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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOAQUIN ALTENBERG, Defendant Below, Appellee/Cross Appellant, v. HOMF II INVESTMENT CORP., OBD PARTNERS, LLC, BRETT JEFFERSON, Plaintiffs Below, Appellants/Cross Appellees.	)	No. 14, 2021 Court Below: Court of Chancery of the State of Delaware C.A. No. 2017-0293-JTL

[CORRECTED] APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

On April 17, 2017, Plaintiffs, HOMF II Investment Corp. ("HOMF"), OBD Partners, LLC ("OBD"), and Brett Jefferson (the "Plaintiffs" or "Investors"), filed a Verified Complaint against Joaquin Altenberg and VERT Solar Finance, LLC ("Finance"). A-258. Plaintiffs filed an Amended Verified Complaint on May 3, 2018. A-442. Neither the Verified Complaint nor the Amended Verified Complaint contains causes of action for fraudulent inducement or equitable fraud. *See id*.

On July 14, 2019, Finance initiated bankruptcy proceedings in the Southern District of Texas. As of the date of trial, the bankruptcy trustee controlled Finance and all claims against it in this litigation are stayed. B2548:15-19. Plaintiffs have agreed to share any proceeds of this litigation with Finance's bankruptcy estate.

The Court of Chancery conducted a trial from September 24-26, 2019 against Altenberg alone. *See* B2100-B3039. On May 19, 2020, the Court issued its Memorandum Opinion ("Mem. Op." or "Opinion"). *See* Appellants' Opening Brief ("Op. Br.") at Ex. A. The Court of Chancery held that Plaintiffs failed to properly allege a cause of action for fraudulent inducement or introduce that claim into the litigation at any point. Mem. Op. at 117. The Court of Chancery also held that "[P]laintiffs failed to prove that Altenberg committed fraud while managing the Fund." *Id*.

The Court of Chancery did, however, conclude that Altenberg breached his fiduciary duty of loyalty to Plaintiffs. That finding is one of the two subjects of Altenberg's cross-appeal. Finding that Plaintiffs had not established their damages claims, the Court engaged in additional proceedings, thereby providing Plaintiffs with a post-trial opportunity to prove their *prima facie* case. That arrangement is the second basis of Altenberg's cross-appeal. On December 7, 2020, the Court entered its Order Specifying Damages and a final order was entered on December 21, 2020.

On January 11, 2021, Plaintiffs filed a Notice of Appeal to this Court. Dkt. 1. On March 2, 2021, Plaintiffs filed Appellants' Opening Brief. Dkt. 11. In their Opening Brief, Plaintiffs argue that the Court should reverse the Court of Chancery's decision regarding Plaintiffs' failure to allege a claim for fraudulent inducement and failure to prove a claim for common law fraud. *Id.* at 20-43.

On January 20, 2021, Altenberg filed a Notice of Cross-Appeal to this Court. Dkt. 7. Altenberg appeals: (1) the Court's finding that Altenberg breached his fiduciary duties to the Fund, because the Court improperly considered parol evidence that was relevant only to a claim that Plaintiffs had not pled; and (2) the Court's conduct of further proceedings to permit Plaintiffs to present a damages analysis after they failed to do so at trial. This is Appellee's Answering Brief On Appeal and Cross-Appellant's Opening Brief On Cross-Appeal.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly found that Plaintiffs failed to properly allege a cause of action for fraudulent inducement. First, proof of fraudulent inducement to contract requires a plaintiff to prove that a statement or statements induced a plaintiff to enter into an agreement through the use of pre-contractual evidence. *See* 37 C.J.S. *Fraud* § 13. The Court of Chancery considered the Delaware and Federal courts' abandonment of the restrictive theory of pleadings, and with those principles in mind, correctly found that Plaintiffs failed to properly plead a claim for fraudulent inducement.

Second, the Court of Chancery correctly found that Plaintiffs did not provide notice of Plaintiffs' purported fraudulent inducement claim. As a result of Plaintiffs' failure to provide notice, Altenberg suffered prejudice. Without such requisite notice, Altenberg had no opportunity to meaningfully defend such a claim during discovery, at trial, or in his post-trial briefing.

Third, Plaintiffs misconstrue the benefit that Court of Chancery Rule 54(c) affords to a plaintiff – an argument raised for the first time on appeal. Because Plaintiffs raise this argument for the first time on appeal and provide no argument that the interests of justice require the Court to consider the argument, the argument is deemed waived. *See* Supr. Ct. R. 8, 14(b)(vi)(A)(3), 14(c)(i). Even if the Court considers this argument, Rule 54(c) only affords Plaintiffs an opportunity for *relief* that has not been demanded in the pleadings, not substantive claims that a party has

never alleged. Rule 54(c) is not designed to allow plaintiffs to recover for claims they never asserted.

2. Denied. The Court should affirm the Court of Chancery's Opinion that Plaintiffs failed to prove that Altenberg committed fraud during the operation of the Fund. At trial and during pre- and post-trial briefing, Plaintiffs only identified two allegedly fraudulent statements on the part of Altenberg that occurred during the operation of the Fund. Plaintiffs alleged that the capital calls formed the basis of a fraudulent act; however, the Court of Chancery correctly held those statements were disclosure claims and should not be analyzed under the rubric of common law fraud. *See* Mem. Op. at 90-91 (citing *Malone v. Brincat*, 722 A.2d 5 (Del. 1998); *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2004 WL 2050527, at *3-4 (Del. Super. Sept. 15, 2004); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs., Inc.*, 854 A.2d 121, 157-63 (Del. Ch. 2004)). Even if the capital calls were to be analyzed under the rubric of common law fraud, the Court of Chancery properly held that Plaintiffs failed to prove scienter on Altenberg's part in connection with the capital calls and thus did not prove their fraud claim.

Second, Plaintiffs alleged that Altenberg promised that all the Fund's assets would be held in Fund-owned project companies, but the Court found that Plaintiffs failed to prove scienter in connection with this alleged fraudulent statement. Based on the Court of Chancery's factual findings, when Plaintiffs found out about this, Altenberg readily admitted to it. Plaintiffs' additional new grounds for fraud during

the operation of the Fund should be dismissed, because Plaintiffs did not allege or prove them at trial. Similarly, Plaintiffs' belated request that the Court find in Plaintiffs' favor on an equitable fraud claim should likewise be disregarded, because Plaintiffs never raised a claim for equitable fraud in their Amended Complaint.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. The Court of Chancery's consideration of inadmissible parol evidence constituted reversible error. The Fund's Operating Agreement is a final, integrated contract. The provisions at issue are unambiguous. The Court of Chancery only admitted that evidence as relevant to a fraudulent inducement claim that Plaintiffs did not properly allege. The pre-contractual, pre-fiduciary duty evidence was irrelevant to any claim that was tried. But the Court acknowledged that that evidence "affected" its determination that Altenberg breached his fiduciary duties. Accordingly, the Court's conclusion that Altenberg committed such a breach should be reversed.

2. Plaintiffs manifestly failed to establish their claim for damages at trial. Altenberg pointed out Plaintiffs' failure of proof in his pretrial briefs, post-trial briefs and at post-trial argument. Altenberg urged the Court of Chancery to hold Plaintiffs to their burden of proof at trial and to conclude that they had failed to prove their entitlement to a damages award. The Court of Chancery agreed that Plaintiffs had failed to prove their claimed damages, but afforded Plaintiffs the extraordinary opportunity to cure their failures of proof in further proceedings. Trial in this case had not been bifurcated and Plaintiffs should have been held to their obligation to prove their entire case at trial. They failed to do so and the Court of Chancery inappropriately re-opened the trial record after post-trial briefing and oral argument had concluded. The damages award against Altenberg should, therefore, be

reversed.

INTRODUCTION

Plaintiffs' theory of their case against Altenberg continually changed throughout the course of the litigation. That problem led to insurmountable consequences for Plaintiffs' claims. Plaintiffs now request this Court to find in Plaintiffs' favor on causes of action that they never alleged in the pleadings. Similarly, they required a second opportunity to establish an award of damages, having failed to do so at trial. Delaware law does not -- and should not -- provide for the sorts of second chances that Plaintiffs seek and, indeed, have already received in this case.

The Court of Chancery correctly held that Plaintiffs did not plead a cause of action for fraudulent inducement and never moved to amend their pleadings to do so. Such inaction on Plaintiffs' part is fatal to their appeal. The Court of Chancery also correctly found that Plaintiffs did not prove the fraud claim that Plaintiffs did allege in their Amended Complaint, because Plaintiffs pivoted their trial strategy and post-trial briefing to address what Plaintiffs believed could be a stronger claim of fraudulent inducement. The Court of Chancery's correct legal analysis of the fraud issues reflects a careful review of the facts and law. The Court of Chancery appropriately applied the law to the evidence that Plaintiffs set forth. Plaintiffs' last minute change of tactics represented a calculated strategic decision that ultimately failed. The Delaware Supreme Court is not the venue for Plaintiffs to undo their own decisions.

Altenberg appeals the portion of the decision and judgment that found him liable for breach of fiduciary duty. That finding was erroneous, because it was, to use the Court of Chancery's word, "affected" by evidence relevant only to a fraudulent inducement claim, a cause of action that Plaintiffs had not pled. The Court of Chancery should never have admitted or considered that parol evidence as it had no relevance to any issue before the Court. Its manifest impact warrants reversal.

Though Plaintiffs were not relieved of their obligation to plead the cause of action they presented at trial, the Court of Chancery did relieve Plaintiffs of their burden to prove all the elements of their case at trial. Plaintiffs failed to present the trial court with a cogent case for the calculation of damages. Rather than entering a nominal damages award as such circumstances warrant, the Court re-opened the case after all post-trial proceedings had concluded to enable Plaintiffs to do that which they should have done at trial. Altenberg respectfully submits that that arrangement was erroneous and that the damages award against him should be reversed.

STATEMENT OF FACTS

Plaintiff Brett Jefferson owns Hildene Capital Management ("Hildene"), which manages $3 billion in hedge funds and separately managed accounts and $6 billion in other assets. B2105:24-2106:1; B2240:8-16; B2241:2-8. Before 2015, Jefferson had never invested in a solar energy project. B2243:9-12. When he moved to the Virgin Islands in 2014, Jefferson became interested in solar energy due to the high cost of electricity in the Virgin Islands and the expensive electric bills he was paying on his condominium buildings there. B2109:7-2110:7; B2244:1-15. Jefferson then began to solicit individuals in the solar energy field and learn how to do solar energy deals in the Virgin Islands. B2109:7-2111:4. Jefferson was introduced to Joaquin Altenberg, a Harvard-educated individual with considerable knowledge and experience in the solar energy field. B2428:17-2429:5; 2245:20-2246:3.

Jefferson and Altenberg eventually partnered up and on June 11, 2015, the parties executed the Fund's Operating Agreement and related documents. B2. That same day, Jefferson and Plaintiff OBD each contributed $500,000 to the Fund. A-651-52 ¶¶ 37-38; B73-76. The Fund's Operating Agreement designated Finance to be the Manager and Management Member of the Fund. A-184, A-195 § 5.1.B.; B2472:14-16. Accordingly, Finance "shall have all rights, powers and privileges as are necessary or convenient to the conduct, promotion or attainment of the purposes or activities of the Company." A-195 § 5.2.A. Altenberg testified that Finance "had

the ability to acquire portfolios, develop them, acquire assets such as modules and inverters, components, EPCs, supporting service providers and capital, to raise money for the portfolios and ultimately keep them or sell them, depending on what met our objectives in providing this sort of evergreen cash-flow solution." B2472:19-2473:1.

In addition, § 2.9 sets forth Finance's right to collect fees for the services it performed for the Fund. A-184. Pursuant to § 2.9, Altenberg and Finance had discretion to determine the amount and timing of the collection of fees up to the cap of $170,000 per megawatt. B2493:15-22; A-187 § 2.9.

I. FINANCE ACQUIRES A PIPELINE OF PROJECTS.

The parties contemplated that the Fund would invest in a series of portfolios of solar energy projects. B2452:12-2453:6. In the industry, it is challenging to acquire a single project, because if projects were sold one-at-a-time, investors would only select the best projects, leaving less lucrative projects to languish without funding. B2454:15-2458:4. Instead, developers grouped them in portfolios of projects. *Id.* Therefore, it "was never contemplated" to do a "one-off project"; instead, they "were always looking at projects that were groups of projects." *Id.* After the Fund purchased a portfolio, it then would focus on the projects that were closest to a critical stage called Notice to Proceed ("NTP"). B2458:7-20; B77. Over the next few months, Altenberg and Finance worked to identify potential pipelines of projects for acquisition. B1. Altenberg at all times

updated the investors as to the acquisition process and sent the Investors a July-August Project Pipeline Report. B78, B79-80. After receiving this report, Jefferson emailed Murphy and remarked: "The guy looks busy." *Id.*

A. The Blue Sky Portfolio.

On November 4, 2015, after months of negotiation, Finance and Blue Sky Utility LLC ("Blue Sky") executed a Solar Development Asset Purchase Agreement (the "Blue Sky APA") whereby Finance purchased on behalf of the Fund the rights to *at least sixteen* solar energy projects in California. B81-211. Altenberg emailed the Agreement to Murphy and Jefferson the next day, and stated: "We will begin construction on the first project with Blue Sky immediately and you will find the initial pipeline included in the contract." B81. The Blue Sky APA was in Finance's name. B87.

On November 16, 2015, Altenberg informed Jefferson and Murphy that construction on three of the Blue Sky projects was ready to commence: Hanford Mall, Orland, and Placerville. B215-33. Altenberg attached the project summary report for each project, which detailed, among other things, the preliminary financial analysis, the "VERT Staged-Progression Model," and project overview. *Id.*

On November 17, 2015, Altenberg met with Jefferson and Murphy. B212-14. On November 19, 2015, Altenberg sent an "Investment Meeting Review," which detailed that "[i]nvestments were approved and project funding will begin upon approval of the Construction Budget by VSF. *Id. An initial investment* was made to

Blue Sky Utility as per the Solar Development [APA] for $512,000." B213 (emphasis added). On the same day as the meeting, the Fund wired $512,000 to Blue Sky. A-653 ¶ 49.

Plaintiffs do not dispute that the Investors approved the Placerville, Orland, and Hanford Mall projects. A-653-54 ¶¶ 52, 55, 59. Plaintiffs nevertheless contended at trial that only one project could permissibly proceed at a time. *See, e.g.*, B2121:11-21.

On November 30, 2015, the Fund and Blue Sky executed an Operating Agreement for "VSF Blue Sky Portfolio I LLC." B234-57. VSF Blue Sky Portfolio I LLC was the "Devco" for the Blue Sky projects, whereby the Fund owned 85 percent and Blue Sky Utility LLC owned 15 percent. B249.

B. Finance Hires DynaSolar As The EPCM For The Blue Sky Projects.

On December 30, 2015, Finance and DynaSolar EPCM, LLC ("DynaSolar") entered into a Master Consulting Services Agreement for project management and engineering services for the Blue Sky projects. B258-93; B2538:6-2539:8. Altenberg's due diligence revealed that DynaSolar had "an excellent track record" in this role. B2538:21-2539:15.

Over the next year, Finance, Altenberg, DynaSolar, and Bright Power, Inc. ("BPI"), a sister company of Blue Sky that operated as the contractor for the projects, worked together to develop the Blue Sky projects. *See, e.g.*, B294-331, B332, B333-

435. Altenberg provided weekly progress reports to the Investors detailing the progress made on the projects (the "Weekly Reports"). *Id*.; B2523:16-2524:3; B2525:3-5; B2537:16-19. Altenberg also had telephone communication with Jefferson approximately once every two weeks. B2531:4-2532:1.

C. The Sunrise Projects.

On January 26, 2016, Altenberg emailed the January 25, 2016 Weekly Report to Jefferson and Murphy. B297-313. It detailed the progress made on the Blue Sky projects, and noted that the Fund was introduced to Sunrise Energy, LLC ("Sunrise"). B298. On February 2, 2016, in addition to various updates on the Blue Sky projects, Altenberg informed Jefferson and Murphy of a review of "the next partner, Sunrise's, first projects." B333-83. He also informed the Investors: "[W]e executed the agreement with Duff & Phelps ("D&P") to provide mark to market analysis and process review." *Id.* The purpose of the discussion with D&P was to develop the methodology and template for the Net Asset Value ("NAV") reports. B2524:8-2528:2. HOMF requested that this methodology be completed prior to HOMF investing in the Fund. *Id.* OBD did not require NAV reports. B2949:9-10. Accordingly, the Fund hired D&P to develop the methodology required to compile the NAV reports. B2527:1-14.

Additionally, the Fund engaged ThayerONeal as the Fund's accountants to utilize D&P's methodology and compile the monthly NAV reports. B2527:15-2528:2. ThayerONeal's ultimately had the responsibility to compile the NAV

reports with Finance overseeing the preparation – not Altenberg, personally. *Id.*; B2545:15-24.

In emails and conversations with Jefferson, Altenberg informed the Investors of a potential purchase of solar panels, which DynaSolar had recommended. B2543:23-2544:11; B1361 (105:4-19); B436-44; B438. Altenberg's rationale behind the purchase of solar panels was that if the Fund could purchase panels at a discount and use the panels on the Fund's projects, it could achieve NTP at a lower cost. B2544:12-23. The purchase would, therefore, benefit the Fund. *See id.* Altenberg testified that he informed Jefferson of this rationale and that, at the time, he seemed to understand it and thought it would be a good idea. B2544:24-2545:5.

The following week's report contained more updates for the Blue Sky projects, Sunrise projects, and the potential purchase of solar panels. B445-53. The Report stated: "DynaSolar has located approximately 8.3 MW of tier 1 solar modules for sale on the secondary market for VERT projects." B446. On February 18, 2016, the Fund entered into an Asset Purchase Agreement with Sunrise whereby the Fund acquired assets related to a proposed solar energy project in Kern County, California and the right to acquire additional projects in Pennsylvania. B454-47.

On February 23, 2016, Altenberg emailed the February 19, 2016 Weekly Report to the Investors. B3183-3209. Altenberg informed Jefferson and Murphy that the Blue Sky projects were delayed by four months. *Id.* Altenberg also attached the Investment Reports for the Placerville and Orland projects. *Id.* The Report

stated that "[DynaSolar] met with GCL and conducted physical inspection of 8 MW of solar modules for potential VERT purchase." B3185-86.

In the same email, Altenberg transmitted a capital call for $509,627. B3183. Altenberg stated, "We are pleased to report that we have signed our second APA with Sunrise Energy, LLC last week." *Id.* Sunrise's first project, Bakersfield in Kern County, California, accounted for $250,000 of the total requested capital. *Id.* Altenberg informed Jefferson and Murphy that they "should also prepare to discuss panel deposits for $250,000 of a $4M purchase that will lower our panel and all in cost by 20 cents (about 50% of the equity needed in all projects)." *Id.*; B548-74.

D. Altenberg Keeps Plaintiffs Apprised Of The Projects And The GCL Panels.

The following week's report, dated February 26, 2016, explained that DynaSolar continued to perform diligence on the GCL panels and that a purchase agreement would be forthcoming. B576. It also provided progress updates on the Blue Sky and Sunrise projects. B576-77.

On February 26, 2016, the Investors fulfilled the capital call by funding $510,000 – Jefferson and OBD each contributed $255,000. B585-88; A-652 ¶ 41. Prior to funding the request, on February 25, 2016, Murphy affirmed Altenberg's efforts and stated: "On to the next stage Joaquin. Great work." B585-88.

On March 14, 2016, Altenberg emailed the March 11, 2016 Weekly Report to Jefferson and Murphy and reported that the Orland and Placerville projects were progressing as planned. B589-96. The Report also stated that, "[t]he 8.3 MW GCL module purchase is expected to be complete by the end of the month." B591.

The next week's report, dated March 18, 2016, provided progress updates on the Blue Sky and Sunrise projects and informed the Investors that the GCL panel purchase would be complete "by the end of next week." B598. After receiving these Weekly Reports, neither Jefferson nor Murphy expressed any objection to the panel purchase. B2531:20-B2532:1.

E. The Beltline Portfolio

The March 25, 2016 Weekly Report informed the Investors that the portfolios were growing and that additional projects with Sunrise and Beltline were under discussion. B2532:3-15; B604-12. The Report stated that "the VERT- DynaSolar team performed a due diligence evaluation for the Georgia Avocado portfolio of projects proposed by Beltline Solar for construction this year. The portfolio is comprised of about twenty-two ground mount/ single-axis tracker projects totaling approximately 34 MW DC." B606.

On March 30, 2016, the parties executed an Amended and Restated Operating Agreement for the Fund to add HOMF as an "Investment Member." A-184; B2503:14-B2504:9. Jefferson solely owned HOMF. B2238:7-11. HOMF contributed its proportionate investment of $3.02 million to the Fund to enter as an

Investment Member. A-652 ¶¶ 42-43.

In April 2016, Jefferson tasked Jason Spear, one of his subordinates at Hildene, with monitoring the investment in the Fund for Jefferson and Murphy. B641. In that role, Spear reviewed the Weekly Reports and reported updates to Jefferson and Murphy. *See, e.g.*, B642, B661-62. Spear compiled this information into an Excel spreadsheet titled, "VERT Solar – Status Tracker.xlsx" ("Status Tracker"). B661-62; B2971:23-2972:11. As of April 21, 2016, the Status Tracker contained information related to the Blue Sky, Sunrise, and Georgia projects as well as the GCL panels. *Id.*

On April 4, 2016, Altenberg provided the Investors with the April 1, 2016 Weekly Report. B621-40. In the email, Altenberg stated: "We also put the deposit down for the panel purchase and are moving forward to acquire those assets at a steep discount to the market. That document is also attached." *Id.* The Weekly Report stated that "[t]he 8.3 MW GCL module purchase agreement was signed by VERT this week. Countersignature from GCL is expected by 4/4/16." B623. It also discussed DynaSolar's continued diligence on the Georgia Projects. *Id.*

The General Terms and Conditions of Sale Agreement between the Fund and GCL for the purchase was attached to Altenberg's April 4, 2016 email (the "Panel Purchase Agreement"). B634. Despite receiving it, Jefferson testified that he did not see the agreement until 2017. B2213:10-13. The Panel Purchase Agreement was countersigned and executed by GCL on April 7, 2016. B617. It provided for the

Fund to pay a deposit of $250,000 into escrow within two business days of acceptance of the agreement by GCL. B613 § 2. It further required the Fund to continue due diligence on the panels, then release the escrow funds and make a payment in full for the panels. *Id.*

On April 18, 2016, Altenberg provided the Investors with the April 15, 2016 Weekly Report. B643-60. This Weekly Report detailed the progress of the Georgia, Blue Sky, and Sunrise projects as well as the continued diligence required under the Panel Purchase Agreement. B644-45. The Weekly Report stated: "The 8.3 MW GCL module purchase agreement was signed by GCL on 4.7.2016 . . . Further documentation is expected from GCL next week so that DynaSolar can complete diligence on these modules." B646. After receiving this Weekly Report, none of the Investors called Altenberg to instruct him not to buy the panels or to cancel the agreement. B2535:18-2536:13.

Contrary to Jefferson's testimony, on April 18, 2016, Spear emailed Jefferson that "VERT is also working on a 34MW (22 ground-mount systems) project in GA. VERT is considering buying 8.3MW of panels that are sitting in a warehouse for use in this project. We may receive a call on our remaining commitment in connection with this purchase." B642. Spear also stated that he was "in the process of creating our own system for tracking the pipeline. It essentially will allow us to see the pipeline and all weekly updates at the same time." *Id.* Spear then forwarded that information to Murphy. B661-62. Thereafter, Altenberg continued to provide

Weekly Reports – all providing detailed information. *See* B2537:3-19, B706-15, B828-38, B865-75, B888-908, B923-33, B934-44, B950-63, B964-79, B617-1006, B1013-21, B1022-30, B1031-41, B1042-50.

F. DynaSolar Transaction.

Around April 24, 2016, Finance and DynaSolar began negotiating a transaction whereby Finance would purchase DynaSolar. *See* B663-705. In addition to acting as an EPCM, DynaSolar had access to project portfolios. B2539:16-2540:2. With this venture, DynaSolar would bring a "huge portfolio" – over 1,000 megawatts of commercial and industrial projects – to the Fund. B2540:2-7.

Altenberg contacted Jefferson to discuss the potential acquisition of DynaSolar. B2541:7-10. Altenberg explained that: "VERT was obviously getting more involved in development and we were needing some technical support. I would either have to build a team or buy a team. This team was ready to go, already operating in that function, already familiar, and I think bringing us an insane amount of projects." B2541:11-18. Altenberg testified that Jefferson responded that "if it's going to help your business, then do it." B2541:22-B2542:1.

The sale ultimately did not go forward, no money from the Fund was used and no capital calls were made in connection with this proposed venture. B2552:18-2562:11, B1463, A-656 ¶ 73.

G. NAV Reports.

On May 6, 2016, Altenberg sent Jefferson the first NAV report with supporting financial data. B856-60. The NAV reports show "the total value of the investment plus what the net asset value against . . . total value is." B2546:21-2547:3. At all times, Altenberg and ThayerONeal used and relied on the processes set up by D&P to compile the NAV reports. B2547:4-16.

The NAV reports contained the General Ledger, which detailed transactions from the beginning of the Fund to the date of the NAV Report. B2590:5-2591:3. Those transactions not only included investments in each of the projects and payments to third parties, but also included payments made from the Fund to Finance pursuant to § 2.9 of the Fund's Operating Agreement. B2591:4-21; *see, e.g.*, B859, B876-81, B882-87, B947-49, B1007-12, B1058-71, B1081-92, B1112-23, B1275-95.

H. Continued Development Of The Georgia Portfolio.

On May 4, 2016, Finance and Beltline Energy, LLC ("Beltline") executed the Master Solar Development APA, whereby Finance acquired assets relating to twenty-two solar energy projects in Georgia ("Georgia Projects"). B775-827, B828-38, A-655 ¶ 70. From May to December 2016, Finance expended a total of $2.3 million for development, project management, and legal costs for the Georgia Projects. A-656 ¶ 78.

Throughout that period of time, Spear was well-informed about the Fund and Altenberg's activities. Spear regularly sent Finance questions regarding the investment. *See, e.g.*, B861-62. On May 21, 2016, Spear also informed Jefferson and Murphy that "VERT is also signing a purchase order for 8.3 MW of solar panels for use in the Avocado Portfolio in Georgia." B863-64.

On June 15, 2016, Murphy and Spear met with Finance in Houston to discuss the Fund's investment. B909-11. Among other things, the agenda for the meeting listed the "GCL Transaction" as a discussion topic. B912-15. At the meeting, which Spear surreptitiously recorded, Altenberg explained that the Fund received a favorable price on the GCL panels and, therefore, they seized the opportunity to purchase them for use on the Fund's projects. B2991:17-2994:2 (audio recording of the meeting), B2989:23-2990:11.

After the meeting, on June 15, 2016, Altenberg sent Spear and Murphy the Fund Allocation and Acquisition overview. B916-19. The attachment listed "Panel Purchase" at $3.5 million as "In Process" and the "DynaSolar Acquisition" as $3.5 million on a date "TBD." *Id.* This document listed the "Beltline Portfolio" as a line item with the date "4/1/16." *Id*. The next day, Murphy responded to Altenberg and explained that he and Jefferson wished to have a follow-up conversation about the Georgia Projects. B920-22. He concluded the email by stating: "Thanks again and keep plugging away." *Id.* On June 27, 2016, the parties discussed via telephone the Blue Sky projects, the GCL transaction, as well as whether to move forward with the

Georgia Projects. B945-46, A-214.

Despite all this information that Altenberg provided to Plaintiffs, Jefferson testified that he did not know about the DynaSolar agreement, Blue Sky projects, and GCL Panels. B2201:14-2202:6.

II. ISSUES BEGIN TO MOUNT CONCERNING PROJECTS AND TRANSACTIONS.

In July 2016, Altenberg began to notice that the due diligence conducted by DynaSolar on the GCL panels was problematic and that the GCL solar panels could not be used on the Georgia Projects. B2552:14-17, B2554:5-15. Altenberg immediately notified DynaSolar of its error and stopped payment on the GCL panels. B2554:16-21; *see also* A-660 ¶¶ 103-104.

Because of DynaSolar's error, the Fund was faced with the need to liquidate the GCL panels in a softened market. B2555:15-20. Altenberg asked GCL to send the panels to Finance so it could liquidate them. B2555:17-20. GCL refused, because GCL was in a lawsuit with the warehouse where the panels were stored. B2555:21-2556:5. Altenberg promptly informed the Investors about those problems. B2556:6-9. He informed them that they could sell the Georgia Projects immediately at a loss of approximately $500,000 or they could drive the portfolio to completion and recoup the investment, possibly even at a premium. B2556:6-14. On July 25, 2016, Altenberg informed Jefferson and Murphy that Georgia Power provided extensions on "all but the 1 smallest project[]" and that a funding request would be

coming. B980-82; B2504:23-2506:7. Altenberg stated that "a formal letter is to follow" and "[t]he estimated funding call is $1.7 [million] . . . ." B980-82. The next day, the Investors replied to set up a call to discuss. B983.

In an email to himself, Spear summarized the call, which included a capital call of $1.7 million. B985-88. Spear noted the goals were to trade or sell the Georgia Projects at cost or five percent above cost and focus on the Blue Sky projects. *Id.* He also noted: "The $1.77 they are looking to raise is for GA only"; and "they spent $1.3mm on panels and the rest on other aspects of GA." *Id.*

On July 28, 2016, Altenberg formally requested a capital call of $1.8 million. B989-92. In the capital call memorandum to the Investors, Altenberg detailed that Georgia Power agreed to push out the completion dates for all but two of the Georgia Projects, because the component costs were rapidly declining which would lower install cost. B991-92; B2508:5-23.

On July 29, 2016, the Investors contributed $1.8 million to the Fund – HOMF contributed $1.2 million, Jefferson contributed $300,000, and OBD contributed $300,000. A-652 ¶ 44; *see also* B1922:5-11 (J. Murphy Dep.) (explaining that two capital calls were made in connection with the Georgia portfolio).

On September 22, 2016, Altenberg formally transmitted a capital call of $500,000. B1051-55. The capital call memorandum detailed that the Georgia portfolio was "progressing towards a sale as expected" and "as discussed on call July 27th [sic], we expect the total investment for this transaction to come to $2.3M and

to date we have drawn $1.8M." B1052-55. That same day, the Investors contributed a total of $449,500 to the Fund. B1056-57, A-652 ¶ 45.

On September 26, 2016, Spear emailed: "Please let me know what the plans are for the proceeds of the sale once the GA projects are successfully sold." B1097. Altenberg responded: "We had planned to put the proceeds back in the account and apply to the other projects coming through the pipeline. Is that satisfactory?" B1096. Spear replied, with Jefferson copied on the email: "Yes, please keep us current on the status of the sale . . . ." *Id.* Despite this agreement to put the proceeds back in the account, Jefferson testified that he believed the proceeds from the sale of the Georgia Projects were going straight to Plaintiffs' bank account. B2344:11-16.

Despite knowledge of the mounting issues with the Fund, Jefferson still recommended Altenberg to other people in October 2016. B1072, B2353:18-2354:19.

On October 31, 2016, Altenberg attached a memorandum summarizing the status of the Georgia Projects. In sum, Altenberg stated, "All offers being entertained are for full repayment at closing of $2.3 million." B1073-80.

On November 30, 2016, Altenberg sent the Investors the draft term sheet for the sale of the Georgia Projects to Boviet Solar USA, LLC ("Boviet"). B1093-11. The term sheet contemplated full repayment of proceeds to date of $2.3 million and a close date in December 2016. *Id.*

On December 2, 2016, Altenberg informed the Investors of the executed term sheet with Boviet for the sale of the Georgia portfolio for $2.3 million. B839-55. Altenberg also attached the Monthly Report which detailed progress on Blue Sky projects and the Georgia Projects, as well as attached the Boviet Term Sheet. *Id.*

On December 21, 2016, Jefferson expressed to Hoffman, Murphy and Spear that the Investors needed to get more involved with the Fund and Finance, and *for the first time* stated: "Before a deal is committed to we must approve it." B1153-58, B1159-60, B1161-62. On December 23, 2016, Jefferson contributed $50,000 to the Fund. A-652 ¶ 46.

On December 30, 2016, Finance entered into an agreement to sell all its assets and rights relating to the Georgia Projects to Boviet for: (1) a payment of $2,300,000, and (2) the right to receive a development fee of $0.025/Watt DC capacity for each project completed by Boviet following the sale. A-657 ¶ 79, B1166-98. However, after entering into this agreement, the parties learned that DynaSolar had illegally placed liens on some of Georgia Projects. B1124-25, B1133. Jefferson and Murphy then became involved and Jefferson expressed his preference to use one of his attorneys to address the DynaSolar situation. B1150-52, B2351:15-18. Between January and June 2017, a total of $1,050,000 was paid to the Fund pursuant to the Boviet sale. *See* B1316-19, B1327-1330, B1459-62, B1463-1558. The remaining $1,250,000 from the Boviet sale was escrowed as a result of the DynaSolar liens and became part of the later DynaSolar settlement.

B2561:3-13, B2575:10-2576:8.

In or around December 2016, Sunrise commenced an arbitration to unwind the Sunrise APA. A-655 ¶ 67. The Fund agreed to cancel the APA and reverse the pending transactions in exchange for a cash payment by Sunrise of $150,000. A-655 ¶ 68. The Fund received the payment on April 17, 2017. B1331-34.

By the end of 2016, "Blue Sky had still not brought a project to NTP, as per the agreement . . . ." B2562:12-2563:21. Blue Sky defaulted on the contract a second time. *Id.* Out of the over twenty Blue Sky projects, only two were built: Orland and Colusa. B2563:19-21; B2567:11-17.

III. THE PARTIES' RELATIONSHIP BEGINS TO DETERIORATE.

From the end of 2016 to January 2017, Jefferson became frustrated and started blaming the Fund's struggles on Altenberg. *See, e.g.*, B1163-65, B1248, B2369:9-2370:20. Despite Jefferson's aggressive intimidation tactics, Altenberg continued to keep the Investors informed of the Fund's activities. *See, e.g.*, B1248-74, B1296-98, B1303-12, B1320-26, B2361:3-2362:12.

Over the next few weeks, Jefferson, Murphy, and Spear started to concoct a case against Finance and Altenberg. Although the Investors had gone along with – and never objected to – Finance's actions previously, for the first time they began to consider whether they could claim otherwise. B1199-1247, B2363:2-11, B3006:16-24. Moreover, the Investors wrote to each other and admitted that based on their email history and Weekly Reports received from Altenberg, that they were aware of

all of the projects and transactions in real-time. *Id.*; *see, e.g.*, B1208-09.

Despite Plaintiffs' contentions that if they had known more information, they would not have continued to invest in the Fund, Plaintiffs admitted at trial that they *did not read* the information that was provided to them in the form of weekly reports, emails, and memoranda. B2302:10-16 ("That doesn't necessarily mean I read it."); B2302:17-22 ("I sometimes get a lot of emails. I don't read each one of them."); B2304:1-9 ("I don't remember reading this at all."); B2314:5-8 ("I don't remember seeing weekly status reports."); B2315:24-2316:11 ("Q: I just asked if you read it. A: I don't know."); B2350:16-21 ("In some cases I read them, some cases I gave to Jason, and some cases Jim did it."); B2319:7-15 ("I never looked at it. Jason told me that he wasn't able to get into it."); B2349:7-14 ("Q: Did you read the memos he sent you ever? A: I don't think I did"). On January 13, 2017, Jefferson signed and sent to his attorney a document titled, "VERT Solar Fund I Side Letter" ("Side Letter"). B1299-1302, B2294:12-2295:9. Among other things in the Side Letter, Jefferson acknowledged and agreed to a laundry list of items including Finance's right to receive fees under § 2.9, and Finance's ability to enter into third-party agreements in its own name on behalf the Fund. B1300-01, B1301 n.1.

On January 26, 2017, Plaintiffs issued their Capital Withdrawal Notices. B1313-15, A-661 ¶ 106. In March 2017, Jefferson bought out HOMF's interest in the Fund. B2238:12-19, B2240:2-5.

In total, Plaintiffs invested $6.8 million in the Fund and Defendants sold projects which generated over $2 million in revenues. B1463. It is undisputed that at least $6.39 million of the Fund's money was used to pay the projects' expenses to third parties. A-661 ¶ 107. These expenses included payments to Georgia Power, Bright Power, Blue Sky Utility, Beltline, DynaSolar, payments for solar panels, accounting expenses, legal expenses, and various other business expenses. B1463. Those expenses do not include payments made to Defendants or VERT entities for the development of the projects. *Id.*

The Fund paid Finance approximately $2.37 million in fees pursuant to the terms of the Fund's Operating Agreements. *Id.* Of those fees, at least $1.65 million was used to pay Finance's employees and contractors. *Id.* Additionally, Finance paid approximately $643,500 to other third-parties for business expenses. *Id.* This includes expenses for accounts payable, accounting expenses, legal expenses, consulting expenses, and various other business expenses. *Id.* These payments are all fully documented in JX 1498 (B1463-1558), which summarizes the Fund's and Finance's bank account records.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY FOUND THAT PLAINTIFFS FAILED TO PROPERLY ALLEGE A CAUSE OF ACTION FOR FRAUDULENT INDUCEMENT.

A. Question Presented

Should this Court affirm the Court of Chancery's finding that the Plaintiffs never validly pled a cause of action for fraudulent inducement? B2120; B2136; A-829-30, A-839-40 (Altenberg's Opening Post-Trial Brief); A-928-29, A-941-43, A-946-48 (Altenberg's Answering Post-Trial Brief); A-1041-43 (Post-Trial Oral Argument).

B. Scope of Review

The Supreme Court reviews the Court of Chancery's formulation and application of legal principles *de novo*. *Genger v. TR Investors, LLC*, 26 A.3d 180, 190 (Del. 2011). The Supreme Court will not overturn the Court of Chancery's factual findings unless they are clearly erroneous. *Klassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1043 (Del. 2014).

Plaintiffs never raised their argument regarding Court of Chancery Rule 54(c) below. When arguments not fairly presented to a trial judge are presented initially on appeal, the standard of review for the Delaware Supreme Court is "plain error." *See Powell v. Dep't of Servs. For Children, Youth, and their Families*, 963 A.2d 724 (Del. 2008).

C. Merits of Argument

1. *The Court of Chancery Correctly Held That Neither The Complaint Nor The Amended Complaint Properly Pled A Cause Of Action For Fraudulent Inducement.*

Chancery Court Rule 8(a) requires that a party provide "(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the party deems itself entitled." Del. Ct. Ch. R. 8(a). In addition, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity." Del. Ct. Ch. R. 9(b). "To satisfy Rule 9(b), a complaint must allege: (1) the time, place, and contents of the false representation; (2) the identity of the person making the representation; and (3) what the person intended to gain by making the representations." *MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *12 (Del. Ch. Dec. 30, 2010) (internal quotations omitted). "Essentially, this particularity requirement obligates plaintiffs to allege the circumstances of the fraud 'with detail sufficient to apprise the defendant of the basis for the claim.'" *Id.* (quoting *Grunstein v. Silva*, 2009 WL 4698541, at *14 (Del. Ch. Dec. 8, 2009)).

A claim of fraudulent inducement to contract requires a plaintiff to plead and prove that a statement or statements induced a plaintiff to enter into an agreement. *See* 37 C.J.S. *Fraud* § 13 ("The basis of any fraudulent inducement claim must be an executed contract that was procured by fraud, without which the contract would not have been executed . . . ."). Doing so requires proof of pre-contractual conduct. *See*

id. Plaintiffs never alleged a fraudulent inducement claim in either their Complaint or Amended Complaint. Therefore, Altenberg had no notice of such a claim to engage in discovery or address it meaningfully before the pretrial conference.

Plaintiffs argue that the Delaware and Federal courts' abandonment of the restrictive theory of pleadings doctrine should alleviate their pleading and notice deficiencies. Op. Br. at 21-22. However, the Court of Chancery already considered this doctrine and, with those principles in mind, found that Plaintiffs failed to properly plead a claim for fraudulent inducement and put Altenberg on notice of such claim. Mem. Op. at 78-79 (quoting 5 Charles Allen Wright et al., *Federal Practice and Procedure* § 1219 (3d ed. 2004 & Supp. 2020)).

In considering this question, the Court of Chancery stated "the question is whether the amended complaint contained a short, plain statement of facts sufficient to put Altenberg on notice that the plaintiffs were litigating a claim for fraudulent inducement, along with allegations sufficient to make it reasonably conceivable that the plaintiffs could be entitled to recover." Mem. Op. at 80. Plaintiffs argued below that paragraph 138 of the Complaint satisfied this question. *Id.* at 81; A-756. Paragraph 138 states: "Solar Finance and Altenberg intended to induce Plaintiffs from acting to protect their investment or take other legal action against them, hoping to finalize the transactions and turn a profit before their conduct was discovered." A-484 ¶ 138.

In his post-trial briefs and during post-trial argument, Altenberg maintained that Plaintiffs had never pled a cause of action for fraudulent inducement. Mem. Op. at 78; A-830 (Altenberg's Opening Post-Trial Brief); A-928-29, A-941-43, A-946-48 (Altenberg's Answering Post-Trial Brief); A-1041-43 (Post-Trial Oral Argument). The Court agreed with Altenberg that paragraph 138 of the Amended Complaint "does not suggest Altenberg committed fraud when soliciting the plaintiffs' investment and convincing them to execute the Operating Agreement and invest. It rather suggests that Altenberg took action while the Fund was in existence to keep the plaintiffs from identifying misconduct and acting to protect their investment." Mem. Op. at 81; A-943 (Altenberg Ans. Br.). The Court of Chancery also considered the Amended Complaint as a whole and found that "the plaintiffs focused on how Altenberg operated the Fund, not the solicitation of the plaintiffs' investment." Mem. Op. at 81.

Not only did Plaintiffs fail to plead a claim for fraudulent inducement in the Amended Complaint, they also failed to frame that issue at any point throughout the pretrial litigation process, despite numerous opportunities to do so. While the parties conducted discovery into the early phases of the parties' relationship, Plaintiffs never put Altenberg on notice that he would face a claim for fraudulent inducement. Mem. Op. at 82. Moreover, Plaintiffs could have identified fraudulent inducement as an issue in their pre-trial brief or pre-trial order, but failed to do so. Mem. Op. at 82, 84; *see also* A-564; A-639-43 § I.A; A-667-77 § III.A. Plaintiffs also could have

emphasized that claim in their post-trial opening brief, but again, failed to do so. Mem. Op. at 86-87. Plaintiffs did not emphasize their purported claim for fraudulent inducement until their post-trial answering brief. *Id.* at 87.

The Court of Chancery acknowledged that Plaintiffs could have moved under Rule 15(b) to amend the pleadings to conform to the evidence presented at trial. Mem. Op. at 87. However, Plaintiffs failed to do so. Accordingly, the Court of Chancery's consideration of the restrictive theory of pleading and conclusion that Plaintiffs failed to properly allege a claim for fraudulent inducement was entirely consistent with Delaware law. The Court of Chancery reaffirmed that finding when it denied Plaintiffs' motion for reargument, stating that:

> [a]fter reviewing in detail the complaint, the plaintiffs' pre-trial brief, and the pre-trial order, the court concluded that the plaintiffs had not fairly placed Altenberg on notice of a claim for fraud in the inducement, *i.e.*, a claim of fraud based on representations during the formation phase. That claim did not emerge front-and-center until the plaintiffs' post-trial answering brief.

A-1115. It was, therefore, Plaintiffs' shifting theory of their own case that led to this result and not any error on the Court of Chancery's part.

To challenge the Court of Chancery's findings, Plaintiffs contend that the "heart" of their fraudulent inducement theory is that the Amended Complaint described "the business negotiations between the parties to show that Altenberg subsequently operated the Fund in a manner inconsistent with the agreements reached during the negotiations [of the Fund's Operating Agreement]." Op. Br. at

23. If this had been Plaintiffs' theory of inducement, Count V should have contained a short, plain statement to that effect. It did not.

Moreover, Plaintiffs contend that "[f]raud has always been part of the Investors' case" and that "Altenberg always has been on notice of the fraud claim against him." Op. Br. at 22. This is true with respect to Plaintiffs' fraud claims during the operation of the Fund *after* the Fund's Operating Agreement had been executed. However, despite numerous opportunities to do so, Plaintiffs never provided Altenberg with notice of a fraud claim based on pre-contractual negotiations or representations.

2. *The Court Of Chancery Correctly Found That The Plaintiffs' Presentation Of A Fraudulent Inducement Claim For The First Time At Trial Caused Altenberg To Suffer Prejudice.*

The Court of Chancery correctly concluded that Altenberg suffered prejudice, because he lacked notice of the Plaintiffs' fraudulent inducement claim. Mem. Op. at 89-90. Prejudice "means undue difficulty in prosecuting a lawsuit as a result of a change of tactics or theories on the part of the other party." *Deakyne v. Comm'rs of Lewes*, 416 F.2d 290, 300 (3d Cir. 1969).

Altenberg suffered prejudice, because Plaintiffs changed their tactics or theory of fraud at a late stage of the case after Altenberg no longer had an opportunity to meaningfully defend such a claim. Indeed, the Court acknowledged that Plaintiffs' purported theory of fraudulent inducement "did not emerge front-and-center until the plaintiffs' post-trial answering brief." A-1115. The parties' briefing schedule

contemplated that the parties would file simultaneous opening and answering post-trial briefs. A-700. The briefing schedule did not contemplate any reply briefing. *Id.* Therefore, Plaintiffs' shift in its theory of fraud focusing on pre-contractual negotiations and representations instead of conduct and representations made after the execution of the Fund's Operating Agreement caused Altenberg to suffer prejudice.

In addition, at post-trial argument, Altenberg argued that he suffered prejudice, because he could not engage in motion practice to challenge a fraudulent inducement claim and he did not have the opportunity to take discovery into that claim. A-1042. The Court stated that the former is "literally true." Mem. Op. at 89.

Finally, the Court of Chancery permitted the introduction at trial, over Altenberg's objections, of evidence to support a claim for fraudulent inducement though it later found that claim not to have been pled. That evidence materially affected the Court's decision and forms one of the two bases of Altenberg's cross-appeal.

Plaintiffs' Opening Brief identifies three pieces of evidence which, they contend, prove that no prejudice was worked upon Altenberg. First, Plaintiffs contend that Altenberg's testimony at trial contradicted his testimony at his deposition. Op. Br. at 26. However, Altenberg testified at trial that he provided the "Project Cali Financial Model" to Plaintiffs as an illustration of how a model project might work. B2828:5-24. The disclaimer on the front page of the model affirms that

understanding: "Preliminary/Subject to further review an evaluation. These materials may not be used or relied upon for any purpose other than as specifically contemplated by a written agreement with VERT Solar Finance." A-1166. Consistent with that statement, Altenberg testified at his deposition:

> Q: And this was the first project pitched to Mr. Jefferson, correct?
>
> A: I don't believe that we pitched this project. I believe we showed this as a representative of a project. We didn't own this project at that point in time.

B1683-84 (Altenberg Dep. Tr.). Accordingly, Plaintiffs' contention that Altenberg lied under oath is false.

Second, Plaintiffs contend that, because Open Energy Group had been identified on the Discovery Plan, Altenberg could not have been prejudiced with respect to them. Op. Br. at 26. However, as the Opinion suggests, Altenberg could have called a witness from Open Energy Group if he had notice that he had to defend against a fraudulent inducement claim. Mem. Op. at 89.

Third, Plaintiffs argue that Altenberg did not suffer prejudice with relation to the three-to-six month timeline contention. Op. Br. at 27. However, Altenberg cannot predict what evidence might have been uncovered in discovery had he had the requisite notice of a fraudulent inducement claim against him. The lost opportunity for discovery or to conduct motion practice on the issue caused him prejudice.

In addition, Plaintiffs contend that the Court of Chancery elevated form over substance when it dismissed Plaintiffs' fraudulent inducement claim for failure to

seek a post-trial amendment to the Amended Complaint under Rule 15(b). Op. Br. at 28-29. To the contrary, the Court of Chancery found that, because Plaintiffs failed to amend the pleadings, they did not provide notice of a fraudulent inducement claim to Altenberg. Had Plaintiffs made such a motion, the Court noted that Altenberg would have had the opportunity to advance arguments against the amendment and that whether leave should be granted would have been a "close question." Mem. Op. at 88, 90. Because Plaintiffs never provided notice of a fraudulent inducement claim to Altenberg, the Court correctly found that Plaintiffs were not entitled to relief for a cause of action that Plaintiffs never alleged.

3. *The Plaintiffs' Introduction Of New Arguments On Appeal Is Improper.*

Plaintiffs further contend that Court of Chancery Rule 54 should absolve them of their pleading deficiencies and that this Court ought to grant them relief despite the Court of Chancery's identified deficiencies. Op. Br. at 27-29. Plaintiffs never raised this argument below and have not explained why this Court should hear the issue. Therefore, the argument is deemed waived. Del. Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."); Del. Supr. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal"); Del. Supr. Ct.

R. 14(c)(i) ("Appellant shall not reserve material for reply which should have been included in a full and fair opening brief.").

4. *Even If The Court Considers Plaintiffs' New Argument On Appeal, Court of Chancery Rule 54(c) Is Unavailing.*

Plaintiffs misconstrue the benefit that Rule 54(c) affords to a plaintiff. Rule 54(c) provides in pertinent part, "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Ct. Ch. R. 54(c).

Rule 54(c) deals with *relief* that a party has not demanded in the pleadings, not substantive claims that a party has never alleged. *See Manhattan Telecomm. Corp. v. Granite Telecomm., LLC*, 2020 WL 6701588, at *5 (D. Del. Nov. 13, 2020) ("[T]he practice of the Court of Chancery permits recovery of damages in excess of the amount demanded in the Complaint. *See* Del. Ch. Ct. R. 54(c) . . . ."); *USX Corp. v. Barnhart*, 395 F.3d 161, 165-66 (3d Cir. 2004) (explaining that the Federal Rule equivalent of Court of Chancery Rule 54(c) "is not designed to allow plaintiffs to recover for claims they never alleged").

Rule 54(c) is most commonly used when the amount of the award varies from the demand for relief. *USX Corp.*, 395 F.3d at 165-66 (discussing the Federal Rule equivalent of Court of Chancery Rule 54(c)). The rule has also been used for the award of attorneys' fees and costs, or for interest on a claim for damages. *See id.*

Critically, Rule 54(c) only permits a plaintiff to recover relief not demanded in the complaint when the party has affirmatively established a substantive grounds for relief, *i.e.*, a cause of action. *See id.* (rejecting the appellants' argument that Rule 54(c) permits courts to grant relief for a claim in which they have never alleged).

Plaintiffs seek refuge in a procedural rule that does not apply to their circumstances. Plaintiffs failed to plead a cause of action for fraudulent inducement. Neither Rule 54(c) nor any other principle of Delaware law provides any basis for them to prevail on that claim. The Court of Chancery's decision on that issue should, therefore, be affirmed.

II. THE COURT OF CHANCERY'S DECISION THAT PLAINTIFFS FAILED TO PROVE THAT ALTENBERG COMMITTED FRAUD DURING THE OPERATION OF THE FUND SHOULD BE AFFIRMED.

A. Question Presented

Did Plaintiffs fail to prove that Altenberg committed fraud during the operation of the Fund? *See* Mem. Op. at 57, 90-92; A-2086-91 (Altenberg's Pretrial Opening Brief); A-834-43 (Altenberg's Post-trial Opening Brief); A-941-58 (Altenberg's Post-Trial Answering Brief).

B. Scope of Review

This Court reviews the trial court's "conclusions of law *de novo* and applies the clearly erroneous standard to findings of fact." *In re Viking Pump, Inc*., 148 A.3d 633, 656 (Del. 2016) (citing *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chicago*, 75 A.3d 101, 108 (Del. 2013)). Plaintiffs primarily challenge the Court of Chancery's findings of fact, so this Court's standard is to determine if those findings were clearly erroneous.

C. Merits of Argument

1. *The Court Of Chancery Correctly Held That Plaintiffs Failed To Prove Fraud During the Operation Of The Fund.*

The Court of Chancery's Opinion states that, "For most of the litigation, the plaintiffs claimed that Altenberg committed fraud while operating the Fund." Mem. Op. at 90. The Court noted, however, that "the plaintiffs pivoted during their post-trial briefing to a claim for fraud in the inducement." *Id*. "The reduced emphasis

that they placed on their claim of fraud during the operation of the Fund was insufficient to prove their claim." *Id*. The Court also found that

> In their post-trial submissions, plaintiffs only advanced two grounds for fraud during the operation of the Fund. Neither supported a fraud claim. Part of the problem may have been ***the scattershot nature of the plaintiffs' briefing.***

Id. at 57 (emphasis added).

Here, when the scant evidence of Altenberg's purported fraud is applied to the legal principles required to prove fraud, Plaintiffs' fraud claim fails in its entirety. Plaintiffs remain unable to identify a fraudulent statement or omission that satisfy the standards of Delaware law. That law requires that each allegedly fraudulent statement or omission be analyzed under each element of a fraud claim. *See Metro Commc'n*, 854 A.2d at 144 (citing elements of common law fraud). Plaintiffs' inability to apply the law to the specific evidence provides the Court no basis to disturb the Court of Chancery's opinion that Plaintiffs failed to prove that Altenberg committed fraud during the operation of the Fund.

a. <u>Plaintiffs introduced scant evidence of any purported fraud.</u>

As the Memorandum Opinion sets forth in detail, Plaintiffs' only allegation of fraud during the operation of the Fund came from the capital calls. Memo. Op. at 91. As the Opinion noted,

> In their post-trial opening brief, the sum total of the plaintiffs' analysis of the six capital calls appeared in a chart that spanned less than a page. For each capital call, the plaintiffs offered a handful of words about 'Altenberg's purported purpose,' then a handful of words what they

> claimed was 'Altenberg's actual, unauthorized and undisclosed purpose.' In their post-trial answering brief, the plaintiffs converted their chart into a single paragraph of discussion. This abbreviated treatment was not sufficient to carry their burden of scienter.

Id.

For the first time in their post-trial answering brief, Plaintiffs alleged an additional fraudulent misrepresentation that took place during the operation of the Fund. *Id*. at 92. Plaintiffs argued that Altenberg's promise that all the Fund's assets would be held in project companies owned by the Fund constituted a fraudulent misrepresentation. *Id*. The Court correctly noted that the source of Altenberg's alleged false representation was the "Project Company Requirement" in the Operating Agreement. *Id*. With respect to this alleged fraudulent misrepresentation, the Court stated:

> During the operation of the Fund, however, the plaintiffs failed to identify any false representation that Altenberg made about whether he was placing the projects in project companies owned by the Fund. He simply ignored the Project Company Requirement.
>
> In January 2017, when Altenberg's counsel mentioned to Jefferson's counsel that the projects were not held in project companies owned by the Fund, Jefferson called out Altenberg about his failure, and Altenberg immediately admitted it. The plaintiffs thus failed to prove the existence of a false representation that could support a claim of fraud on this score, as opposed to a claim for breach of the Operating Agreement.

Id. at 92.

The Court's standard of review with respect to the Court of Chancery's factual findings is "clearly erroneous." Here, there is no evidence that the Court of

Chancery erred at all when it made factual findings regarding the lack of fraudulent misstatements and Plaintiffs have not set forth any contrary evidence to show that Altenberg, for example, did not admit to the manner in which he held the Projects. In fact, Plaintiffs make no effort whatsoever to show that the Court's factual findings on these issues were "clearly erroneous" and do not address the issue. When each of these two purported pieces of evidence are applied to the law below, it is manifest that Plaintiffs failed to prove their claim of fraud during the operation of the Fund.

b. The law applied to the scant evidence of Altenberg's purported fraud.

With respect to the first alleged fraudulent misrepresentation in connection with the capital calls, it is important to note that the Court of Chancery never held that Altenberg made any fraudulent statements in connection with each capital call as Plaintiffs claim on appeal. Instead, the Court found that Plaintiffs' claims in connection with the capital calls "are not properly analyzed under the rubric of common law fraud." *Id*. at 90. The Court specifically stated:

> In twin decisions issued in 2014, this court and the Delaware Superior Court held that the disclosures that fiduciaries make when exercising a contractual right to call for capital are not properly analyzed under the rubric of common law fraud. They are instead properly analyzed as disclosure claims under *Malone v. Brincat*, 722 A.2d 5 (Del. 1998). *See Albert v. Alex. Brown Mgmt. Servs., Inc.,* 2004 WL 2050527, at *3-4 (Del. Super. Sept. 15, 2004); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs., Inc.*, 854 A.2d 121, 157-63 (Del. Ch. 2004). To the extent that the plaintiffs seek to prove a claim for common law fraud based on the capital calls, judgment will be entered in favor of Altenberg.

Id. at 90-91.

Even though the law in Delaware is clear that capital calls are analyzed as disclosure claims, Plaintiffs take issue with the Court's application of the law in this manner and claim that the Court of Chancery "erred in formulating the legal standard applicable to the facts." Op. Br. at 40. Plaintiffs' attempt to distinguish *Mobilecomm* from this case is unhelpful as it only tries to distinguish the facts from the Court's dicta and not its holding. Moreover, the alleged acts that Plaintiffs contend that Altenberg took were not proven at trial and Plaintiffs' citations to the Opinion do not support Plaintiffs' assertions. *Id*. Specifically, Plaintiffs' repeated claims throughout their opening brief that Altenberg lied about where the money was going (*See* Op. Br. at 35-36, 42) are not supported by the record or the Court's Opinion. Altenberg respectfully submits, therefore, that the Court should reject them.

Notably, the Court of Chancery held that *even if* the capital calls were evaluated using the rubric of common law fraud, Plaintiffs' fraud claim would still fail, because Plaintiffs did not carry their burden of proving that Altenberg acted with scienter by making intentionally false statements or by intentionally withholding material information. *Id*. at 91. In other words, the Court analyzed the capital call evidence in connection with both a common law fraud claim *and* a disclosure claim and held that Plaintiffs failed to prove either. Accordingly, even if the Court had erred in reviewing the capital calls in connection with a disclosure claim (it did not),

the Court also analyzed the capital calls as Plaintiffs would have it analyze them and still came to the same result.

With respect to the alleged fraudulent misstatement regarding Altenberg's alleged promise that all the Fund's assets would be held in project companies owned by the Fund, this was a contractual promise that Finance had made, not Altenberg, as Altenberg was not a signatory to the Operating Agreement. As the Court of Chancery noted in its Opinion, this alleged promise did not form a basis for fraud; rather, it described a situation where Altenberg ignored a provision of the Operating Agreement. *Id*. at 92. That conclusion is demonstrably correct.

In support of its holding, the Court of Chancery cited to the record evidence that Altenberg admitted to not holding the assets in Fund's name *and* that Altenberg admitted this to Plaintiffs during the operation of the Fund in January 2017. *Id*. The Court then properly applied the law from the *Restatement (Third) of Torts* to the evidence and found that the evidence did not support a claim for fraud. *Id*.

Plaintiffs have made no effort to dispute these facts or show that the Court made these factual findings in error. When the two pieces of evidence of Altenberg's purported fraud are applied to the law, the Court of Chancery's opinion should be affirmed.

c. Plaintiffs did not prove scienter.

Plaintiffs contend that they proved scienter at trial based primarily on their claims that: (1) Altenberg lied every time he asked the Investors for more capital; (2)

he provided intentionally false weekly reports; and (3) he manufactured NAV Reports. Op. Br. at 42. Plaintiffs distort the Court of Chancery's Opinion. A close review of Plaintiffs' citations demonstrate that the Court never made any of these factual findings. *See id*. The factual finding that the Court of Chancery *did* make is that the facts set forth at trial did not prove scienter on the part of Altenberg. *See* Mem. Op. at 91. Plaintiffs may quibble with the Court of Chancery's factual findings, but Plaintiffs fall far short of establishing that those findings were clearly erroneous. The Court's conclusions in this regard should, therefore, be affirmed.

2. *Plaintiffs Did Not Allege A Cause Of Action For Equitable Fraud or Negligent Misrepresentation In Their Amended Complaint.*

Based on the Court of Chancery's finding that Plaintiffs failed to prove scienter on Altenberg's part, Plaintiffs shift their focus and ask this Court to find in their favor on an equitable fraud claim or negligent misrepresentation claim. The problem with this strategy is that Plaintiffs never pled an equitable fraud or negligent misrepresentation claim in either the original Verified Complaint or the Amended Verified Complaint. Plaintiffs thereby again ask this Court to overturn the trial court's conclusions on claims they never made in that court.

Plaintiffs raised an argument for equitable fraud for the first time in their post-trial answering brief. *See* A-896-97. Defense counsel specifically informed the Court of this new addition to the case during post-trial oral argument. *See* A-1043 ("Also new is a claim for equitable fraud, also not something that was pled

appropriately."). The Court of Chancery correctly refused to analyze the equitable fraud claim, because Plaintiffs had never alleged such a claim in their original Complaint or their Amended Complaint.

Plaintiffs claim that they preserved their argument regarding equitable fraud in their pre-trial opening brief. That is incorrect. Plaintiffs cite to a single case that they cited in their pre-trial brief for the proposition that fraud claims (both equitable and common law fraud claims) are distinct from a breach of fiduciary duty claim. Op. Br. at 41-42 (citing A-607). In no way is this single case citation sufficient to assert an equitable fraud claim under the Court of Chancery's pleading requirements. Because Plaintiffs had never pled an equitable fraud claim, this Court should not consider it. *See Wolf v. Magness Constr. Co*., 1994 WL 728831, at *5 (Del. Ch. Dec. 20, 1994) (drawing a distinction between equitable fraud and common law fraud and holding that Plaintiff did not allege a cause of action for equitable fraud and therefore, required scienter be pled); *DRR, L.L.C. v. Sears, Roebuck & Co.*, 949 F. Supp. 1132, 1137-38 (D. Del. 1996) (same).

Plaintiffs have failed to present grounds to support reversal of the Court of Chancery's conclusions regarding fraudulent inducement and fraud during the operation of the Fund. Altenberg, therefore, respectfully requests that the Court affirm those portions of the decision below.

CROSS-APPEAL ARGUMENT

I. THE COURT OF CHANCERY'S CONSIDERATION OF INADMISSIBLE PRE-CONTRACTUAL, PRE-FIDUCIARY DUTY PAROL EVIDENCE INFECTED THE COURT'S ANALYSIS OF PLAINTIFFS' FIDUCIARY DUTY CLAIMS AND CONSTITUTED REVERSIBLE ERROR.

A. Question Presented

Did the Court of Chancery err in allowing parol evidence to affect its decision on Plaintiffs' fiduciary duty claims when that evidence was provisionally admitted solely with respect to a fraudulent inducement claim that Plaintiffs had not pled? Altenberg preserved this question as follows: B2120; B2136; A-829-30, A-839-40 (Altenberg's Opening Post-Trial Brief); A-928-29, A-941-43, A-946-48 (Altenberg's Answering Post-Trial Brief); A-1041-43 (Post-Trial Oral Argument).

B. Scope of Review

Altenberg's cross-appeal rests on the premise that the Court of Chancery erred as a matter of law. The Supreme Court reviews the Court of Chancery's formulation and application of legal principles *de novo*. *Genger v. TR Investors, LLC*, 26 A.3d 180, 190 (Del. 2011).

C. Merits of Argument

At trial, Plaintiffs introduced a substantial amount of evidence, both testimonial and documentary, suggesting that Altenberg behaved in a misleading fashion before the parties entered into their agreement and before Altenberg owed

Plaintiffs any fiduciary duties.[1] Altenberg objected to the presentation of that evidence on several occasions on the grounds that it was irrelevant to Plaintiffs' fiduciary duty claims and Plaintiffs' claims for fraud during the operation of the Fund. Plaintiffs responded that the evidence was relevant to a claim for fraudulent inducement. The Court of Chancery overruled Altenberg's objections and deferred ruling on the question of whether Plaintiffs had properly pled a claim for fraudulent inducement. Altenberg could not, of course, stand idly by and allow this evidence to go unrebutted, but rather was compelled to introduce as much of his own pre-contractual, pre-fiduciary evidence that he could muster at that late date.

Accordingly, the Court heard Plaintiffs' evidence solely on the basis of Plaintiffs' representation that it was relevant to a fraudulent inducement claim. The evidence has no conceivable relevance to any other matter before the Court at trial. Of course, the Court of Chancery later concluded that Plaintiffs had failed to plead a claim for fraudulent inducement and the evidence in question should, therefore, never have been introduced.

The severe problem that this sequence of events caused is that the Court of Chancery explicitly acknowledged that the inadmissible evidence infected and,

[1] The specific parol evidence that the Court improperly considered as it related to assessing Altenberg's credibility included: Altenberg's solicitation materials and alleged promises made before the execution of the Fund's Operating Agreement (Mem. Op. at 72-74); evidence regarding Project Cali (Mem. Op. at 71); the three-to-six month timeline for project completion and equity recycling (*Id.*); and the availability of financing from Open Energy Group and other providers of debt financing (Mem. Op. at 71-72).

indeed, impacted its consideration of Plaintiffs' claims for breach of fiduciary duty -- the only claim on which Plaintiffs prevailed. The Court's Opinion states, "the evidence that Altenberg engaged in fraud when inducing the plaintiffs to invest has affected this court's assessment of his credibility generally and the overall equities of the case. Setting forth the underlying reasons for that assessment promotes transparency." Mem. Op. at 57. Since the Court of Chancery's decision was admittedly affected by evidence irrelevant to any claim before the Court, that decision should be overturned.

Plaintiffs introduced the evidence at issue in an attempt to establish expectations and duties not set forth in the parties' unambiguous, integrated agreement. That evidence is, by definition, parol. "The parol evidence rule bars the admission of evidence extrinsic to an unambiguous, integrated written contract for the purpose of varying or contradicting the terms of that contract." *Galantino v. Baffone*, 46 A.3d 1076, 1081 (Del. 2012); *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity."); *Carrow v. Arnold*, 2006 WL 3289582, at *4 (Del. Ch. Oct. 31, 2006) ("When a contract is intended to be the final expression of the parties' agreement, the parol evidence rule bars the introduction of evidence of prior or contemporaneous oral understandings that vary the written terms of the agreement."); Restatement of Contracts (Second) § 213, cmt. (a) ("[The parol

evidence rule] renders inoperative prior written agreements as well as prior oral agreements.").

"The parol evidence rule is a principle of substantive law that prevents the use of extrinsic evidence of an oral agreement to vary a fully integrated agreement that the parties have reduced to writing." *Taylor v. Jones*, 2002 WL 31926612, at *3 (Del. Ch. Dec. 17, 2002). "The parol evidence rule is a rule of substantive law and not a rule of evidence." *Carey v. Shellburne*, 224 A.2d 400, 402 (Del. Nov. 9, 1966). Thus, even if parol evidence is admitted at trial without objection, such evidence is of no probative force and should not be considered by the Court. *Id.*

"The parol evidence rule prevents the consideration of oral evidence that would contradict either total or partial integrated agreements." *Taylor*, 2002 WL 31926612, at *3 (emphasis in original omitted). The factors the Court assesses as to whether a contract is fully integrated include: "whether the writing was carefully and formally drafted, whether the writing addresses the questions that would naturally arise out of the subject matter, and whether it expresses the final intentions of the parties." *Id.* An integration clause contained in the contract creates a "presumption of integration." *Carrow*, 2006 WL 3289582, at *5.

Here, the Fund's Operating Agreement is a final, integrated contract. A-202 § 9.10. Section 9.10 of the Fund's Operating Agreement, titled "Entire Agreement," provides, "This Agreement constitutes the entire agreement among the parties. This Agreement supersedes any prior agreement or understanding among the parties and

may not be modified or amended in any manner other than as set forth herein or therein." A-202 § 9.10. The Court of Chancery below acknowledged that "[t]his provision is a standard integration clause . . . ." D.I. 296 at 77. Because the Fund's Operating Agreement is a final, integrated contract, the parol evidence rule bars the admission of prior or contemporaneous oral promises and representations that are inconsistent with its plain and unambiguous written terms.

Plaintiffs' claims do not fall under the fraud exception – or any other exception – to the parol evidence rule because the Court of Chancery found that Plaintiffs did not properly plead a fraudulent inducement claim. Delaware law recognizes that "where fraud or misrepresentation is alleged, evidence of oral promises or representations which are made prior to the written agreement will be admitted." *Carrow*, 2006 WL 3289582, at *8 (quoting *Anglin v. Bergold*, 1989 WL 88625 (Del. June 26, 1989)). "The presumption embodied in the parol evidence rule is that the final written contract reflects the positions and compromises upon which the parties finally reached agreement." *Carrow*, 2006 WL 3289582, at *8. "If the only showing required to invoke the fraud exception to the parol evidence rule were inconsistent prior oral statements, such oral statements would often (usually) be admitted, and the exception would swallow the rule." *Id.*

Altenberg maintained during pre-trial briefing, at trial, and post-trial briefing that Plaintiffs had never pled a cause of action for fraudulent inducement. B2088 (Altenberg's Pre-Trial Brief); B2120; B2136; A-829-30, A-839-40 (Altenberg's

Opening Post-Trial Brief); A-928-29, A-941-43, A-946-48 (Altenberg's Answering Post-Trial Brief); A-1041-43 (Post-Trial Oral Argument). Plaintiffs alleged that claim in neither their Complaint nor their Amended Complaint and Altenberg had no opportunity to engage in discovery or address it meaningfully before pretrial. Accordingly, at trial, because Plaintiffs failed to plead a cause of action for fraudulent inducement, Altenberg objected to Plaintiffs' improper introduction of parol evidence. B2120; B2136. The issue was deferred for decision until after post-trial briefing. B2120; Mem. Op. at 86.

The Court of Chancery agreed with Altenberg and found that Plaintiffs never properly introduced or pled a claim for fraudulent inducement. Mem. Op. at 90. Therefore, the pre-contractual, pre-fiduciary duty evidence had no relevance to any issue being tried. But despite finding that Plaintiffs had never pled a cause of action for fraudulent inducement, the Court of Chancery impermissibly considered that evidence and allowed it to "affect" its finding that Altenberg breached his fiduciary duties to the Fund. To be clear, the evidence at issue concerned statements and events that occurred before Altenberg ever owed Plaintiffs any fiduciary duty. It could not, therefore, bear any relevance to a fiduciary duty claim.

The Court's consideration of that parol evidence constituted reversible error. The Court openly and transparently acknowledged that that evidence affected its resolution of the only claim on which Plaintiffs prevailed. Since the parol evidence rule is a substantive rule, the Court's introduction of and reliance upon that evidence

warrants reversal of the Court's findings on Plaintiffs' claims for breach of fiduciary duty.

II. THE COURT OF CHANCERY'S AWARD OF DAMAGES SHOULD BE VACATED, BECAUSE PLAINTIFFS FAILED TO PROVE THEIR DAMAGES AT TRIAL.

A. Question Presented

Did the Court of Chancery err when it provided Plaintiffs with a second opportunity to prove adequately their damages after a non-bifurcated trial and where the Defendant contested Plaintiffs' damages claims before, during and after trial? A-678 ¶ 10; A-965-66 (Altenberg Post-Trial Ans. Br.); B3144-45 (Altenberg Ans. Br. In Opp. To Motion for Entry of Judgment); A-1076-77 (Post-Trial Oral Argument).

B. Scope of Review

The Supreme Court reviews the Court of Chancery's formulation and application of legal principles *de novo*. *Genger v. TR Investors, LLC*, 26 A.3d 180, 190 (Del. 2011). Altenberg challenges the Court of Chancery's failure to hold Plaintiffs to the legal elements of their cause of action and this Court's review is, therefore, *de novo*.

C. Merits of Argument

Trial in this case was not bifurcated. At all times, the Court and the parties were prepared to try all issues of liability and damages in one proceeding. Therefore, Plaintiffs bore the burden of proving their damages by a preponderance of the evidence *at trial*. *See Beard Research, Inc. v. Kates*, 8 A.3d 573, 613 (Del. Ch. 2010). While the Court of Chancery has broad discretion to fashion remedies for breaches of the duty of loyalty, "it cannot create what does not exist in the

evidentiary record, and cannot reach beyond that record when it finds the evidence lacking." *Ravenswood Inv. Co., L.P. v. Estate of Bassett S. Winmill*, 2018 WL 1410860, at *2 (Del. Ch. Mar. 21, 2018) (awarding only nominal damages to the plaintiffs even though they had proven breaches of the duty of loyalty because plaintiffs failed to prove actual or rescissory damages at trial). "[W]hen acting as the fact finder, th[e] Court may not set damages based on mere 'speculation or conjecture' where a plaintiff fails adequately to prove damages." *OptimisCorp v. Waite*, 2015 WL 5147038, at *82 (Del. Ch. Aug. 26, 2015).

At every step of this litigation – pre-trial, trial and post-trial – Plaintiffs have failed to meet their burden of proving damages, even though they had all the evidence available to them. In their Amended Complaint, Plaintiffs generally alleged that they had been "damaged by an amount to be proven trial" and that they should be awarded "rescissory or compensatory damages." A-480 ¶ 115. Plaintiffs repeated the general nature of its damages averment in the Pretrial Order. *See* A-679.

Plaintiffs possessed all the Fund's, Finance's, and even Altenberg's personal bank statements and financial records in advance of trial. Plaintiffs were not without sufficient time to prepare for trial. Indeed, Plaintiffs pressed the trial court -- successfully -- to maintain the scheduled trial date even though Altenberg's counsel was engaged only six weeks in advance of that date.

Nevertheless, Plaintiffs made virtually no attempt to calculate or establish

damages at trial. Plaintiffs presented no lay or expert witness to prove that they sustained any compensable damages. Plaintiffs failed to reconcile and calculate the specific amounts they alleged that Altenberg misappropriated. In contrast, Altenberg analyzed and compiled all the bank statements to show that the money that Plaintiffs had invested in the Fund had been used for the operation of the Fund and paid to third parties, thereby establishing the entire fairness of the transactions. *See e.g.* B1463-1558 (Bank Statements Tracker). On the basis of that work, Plaintiffs even stipulated that the Fund's bank statements showed that the Fund paid approximately $6.39 million to third parties for business expenses. A-661 ¶ 107.

Altenberg recognized Plaintiffs' failure of proof and brought it to the Court's attention in his post-trial briefing and at post-trial oral argument. Conversely, Plaintiffs' post-trial briefing failed to prove damages or even to address the issue meaningfully. In Plaintiffs' Post-Trial Opening Brief, they relied on conjecture and contended that the Court should disgorge all profits, including "excessive compensation," that Altenberg had received. They failed, however, to cite any measure of profits or what amount of Altenberg's compensation had been "excessive." *See* A-769-71.

Plaintiffs also argued that, because it is not possible to rescind the allegedly unauthorized deals, the Court should award them repayment of their investment in the form of rescissory damages. *See* A-771-72. However, repayment of Plaintiffs' investment is not an appropriate remedy here, because Plaintiffs admit that they had

approved some of the projects that the Fund had acquired. A-653-54 ¶¶ 52, 55, 59. "The traditional measure of damages is that which is utilized in connection with an award of compensatory damages, whose purpose is to compensate a plaintiff for its proven, actual loss caused by the defendant's wrongful conduct." *Strassburger v. Early*, 752 A.2d 557, 579 (Del. Ch. 2000). "Rescissory damages is an exception to the normal out-of-pocket measure." *Id.*

Plaintiffs were afforded the opportunity to prove all the elements of their damages claims at a single, unified, plenary trial. They did not run out of time, seek bifurcation or ask the Court for any accommodation with respect to their damages claims. They simply made no attempt to calculate them or attribute them to any of the allegedly unauthorized transactions. That failure should have been fatal to Plaintiffs' damages claims.

The Memorandum Opinion acknowledged that Plaintiffs did not adequately prove their damages at trial, but the Court ordered additional briefing on the issue. *See* Mem. Op. at 115-16. The Court noted that the necessary information to quantify an award of Plaintiffs' breach of fiduciary duty claim "could well exist in the form of bank statements and invoices that are scattered through the record, [however,] the court is not in a position to sift through the information to make or confirm the specific calculations." *Id.* at 115.

Under Delaware law, Plaintiffs bear the burden of calculating damages. *See Beard Research, Inc.*, 8 A.3d at 613. The trial is the time for Plaintiffs to have done

so, with post-trial briefing and argument their opportunity to synthesize and clarify the evidence. Defendants are able to strategize their defense under those ground rules and enjoy certainty when a record is closed. Instead of adhering to those foundational principles, the Court of Chancery gave Plaintiffs a Mulligan, which neither the rules of golf nor of the Court of Chancery abide.

Surprisingly, the Memorandum Opinion notes that "[t]he parties focused their efforts at trial, in their post-trial submissions, and during post-trial argument on the question of liability and not the issue of remedy." It was not Altenberg's burden, however, to prove or even address Plaintiffs' damages claims or, importantly, to notify Plaintiffs that they had failed to prove their case while they still had an opportunity to do so. Altenberg never agreed to a bifurcation of trial into liability and damages phases and the Court never ordered such an arrangement.

To the contrary, Altenberg identified the issue of whether Plaintiffs had suffered any damages as an issue of fact and law that remained to be litigated *at trial* in the Pretrial Order. A-678 ¶ 10. Altenberg also argued in his post-trial briefing that Plaintiffs had failed to adequately prove any damages. A-965-66. Altenberg further emphasized at post-trial oral argument that Plaintiffs offered no proof by which the Court could assess damages. A-1076-77 (Post-Trial Oral Argument). Plaintiffs had the opportunity at every stage of this case to present a damages calculation, but they failed to do so.

Accordingly, the Court erred when it: (1) gifted Plaintiffs with a second

opportunity to prove damages when Plaintiffs had every opportunity to do so at trial; and (2) awarded more than nominal damages to Plaintiff. *See* A-1117. Altenberg respectfully requests that the Court vacate the award of damages that the Court of Chancery entered.

CONCLUSION

The Court of Chancery properly concluded that Plaintiffs had never pled a claim for fraudulent inducement and failed to establish their claim for fraud in the operation of the fund. Because it recognized that Plaintiffs had never presented a claim for fraudulent inducement, however, the Court should not have admitted evidence relevant only to that claim and should not have allowed that evidence to affect its decision regarding Plaintiffs' claims for breach of fiduciary duty. Moreover, the Court improperly permitted Plaintiffs to re-open the trial in order to establish the claim for damages that they could and should have established at trial. Should the Court affirm the Court of Chancery's decision regarding Plaintiffs' breach of fiduciary duty claim, Altenberg respectfully submits that its damages award should be vacated.

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