form of debt" (JX 090 (A0137)), and six days before signing, Gortikov wrote to Nerush: "We are making an incredibly risky loan." (JX 107 (A0145).)

The final agreement points the same way. Section 13.2 provides that the Investor's interest "and any preferred return thereon constitutes debt for U.S. tax purposes," that payments to the Investor "shall be treated as payments of interest or principal, as applicable," and that the Investor "will not otherwise be treated as a Member of the Company for U.S. tax or accounting purposes." (A0210.) The negotiation history Plaintiffs invoke confirms the point rather than undercutting it. Plaintiffs cite the January 16, 2023 email for the proposition that Nerush's counsel "withdrew his proposal," "preserving Investor's status as a member." (AB 8 (citing B00154).) But that email states that counsel had "warmed up over the weekend to the existing debt characterization language in 13.2 and ha[d] therefore deleted [his] 3 red line additions" on the subject. The redlines were dropped because Section 13.2

already characterized the contribution as debt for tax purposes, not because the parties rejected debt treatment. Plaintiffs answer that Section 13.2 preserves the Investor's membership "for interpretation, enforcement, and remedies." (AB 24.) That carve-back governs the parties' rights under the Delaware Act. It does not decide whether, under California law, the payment obligation Nerush guaranteed is a loan.

E. Estoppel cannot rest on a structure Plaintiffs chose knowing it was a "loan."

The Opinion announced estoppel as a ground in a single sentence and never analyzed its elements. (Mem. Op. 33.) Plaintiffs now supply a theory the Court did not adopt: that Defendants "induced Investor to forgo a Second Deed of Trust," and with it a usury-exempt structure. (AB 28.) Plaintiffs' own brief shows otherwise. Nerush's counsel offered that structure; his second alternative was that "the Investor participates as a second trust deed lender and is not included as an Investor Member." (AB 7 (quoting A0136).) The parties chose the first alternative with that option on the table.

The remaining elements fail as well. Equitable estoppel requires that the party invoking it "lacked knowledge and the means of knowing the true facts." (AB 26.) The Investor's own counsel and principal described the transaction as debt and as a "loan." (JX 090 (A0137); JX 107 (A0145).) And the decision on which Plaintiffs rely rests on borrower fraud: "In the absence of fraud by the borrower, the parties to

a usurious transaction are not in pari delicto." *Buck v. Dahlgren*, 23 Cal. App. 3d 779, 788 (1972) (quoting *Heald v. Friis-Hansen*, 52 Cal. 2d 834, 837 (1959)). The Court made no finding that Defendants misrepresented the structure. Without such a finding, California's usury protection cannot be waived by contract or lost by a label. *WRI Opportunity Loans II, LLC v. Cooper*, 154 Cal. App. 4th 525, 542-44 (2007); *Stock v. Meek*, 35 Cal. 2d 809, 817-18 (1950). For the same reason, the August 2024 Second Amendment's acknowledgment that Nerush had "no set-offs, counterclaims, claims, defenses or other causes of action against Investor" (A0342 § 4), on which Plaintiffs rely (AB 14, 27), cannot waive a usury defense California law makes nonwaivable, and the amendment's ratification of the LLC Agreement (A0342 § 8) does not resolve the choice-of-law question that determines whether the defense exists.

Beyond the equity and estoppel holdings, Plaintiffs do not dispute that a guarantor may assert usury or contest the remedy if the instrument is debt. (AB 25 n.8, 26 n.9.) If California law applies and the instrument is debt, the judgments on Counterclaims IV, V, and VI should 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 to treble damages. (OB 37-38.)

IV. PLAINTIFFS CONCEDE THE FUNDING EMAIL OVERSTATED THE CASH RAISED, AND THE REMAINING GROUNDS FOR JUDGMENT ON COUNTERCLAIM VIII FAIL.

Plaintiffs do not defend the finding that the January 3 email was "neither false nor misleading." (Mem. Op. 52.) They acknowledge that Gortikov was "exaggerating" when he wrote that $10.5 million had been "sitting dormant in our account," and that the Investor "had raised approximately $8.35 million by closing." (AB 31.) "Exaggerating" is Plaintiffs' characterization. Gortikov's own was blunter: asked on direct whether the "sitting dormant" statement was "an accurate statement," he answered, "It was not," and, asked whether he had $10.5 million "at that time," he answered, "I did not." (Trial Vol. I at 92-93 (A1759-A1760).) The Opinion itself opens by finding that in January 2023 "the plaintiffs invested nearly $8 million." (Mem. Op. 1.) Plaintiffs instead defend the judgment on hearsay, intermediary, materiality, reliance, and Rule 15(b) grounds. None holds.

A. The relay testimony was not hearsay.

A statement offered to prove that it was made and communicated, rather than for its truth, is not hearsay. D.R.E. 801(c); *Sanabria v. State*, 974 A.2d 107, 112 (Del. 2009) ("comments by a third party that are not admitted for the truth of their content do not constitute hearsay statements"). Counsel offered Nerush's testimony on that basis: "to prove that Mr. Proniloff communicated that information to Mr. Nerush, which originated from Mr. Gortikov." (Trial Vol. III at 538-39 (A1808-

A1809).) The Court ruled that it was offered for its truth and invited briefing. (*Id.* at 539, 544 (A1809, A1814).) A fraud claimant offers a misrepresentation because it is false, so the Court excluded the evidence for the very reason that made it admissible.

Plaintiffs answer that attributing the statements to Gortikov required the Court "to accept Proniloff's out-of-court statements as true." (AB 34.) It did not. Gortikov's own emails prove what Gortikov said: "we have had $10.5 million of our investor funds sitting dormant in our account" (JX 099 (A0142)), and "Can you please tell him that I am giving him $10.5 million dollars." (Supp. A2205-A2206.) Those are statements of a party opponent. D.R.E. 801(d)(2). Gortikov confirmed that "him" meant Nerush. (Trial Vol. I at 196 (A1767).) Nerush's testimony proves only what Nerush heard. Each layer has its own basis, so D.R.E. 805 is satisfied. And the exclusion was not harmless: the Opinion's next sentence rests the no-representation holding on the gap the exclusion created. (Mem. Op. 52.)

B. Gortikov is liable for what he directed his conduit to convey.

The maker of a fraudulent misrepresentation is liable when it "is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction." Restatement (Second) of Torts § 533; *Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 59, 61 (Del. Ch. 2015). Section 533 addresses statements made through someone who is not the plaintiff's agent, so

the finding that Proniloff was not Nerush's agent (AB 32) is beside the point. Gortikov himself considered Proniloff "a liaison for Mr. Nerush personally" (Trial Vol. I at 186-87 (A1765-A1766)), which is why he had reason to expect that what he told Proniloff would reach Nerush.

Plaintiffs treat the two emails as unrelated: the January 3 email was inaccurate but not directed to Nerush, while the January 16 email was directed to Nerush but "accurately described the investment." (AB 32, 35.) Section 533 asks about substance, and the emails share it. Gortikov copied Proniloff on the January 3 email (JX 099 (A0141-A0142)), and he described Proniloff as a "conduit" whose job was "to convey information." (Trial Vol. I at 104-05 (A1763-A1764).) Thirteen days later, and three days before closing, he asked that conduit to tell Nerush, "I am giving him $10.5 million dollars." (Supp. A2205-A2206.) The substance Proniloff had from Gortikov was that the money was already in the account. Proniloff's January 11 email to Nerush, reporting that "Bryan has delivered on his commitment," confirms that the funding message reached Nerush. (JX 104 (A0143).)

C. The shortfall was material.

Plaintiffs say the initial raise funded the closing and every reserve the owners could reach, and that only "the reserve paying Investor's own return" was short. (AB 33.) That reserve was the Preferred Return Reserve, the same reserve the Investor drew on "to pay themselves returns" and could not reconcile. (Mem. Op. 61-62.)

The shortfall went to the return Nerush guaranteed. Gortikov testified that the spread between the return charged on $10.5 million and his own investors' return on $8.35 million "was by design," "a critical component, a premeditated, known component fundamental to the economics of this transaction," and that "[i]f that wasn't the case, we wouldn't have proceeded." (Trial Vol. II at 280, 351-53 (A1773, A1785-A1787).) Pressed on the arithmetic, Gortikov agreed that a 19% return was accruing on approximately $2.15 million "that isn't there in cash," and, when asked "who gets that," he answered, "Me," adding, "If the redemption price is paid in full." (Trial Vol. II at 325-26 (A2211-A2212).) Asked whether "the only person who financially benefits from . . . raising only 8.35 million" was himself, he answered, "Yes, . . . as consideration for the extraordinary risk I'm taking." (Trial Vol. II at 353 (A1786).) The benefit of the shortfall thus ran to Gortikov, not the Project, which directly answers Plaintiffs' contention that the fundraising difference did not reduce the funds available to the owners. (AB 33.) Materiality asks whether the truth would have mattered to the decision to invest, not whether the money arrived later. A misrepresentation bearing on the financing of a transaction is material, *cf. Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074-76 (Del. 1983), and once Gortikov chose to speak he could not do so "partially or obliquely" in a manner that misled; a half-truth is actionable. *Prairie Capital*, 132 A.3d at 52-54; *see Stephenson*, 462 A.2d at 1074; *Kronenberg v. Katz*, 872 A.2d 568, 585-87 (Del. Ch.

2004). The Opinion's observation that the Investor "ultimately contributed over $10.5 million" and "never defaulted" (Mem. Op. 54) applies a performance test, not an inducement test.

D. The reliance holding contradicts itself.

In a single passage, the Opinion found that "[n]one of the representations made by the plaintiffs are inconsistent with" the LLC Agreement's terms, and then held that 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.) The next page adds that Section 2.2 "was not a representation of liquidity." (Mem. Op. 54.) If the contract said nothing about liquidity, reading it could not have corrected a representation about liquidity. Nerush's testimony that he would not have read the documents (AB 32) is therefore beside the point. The failure-to-read cases bind a signer to a contract's terms; they do not bar reliance on a representation those terms do not address.

The Court also held that this agreement "lacks an anti-reliance provision." (Mem. Op. 26 & n.139.) Absent language that "add[s] up to a clear anti-reliance clause," extra-contractual representations remain actionable. *Kronenberg*, 872 A.2d at 593; *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1059 (Del. Ch. 2006). That finding applies to both parties to the same agreement. Plaintiffs' answer, "Plaintiffs proved fraud; Defendants did not" (AB 33), is a conclusion, not

a reason. Because the Opinion decided justifiability alone, the proper course is reversal and remand to decide reliance in fact under the correct standard. Proniloff's January 11 email acknowledged that Nerush was "hesitant to close" and urged him to proceed, and Nerush closed eight days later after further communications from Proniloff. (JX 104 (A0143); Trial Vol. III at 530-31, 533-34 (A1802-A1803, A1805-A1806).)

E. The Rule 15(b) ruling was a sound exercise of discretion.

Plaintiffs' alternative ground requires an abuse of discretion. (AB 30 (citing *Laird v. Buckley*, 539 A.2d 1076, 1079 (Del. 1988)).) The Court found the funding claim "fully litigated," the issue "pressed throughout trial," and no "change of tactics or theories" on either side. (Mem. Op. 30, 32.) Plaintiffs say timely notice would have let them "call Proniloff at trial." (AB 36.) But Proniloff's deposition was part of the trial record (Mem. Op. 2 n.1, 45 n.229). Not calling him was a choice, not prejudice.

V. THE FEE AWARD RISES OR FALLS WITH ARGUMENTS III AND IV.

Plaintiffs offer no independent basis for the fee award. They argue only that "[t]he reasons to affirm the Judgment also support Plaintiffs' contractual right to reasonable fees." (AB 48.) The award rests on Section 16.13 of the LLC Agreement, which shifts fees to the "prevailing party," and Section 1.7 of the Guaranties, which shifts costs incurred "in connection with the enforcement" of Nerush's obligations. (Mem. Op. 67-68; Final J. ¶¶ 8-9.) Both turn on the merits. Appellants do not challenge the reasonableness of the amount. If the Court grants relief on Argument III or IV, the fee award should be vacated and remanded for a new determination.

CONCLUSION

For these reasons and those in the Opening Brief, Appellants respectfully request that the Court (1) reverse paragraph 6(a) of the Final Judgment and remand for recalculation of prejudgment and post-judgment interest on the Unreturned Capital award at the legal rate under 6 *Del. C.* § 2301(a), compounded quarterly; (2) reverse the equity holding, apply California law, reverse the judgments on Counterclaims IV, V, and VI, and remand on the usury remedy; (3) reverse the judgment on Counterclaim VIII and the corresponding affirmative defense and remand to apply the correct standards governing reliance, falsity, and materiality, or grant the alternative relief requested in the Opening Brief (OB 48); and (4) if relief is granted on Argument III or IV, vacate the fee award and remand for a new determination.

Respectfully submitted,

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