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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| HOMF II INVESTMENT CORP., OBD PARTNERS, LLC, BRETT JEFFERSON, | ) | |
| Plaintiffs-Below, Appellants, | ) | C.A. No. 14, 2021 |
| v. | ) | Court Below: Court of Chancery of the State of Delaware |
| JOAQUIN ALTENBERG, VERT SOLAR FINANCE, LLC, | ) | C.A. No. 2017-0293-JTL |
| Defendants-Below, Appellees, | ) | |
| and | ) | |
| VERT SOLAR FUND I, LLC, | ) | |
| Nominal Defendant-Below. | ) | |

# APPELLANTS' REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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## PRELIMINARY STATEMENT[1]

Before the Court is an appeal and a cross-appeal of the Court of Chancery's 118-page post-trial Opinion concerning Altenberg's fraudulent conduct and breaches of fiduciary duties in connection with his solicitation of investments from the Investors, and his management and operation of the Fund. The Opinion, brimming with findings of Altenberg's lies and bad acts, held that Altenberg breached his fiduciary duties to the Investors. The Court of Chancery also held that Altenberg defrauded Investors when soliciting their investments, but the Investors were not entitled to a remedy because they did not present their fraudulent inducement claim in a procedurally proper way. Lastly, the Court of Chancery concluded that the Investors did not establish their claim for fraud during the operation of the Fund. Ultimately, the trial court awarded the Investors damages in the amount of $4,431,890.63, plus $1,721,259.93 in attorneys' fees and expenses.

The Investors' respectfully request this Court to reverse the trial court's conclusions that (1) Plaintiffs are not entitled to relief on their claim for fraudulent inducement; and (2) Plaintiffs did not prove fraud during the operation of the Fund. The record before the Court of Chancery proved that Altenberg had notice of the facts constituting the Investors' claims of fraudulent inducement, a fact that is

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[1] Each capitalized term not otherwise defined herein shall have the meaning ascribed to such term in the Appellants' Opening Brief (Dkt. No. 11) ("Opening Brief" or "O.B.").

unequivocally demonstrated by Altenberg's own discovery requests. Further, after years of lying, Altenberg revealed at trial for the first time that Project Cali, a project he proposed to Investors for the sole purpose of soliciting their investment, was never a possible investment for the Fund. Altenberg should not be rewarded for his many lies. Similarly, the record before the Court of Chancery does not support its conclusion that the Investors failed to prove fraud. Both of these holdings should be reversed.

On cross-appeal, Altenberg seeks to overturn the Court of Chancery's finding that he breached his fiduciary duties to Investors on the basis of the parol evidence rule. Altenberg lodges his complaint in this fashion in an attempt to elevate the standard on appeal. The pre-contractual evidence at issue is not parol evidence as the Court of Chancery correctly concluded. Rather, the root issue Altenberg complains of is the trial court's assessment of his credibility. This Court will only reverse a trial court's determination of a witness's credibility if it is clearly erroneous. Altenberg has failed to meet this burden.

Lastly, Altenberg baselessly seeks reversal of the Court of Chancery's Damages Award. The Court of Chancery acted within its discretion to order supplemental briefing on the parties' damages. Even so, the Damages Award is primarily based on evidence set forth at trial. Altenberg's attempt to reverse the

Damages Award is solely another attempt to reap the benefits of the frauds he has committed over the past six years.

## NATURE OF PROCEEDINGS

The Investors rely upon the Nature and Stage of the Proceedings set forth in their Opening Brief. *See* O.B. at 3-4. On April 1, 2021, Altenberg filed Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal. Dkt. No. 12. A corrected version of Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal ("Altenberg's Brief" or "Altenberg Br.") was filed on April 8, 2021. Dkt. No. 15.

This is Appellants' Reply Brief on Appeal and Answering Brief on Cross-Appeal.

## SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. Denied. The Court of Chancery's determination concerning a witness's credibility will not be overturned unless it is clearly erroneous. It was within the Court of Chancery's discretion to consider any and all evidence concerning Altenberg's dealings with the Investors in assessing Altenberg's credibility as a fact witness and in assessing the Investors' fraud claims. First, any pre-contractual evidence is not parol evidence because the Court of Chancery did not rely on it for the purpose of varying or contradicting the terms of the Operating Agreement. Second, even if the pre-contractual evidence is parol evidence (it is not), the Court of Chancery properly considered the evidence in evaluating the Investors' fraud claims. There is no dispute that the Complaint alleged a claim for fraud, separately from the Investors' claim for fraudulent inducement. Third, reversal of the Court of Chancery's finding against Altenberg on the breach of fiduciary duty claim is not warranted, even if the pre-contractual evidence is inadmissible. The Court of Chancery held a live, in-person trial to evaluate the credibility of Altenberg as a fact witness. The Court of Chancery saw through Altenberg's salesmanship and determined that he lacked credibility. Finally, Altenberg waived his right to object to the Court's consideration of the pre-contractual evidence by failing to object to the evidence at the time it was marked as a joint exhibit in the Pre-Trial Stipulation

and Proposed Order. Accordingly, the Court of Chancery's finding in the Investors' favor on their breach of fiduciary duty claim should be affirmed.

2. Denied. Delaware law requires a plaintiff prove damages by a preponderance of the evidence. As such, the Investors were not required to provide the Court of Chancery with a precise damages calculation. Rather, as the Court of Chancery concluded, the evidence at trial sufficiently set forth the Investors' damages to permit the court to quantify an award for Altenberg's breach of fiduciary duty.

Delaware law further provides the trial court with broad power to fashion relief to parties. Thus, the Court of Chancery had discretion to allow the parties to submit further briefing on the damages the Investors suffered. The Court of Chancery's award of damages tracks its findings at trial and did not constitute an abuse of discretion. Accordingly, the Court of Chancery's award of damages to the Investors should be affirmed.

## STATEMENT OF FACTS

The Investors rely upon the Statement of Facts set forth in their Opening Brief. *See* O.B. at 7-19.

## REPLY IN SUPPORT OF ARGUMENT ON APPEAL

### I. THE INVESTORS ARE ENTITLED TO JUDGMENT IN THEIR FAVOR FOR ALTENBERG'S FRAUDULENT INDUCEMENT.

#### A. The Investors Provided Altenberg with Notice of a Claim For Fraud in the Inducement.

Altenberg should not be permitted to reap the benefits of his own lies by escaping responsibility for his fraudulent inducement of the Investors. Altenberg used blatant lies about projects that never existed to convince the Investors to invest in his doomed venture. Altenberg lied throughout discovery to prevent the Investors from uncovering the full extent of his fraudulent inducement until trial. These actions should not be rewarded. Altenberg had sufficient notice of Investors' claim for fraudulent inducement and the Investors are entitled to a judgment against him on that claim.

The standard to place an opposing party on notice of claims asserted is "minimal." *OptimisCorp v. Waite*, 2015 WL 357675, at *2 (Del. Ch. Jan. 28, 2015). "Pleadings are usually for notice giving with the task of narrowing and clarifying the basic issues and ascertaining the relevant facts being left to the deposition and discovery process." *Ferguson v. Wesley Coll., Inc.*, 2000 WL 706833, at *2 (Del. Super. Ct. Mar. 23, 2000).

The Investors stated a claim for fraud from the very inception of the case below. A-297-99 (Count IV); A-483-85 (Counts V and VI). Fraud always has been

part of the litigation.[2] As the Court of Chancery acknowledged, Paragraphs 22 and 23 of 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." O.B. Ex. A, 81; A-449-50 ¶ 22 (stating in part "Altenberg stated that OEG would approve all of the transactions he was looking at . . . The Investment Members, having been informed that OEG would finance all the deals, believed that this would be a great investment . . . the Investment Members committed capital based on their understanding of OEG's roles, as the financing OEG was to provide was an absolutely vital component of the investment's feasibility"); ¶ 23 ("The primary reason Jefferson became involved with Altenberg was Altenberg's connections with OEG which, Jefferson was led to believe, essentially completed the financing piece of the transaction."). Accordingly, the Amended Complaint provided notice of the claim for fraudulent inducement to Altenberg. Altenberg's argument that he lacked notice that he was to defend against fraud claims strains credulity. Altenberg Br. at 35.

Even so, the Court of Chancery acknowledged that the Investors' failure to sufficiently provide Altenberg with notice of their claim for fraudulent inducement

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[2] The Court of Chancery found no doctrinal distinction between fraud and fraudulent inducement that would require the Investors to separately plead a count titled "Fraudulent Inducement." Opening Brief, Ex. A ("O.B. Ex. A") at 78-81; A-1114 at ¶ 4(a)).

did not preclude the Investors from conducting discovery into Altenberg's solicitation of the Investors' investment or pursuing a claim for fraudulent inducement. O.B. Ex. A at 81. The trial court incorrectly concluded that Altenberg was not given notice of the claim. *Id.*

The Investors provided notice of their fraudulent inducement claim during the discovery process. *See* O.B. at 23-24; O.B. Ex. A at 82 (finding that it was "clear that the parties conducted extensive discovery into the early phases of the parties' relationship" and "thoroughly investigated the solicitation of the plaintiffs' investment."); Altenberg Br. at 33 (conceding that "the parties conducted discovery into the early phases of the parties' relationship"); A-317 (Defendants' and Nominal Defendant's Request for Production of Documents Nos. 16 and 17 specifically sought discovery from Investors "concerning any…proposed investment in the [Fund]…"). The extensive discovery into the pre-contractual period provided Altenberg with notice that the Investors' fraud claim encompassed both pre- and post-contractual misrepresentations. *OptimisCorp*, 2015 WL 357675, at *4 (finding that Defendants were on notice of a conspiracy because defendants' discovery demonstrated an understanding that some form of conspiracy was at issue).

The pre-trial papers also provided notice of the Investors' fraudulent inducement claim. *See* A-607 (Plaintiffs' Pre-Trial Brief) ("Altenberg induced Plaintiffs to invest in the Fund by lying about his experience in the solar finance

industry and his knowledge of OEG's requirements."). The Joint Exhibit List[3] included pre-contractual documentation that put Altenberg with notice of the Investors' claim for fraudulent inducement. AR-16-182 (listing AR-183-196 (JX 3 – VERT Solar Finance Solar Acquisition Platform Presented to Brett Jefferson by Joaquin Altenberg), AR-197-200 (JX 4 – VERT Solar Finance Project Cali Financial Model), A-78-111 (JX 126 – 5/28/2015 Email from J. Altenberg to B. Jefferson RE: Re: Delayed on model), and A-112-177 (JX 131 – 5/30/2015 Email from J. Altenberg to B. Jefferson RE: Cali Project). Altenberg's assertion that fraudulent inducement was never "identified…as an issue" within the Plaintiffs' Pre-Trial Brief or Pre-Trial Order is simply untrue. Altenberg Br. at 33.

The Investors' post-trial papers also analyzed their fraudulent inducement claim. Specifically, the Plaintiffs' Post-Trial Opening Brief outlined Altenberg's fraudulent misrepresentations he used to induce the Investors to invest in the Fund. A-756 ("[Altenberg] misrepresented the very purpose of the Fund. Altenberg's false pitch documents fraudulently misrepresented that Project Cali was ready for a speedy investment . . . Altenberg misrepresented OEG as a 'dedicated' source of financing that was a 'lock' even though OEG never made any such commitment."). The Investors again argued that Altenberg fraudulently induced them to invest in the

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[3] "Joint Exhibit List" shall refer to the parties list of joint exhibits used at trial. AR-16-182.

Fund through their post-trial answering brief. A-897-898. Altenberg baselessly complains that the Investors' post-trial opening brief did not "emphasize" the claim for fraudulent inducement. Altenberg Br. at 34. As noted, the claim was described and analyzed, and Altenberg cites to no authority to suggest that a claim must be "emphasized" in any particular manner.[4]

The Court of Chancery's conclusion that Altenberg did not have notice of the fraudulent inducement claim is unsupported by the record and should be reversed.

**B. Altenberg Suffered No Prejudice.**

Altenberg changed his story at trial to deprive the Investors the ability to discover the facts leading up to their investment in the Fund. Altenberg lied at his deposition;[5] he testified that he presented Project Cali to Jefferson as "an opportunity that's live right now that [they] could go and capture" if Jefferson were to invest with VERT Solar Finance at the time. A-560:13-20.

A year later at trial, Altenberg admitted for the first time that Project Cali was never a project in which the Fund could have invested. A-696:21-24 ("Q. Was the

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[4] The Court of Chancery wrongly focused on the fact that Investors' claim was not "front and center" throughout their post-trial answering brief. O.B. Ex. A at 87. The emphasis placed on such an argument is irrelevant to whether Altenberg had notice of the Investors' claim.

[5]The Investors were required to take Altenberg's deposition on five separate occasions as a result of Altenberg's continued bad acts and dishonesty throughout this litigation. AR-1-15.

California City project, Mr. Altenberg, not really a project that was being offered to the investment members? A. That's correct, it was not.").

Contrary to Altenberg's assertion, this testimony was clearly inconsistent with his deposition testimony. When confronted at his deposition with the Project Cali model that he pitched to Jefferson, Altenberg testified that he was hoping to become involved in that specific project. He had the opportunity to disclose that Project Cali was never a real project, but he failed to do so:

> Q. At the time this was provided to Mr. Jefferson had VERT Solar Fund been created yet?
>
> A. No.
>
> 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 representative of a project. We didn't own this project at that point in time.
>
> Q. Were you hoping to become involved in this project?
>
> A. Yes.

A-559:17-A:560:5.

The Court of Chancery seemingly agreed that Altenberg lied at his deposition. *See* O.B. Ex. A at 61 ("there was nothing suggest that Project Cali was not a real project that was available for investment"; 62 ("other evidence corroborates the [Investors'] credible testimony that Altenberg represented that

Project Cali would be the Fund's first project"). The Court of Chancery further recognized that this admission was "critical evidence" and the "centerpiece" of the Investors' claim for fraudulent inducement. *Id.* at 86. This change in Altenberg's story at trial prejudiced the Investors, and Altenberg shall not be permitted to benefit from this deceit. In light of Altenberg's ever-changing story, his claim of prejudice should be disregarded. *See* Altenberg Br. at 35-38. Altenberg's argument lies contrary to the principles of equity.

Altenberg inaccurately argues that the Investors' theory of fraudulent inducement was stated only in its post-trial briefing. *Id*. at 35-36. Altenberg fails to acknowledge that the Investors' claim for fraudulent inducement was set forth within the Investors' post-trial opening brief. A-756-57. Altenberg suffered no prejudice because he had the opportunity to – and he did – defend against the claim in his post-trial answering brief. A-942-48. He further defended against the claim at post-trial argument. A-1041-42; A-1050-51. Lastly, Altenberg contends that he was prejudiced because the trial court allowed evidence to support a claim for fraudulent inducement which affected the Court's decision. Altenberg Br. at 36. For the reasons discussed *infra*, Argument on Cross-Appeal, I, the Court's consideration of such evidence was proper. Altenberg was not prejudiced.

### C. The Investors are Entitled to Relief Under Court of Chancery Rule 54(c).

#### 1. The Circumstances Support the Application of Court of Chancery Rule 54(c)

Court of Chancery Rule 54 provides in relevant 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).

Altenberg improperly narrows the application Court of Chancery Rule 54, asserting that it "deals only with relief that a party has not demanded in the pleadings, not substantive claims that a party has never alleged." Altenberg Br. at 39. While the two cases relied upon by Altenberg apply Court of Chancery Rule 54 to permit recovery of damages in excess of the amount set forth in the operative complaints, neither case limits Court of Chancery Rule 54 to that singular use. *See Manhattan Telecomm. Corp. v. Granite Telecomm., LLC*, 2020 WL 6701588, at *5 (D. Del. Nov. 13, 2020); *USX Corp. v. Barnhart*, 395 F.3d 161, 165 (3d Cir. 2004).

Rather, Federal Rule of Civil Procedure 54 (the federal counterpart to Court of Chancery Rule 54) allows relief based on a particular theory when the theory was "squarely presented and litigated by the parties at some stage or other of proceedings." *Evans Prod. Co. v. W. Am. Ins. Co.*, 736 F.2d 920, 923 (3d Cir. 1984). Indeed, Altenberg concedes that "Rule 54(c) 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." Altenberg Br. at 40 (citing *USX Corp.*, 395 F.3d at 165) (emphasis added). Here, the Court of Chancery concluded that the Investors did establish a cause of action for fraud in the inducement. O.B. Ex. A at 117 ("The record at trial established that Altenberg induced the plaintiffs to invest in the Fund by making fraudulent representations."). Therefore, the Court of Chancery's decision on the Investors' fraudulent inducement claim should be reversed as inconsistent with Rule 54.

### 2. The Investors Did Not Waive Their Argument That the Opinion Conflicts with Court of Chancery Rule 54.

The Investors did not waive their argument under Court of Chancery Rule 54. "[W]aiver occurs where a party intentionally relinquishes an available contention or objection." *Brown v. United Water Del., Inc.,* 3 A.3d 272, 276 (Del. 2010). The Investors had no opportunity to contest the Court of Chancery's denial of relief pursuant to the Investors' claim for fraudulent inducement. A motion for reargument on this basis would have been inappropriate and Altenberg does not argue otherwise. The Investors Defendants cannot waive an argument they had no chance to make.

Further, the Investors did not waive their argument because only "questions presented" on appeal must be preserved before the trial court, not each and every merit in support of the question presented. *See* Del. Supr. Ct. R. 14 (b)(vi)A.(1) (requiring each brief to contain an argument section that include a subsection

containing the "*Questions presented"* that must state "the question or questions presented, with a clear and exact reference to the pages of the appendix where a party preserved each question in the trial court.") (emphasis in original); Del. Supr. Ct. R. 14 (b) (vi) A. (1) (3) (requiring the argument section of a brief include a subsection containing the "*Merits of argument*") (emphasis in original); *see also* Del. Supr. Ct. R. 8 ("Only **questions** fairly presented to the trial court may be presented for review…") (emphasis added).

Altenberg's argument incorrectly blurs the line between the question presented by the Investors, and the merits supporting the Investors argument. The difference is unquestionably clear. The Investors Opening Brief appropriately identifies the question presented and the exact pages of the record where the issue was preserved in the trial court:

> Did the Court of Chancery err in finding that the Investors are not entitled to a remedy for fraudulent inducement, even though the trial court made factual findings holding that Altenberg induced the Investors to invest in the Fund by making false representations, because they did not present their claim in a procedurally proper way? O.B. Ex. A, 78-90, 117; A-662-67, 689; A-897-98.

Altenberg's argument targets one of the merits that support this issue on appeal, i.e., whether the trial court's finding that the Investors are not entitled to a remedy for fraudulent inducement conflicts with Court of Chancery Rule 54.

Even if this Court determines that the Investor's argument concerning Court of Chancery Rule 54 was not properly preserved in the trial court (it should not), this Court should consider the argument because "the interests of justice so require." 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."). "Review of an alleged error under the interests of justice exception is 'limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive a party of a substantial right, or which clearly show manifest injustice.'" *Baize v. Vincent*, 149 A.3d 240, *2 (Del. 2016) (citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

The interest of justice exception applies to the present circumstances. Despite finding that the Investors established a claim for fraudulent inducement against Altenberg, the Court of Chancery denied the Investors' relief for fraudulent inducement on the basis that the claim was not "advanced in a procedurally proper way." O.B. Ex. A at 56. Such denial of relief after the Investors established a claim for fraudulent inducement gives rise to the interest of justice exception.[6]

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[6] Altenberg fails to make any argument concerning the applicability of the interest of justice exception and thus has waived his right to argue otherwise. *See Emerald Partners v. Berlin,* 726 A.2d 1215, 1224 (Del. 1999) (holding that a party's failure to raise an argument in its answering brief constitutes a waiver of that argument).

For these reasons, this Court should adopt the Court of Chancery's finding that "[t]he evidence at trial established that Altenberg fraudulently induced the plaintiffs to execute the Operating Agreement and invest in the Fund." O.B. Ex. A at 56.

## II. THE INVESTORS PROVED THAT ALTENBERG DEFRAUDED THEM DURING THE OPERATION OF THE FUND.

### A. The Investors Proved Altenberg's Fraud During the Operation of the Fund.

The Investors submitted evidence and the Court of Chancery made factual findings regarding Altenberg's fraud during the operation of the Fund. O.B. at 32-36. Specifically, the Investors alleged that Altenberg engaged in fraud during the operation of the Fund in at least four different ways: (1) Altenberg issued false and misleading reports and financial statements to the investors (*id.* at 33); (2) Altenberg falsely reassured the Investors that he remained committed to their original investment structure, and relatedly undertook unauthorized ventures that fell outside of the purpose of the Fund (*id.* at 34-35); (3) Altenberg lied to the Investors every time he sought capital contributions (*id.* at 35-36); and (4) "Altenberg lied about little things," *i.e.,* Altenberg misrepresented that Don Kendall had joined Finance as executive chair to ease the Investors' concern to keep them in the Fund or that he lied about Elwin Thompson and Erica Engle working for Energy Nexus, when they did not. *Id.* at 36 (citing O.B. Ex. A at 76). The evidence of Altenberg's ongoing fraud during the operation of the Fund demonstrates that the trial courts finding to the contrary was an abuse of discretion and should be reversed.

Rather than focusing on the Investors' substantive of allegations of fraud during the operation of the Fund against Altenberg, the trial court instead noted the

"reduced emphasis" the Investors gave to their claim for fraud during the operation of the Fund within their post-trial briefing. O.B. Ex. A at 90. Again, the Investors are aware of no authority to suggest that a claim must be "emphasized" in any particular manner. In any event, Investors' post-trial opening brief argued that Altenberg defrauded the Investors by siphoning money out of the Fund, failing to disclose transactions, and concealing evidence of his misdeeds and providing false and misleading financials. A-753. Further, the Investors' post-trial answering brief highlights the trial evidence demonstrating Altenberg's fraud during the operation of the Fund. A-887-A-891. Regardless of the trial court's sentiments towards Investors' post-trial briefing, the trial court cannot ignore the record evidence demonstrating Altenberg's fraud during the operation of the Fund. Its disregard of such evidence is an abuse of its discretion.

Altenberg too disregards the entirety of Investors' allegations of fraud during the operation of the Fund against Altenberg and instead only substantively addresses the Investors' assertion that Altenberg committed fraud each time he sought capital contributions. Altenberg Br. at 42-43. Altenberg's argument that the Investors' claims concerning the capital calls "are not properly analyzed under the rubric of common law fraud" are unavailing. *Id.* at 44 (citing O.B. Ex. A at 90). As set forth in the Opening Brief, this argument fails because the present case is distinguishable from *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs., Inc.*, 854 A.2d

121 (Del. Ch. 2004). *See* O.B. at 39-40. In an attempt to ignore the "context specific policy concerns" raised by the Court in *Mobilecomm,* Altenberg's only response is that the Investors' distinction is "unhelpful" because it "only tries to distinguish the facts from the Court's dicta and not its holding." Altenberg Br. at 45. For the reasons set forth in the Opening Brief, the Investors maintain that the Court of Chancery erred by concluding that the Investors' only allegation of fraud during the operation of the Fund was through Altenberg's continued and intentional lies concerning the capital calls and then declining to analyze such capital call misrepresentations as frauds. O.B. at 39-41.

**B. The Investors Established Scienter.**

Under Delaware law, the Investors could have established scienter to establish fraud by showing that Altenberg acted "either knowingly, intentionally, or with reckless indifference to the truth." *Mobilecomm,* 854 A.2d at 143. The Investors set forth evidence to establish the requisite scienter to support a fraud or disclosure claim. O.B. at 42 (citing O.B. Ex. A at 5, 16-17, 23-27, 31, 34-36, 39-40, 57, 71-77). As such, the trial court's conclusion that the Investors failed to prove scienter is an abuse of discretion.

Altenberg's attempt to distinguish the Court of Chancery's specific findings concerning Altenberg's continuous lies and misrepresentations (O.B. Ex. A 23-27, 31, 34-36, 39-40, 74-76) from the element of scienter misses the mark. Altenberg

Br. at 46-47. Indeed, it is these specific findings concerning Altenberg's lies and misrepresentations that the Court was required to consider when evaluating scienter. The Court's failure to appropriately apply these facts to the legal issue of scienter was an abuse of discretion and requires that the Court of Chancery's finding be reversed.

### C. The Investors Stated Claims for Equitable Fraud or Negligent Representation.

Delaware law does not require a separate count for equitable fraud so long as "one of two fundamental sources of equity jurisdiction exist," *i.e.*, "(1) an equitable right founded upon a special relationship over which equity takes jurisdiction, or (2) where equity affords its special remedies, e.g., 'rescission, or cancellation; where it is sought to reform a contract . . . or to have a constructive trust decreed." *Ameristar Casinos, Inc. v. Resorts Int'l Holdings, LLC*, 2010 WL 1875631, at *12 (Del. Ch. May 11, 2010); *Zebroski v. Progressive Direct Ins. Co.*, 2014 WL 2156984, at *7 (Del. Ch. Apr. 30, 2014). The first of the two sources of equity jurisdiction exist here. Namely, a fiduciary relationship exists between Altenberg and the Investors. O.B. Ex. A at 93. Accordingly, a remedy for equitable fraud is available to the Investors.

Altenberg relies upon two cases to support his position that the Court should not consider Investors' claim for equitable fraud. Altenberg Br. at 48 (citing *Wolf v. Magness Constr. Co.*, 1994 WL 728831, at *5 (Del. Ch. Dec. 20, 1994) *and DRR,*

*L.L.C. v. Sears, Roebuck & Co.*, 949 F. Supp. 1132, 1137-38 (D. Del. 1996)). Both of these cases are distinguishable because neither involved a fiduciary relationship justifying the imposition of such equitable relief. *See Wolf*, 1994 WL 728831; *DRR, L.L.C.*, 949 F. Supp. 1132.

Further, Altenberg was on notice of a claim for equitable fraud. As noted, fraud always has been a claim in this action. A-297-99 (Count IV); A-483-85 (Counts V and VI). Further, the Investors reserved their right to seek other equitable relief. *See* A-480 ("Plaintiffs are entitled to other equitable relief not available at law.") A-607 (Investors' Pre-Trial Brief) ("Fraud may provide a remedy for negligent or even innocent misrepresentations…"); *see also Zebroski*, 2014 WL 2156984, at *7 ("The elements of equitable fraud are similar to those for common law fraud, except that "the claimant need not show that the respondent acted knowingly or recklessly—innocent or negligent misrepresentations or omissions suffice.").

For these reasons, the Court of Chancery erred in finding that Altenberg was not liable to the Investors for common law fraud during the operation of the Fund, and such finding should be reversed.

## ARGUMENT IN OPPOSITION TO CROSS-APPEAL

### I. THE COURT OF CHANCERY PROPERLY CONSIDERED EVIDENCE OF FRAUDULENT MISREPRESENTATIONS TO ASSESS ALTENBERG'S CREDIBILITY.

#### Question Presented

Did the trial court abuse its discretion when considering evidence of Altenberg's fraudulent misrepresentations to evaluate Altenberg's credibility? A-991:23-A-993:18 (Post-Trial Oral Argument); B2120:4-15 (Trial Transcript, Vol. I).

Answer: No.

#### Scope of Review

Questions of whether a trial court correctly applied the parol evidence rule when interpreting a contract are reviewed *de novo*. *See Galantino v. Baffone*, 46 A.3d 1076, 1080 (Del. 2012) (stating "[w]e review questions of law, including those that require the interpretation of statutes and contractual terms, *de novo*" when discussing appellants' claim that lower court misapplied parol evidence rule); *Peden v. Gray*, 886 A.2d 1278 (Del. 2005).

While Altenberg advances his argument in terms of the parol evidence rule, he does so only to impose a *de novo* review on the Court of Chancery's findings. Altenberg's true concern is not the application of the parol evidence rule, but rather whether the Court's analysis of the Investors' breach of fiduciary duty claim was "infected" by the Disputed Evidence (defined below), *i.e.*, whether the Court properly assessed Altenberg's credibility.

This Court reviews findings of historical fact under the deferential "clearly erroneous" standard of review. *CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1041 (Del. 2016). "That deferential standard applies not only to historical facts that are based upon credibility determinations but also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts." *Id.* "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* "When factual findings are based on determinations regarding the credibility of witnesses, the deference already required by the clearly erroneous standard of appellate review is enhanced." *Id.*; *see also Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015).

## Merits of the Argument

### A. The Parol Evidence Rule Does Not Bar the Trial Court's Consideration of the Disputed Evidence to Assess Altenberg's Credibility.

#### 1. The Disputed Evidence Was Not Relied Upon for the Purpose of Varying or Contradicting the Terms of a Written Contract.

"When a written 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." *Carrow v. Arnold*, 2006 WL 3289582, at *4 (Del. Ch. Oct. 31, 2006) (citations omitted). For the parol evidence rule to apply, the Court must determine first, "whether the parties' written contract was intended to be the final expression of their

agreement," and second, "whether the alleged oral representations would contradict the written terms of the agreement." *Id.* (citations omitted).

A court should consider "the facts and circumstances surrounding the execution the instrument" to determine whether a written contract is the final expression of the parties' agreement. *Id.* (citations omitted). While the presence of an integration clause in a written contract may create a presumption of integration, it is not controlling. *Addy v. Piedmonte*, 2009 WL 707641, at *9 (Del. Ch. Mar. 18, 2009). Instead, to determine whether a contract is fully integrated, a court should consider "whether a contract is fully integrated, the court focuses on whether it is carefully and formally drafted, whether it addresses the questions that would naturally arise out of the subject matter, and whether it expresses the final intentions of the parties" *Id.* Altenberg summarily asserts that the Operating Agreement includes an integration clause and thus, is a final, integrated contract. Altenberg Br. at 52-53 (citing A-202 ¶ 9.10). This must be rejected. Whether the Operating Agreement is fully integrated can only be properly analyzed through consideration of its drafting, whether it addresses the questions that would naturally arise out of the subject matter, and whether it expresses the final intentions of the parties. While a review of these factors would demonstrate that the Operating Agreement was not a final expression of the parties' agreement, the Court need not engage in such analysis here, because the second element of the parol evidence rule – that the

evidence was proffered to vary the terms of an unambiguous contract – is clearly not met here.

Delaware law prohibits a trial court from considering parol evidence only when the evidence is proffered to vary the terms of an unambiguous contract. *James River-Pennington Inc. v. CRSS Cap., Inc.*, 1995 WL 106554, at *5 (Del. Ch. Mar. 6, 1995); *see also Galantino*, 46 A.3d at 1081 ("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*.") (emphasis added). The parol evidence rule does not apply "where the issue is not what the contract means." *Id.*

The Court of Chancery's reliance upon evidence demonstrating Altenberg's fraudulent inducement to assess Altenberg's credibility does not trigger the application of the parol evidence rule because the evidence was not relied upon for the purpose of varying or contradicting the terms of a written contract. Altenberg identifies the parol evidence that was improperly considered by the trial court to include:

> [1] Altenberg's solicitation materials and alleged promises made before the execution of the Fund's Operating Agreement (O.B. Ex. A at 72-74); [2] evidence regarding Project Cali (*id.* at 71); [3] the three-to-six month timeline for project completion and equity recycling (*Id.*); and [4]

> the availability of financing from Open Energy Group and other providers of debt financing (*id.* at 71-72).[7]

Altenberg Br. at 50, n. 1. Altenberg seeks to reverse the trial court's findings on the Investor's breach of fiduciary duty claims on the sole basis that the trial court considered the Disputed Evidence when assessing his credibility. Altenberg Br. at 51. Altenberg plainly asserts that the Disputed Evidence was being used to "establish expectations and duties" set forth in the Operating Agreement (Altenberg Br. at 51), however this is not so. To the contrary, the topics of the Disputed Evidence never made it into the Operating Agreement, and thus, there are no parol evidence issues. 991:5-A-992:5 (Post-Trial Oral Argument). The Court of Chancery agreed and determined that the Disputed Evidence did not give rise to issues with the parol evidence rule. See O.B. Ex. A. at 61 (finding that the Investors were "not relying upon the materials themselves," but rather using them to "corroborate their testimony."). Thus, because the Disputed Evidence was not introduced to interpret the Operating Agreement, the parol evidence rule does not apply.

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[7] These four categories of documents identified by Altenberg will collectively be referred to as the "Disputed Evidence".

### 2. Even if the Parol Evidence Rule Does Apply, Which It Does Not, the Disputed Evidence is Allowed Under the Fraud Exception.

Delaware courts have long recognized 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; *see also Scott-Douglas Corp. v. Greyhound Corp.*, 304 A.2d 309, 317 (Del. Super. Ct. 1973) ("where fraud or misrepresentation is alleged the proof of oral promises or representations made prior to execution of a written agreement is not barred by the parol evidence rule"); *Patel v. Shree Ji, LLC*, 2013 WL 4046573, at *3 (Del. Com. Pl. Aug. 9, 2013) ("the parol evidence rule will not apply where a party to a contract asserts that there was fraud in the inducement").

This standard is unquestionably met. O.B. Ex. A at 1 (trial court explaining that through this lawsuit, the Investors "contended that Altenberg fraudulently induced them to invest in the fund" and "contended that Altenberg committed fraud during the life of the fund."); *see also* A-483-85 (Amended Complaint) (Count V (asserting a claim for fraud against Finance and Altenberg) and Count IV (asserting a claim for fraud against Finance, Altenberg, and his wife)); A-640 (Pretrial Stipulation and Order) ("Defendant committed fraud and conspired to commit fraud…"). Even Altenberg concedes that fraud was alleged. Altenberg Br. at 7 ("The Court of Chancery also correctly found that Plaintiffs did not prove the fraud

claim *that Plaintiffs did allege in their Amended Complaint*…") (emphasis added), 34 (admitting that he has been on notice of Plaintiffs' claims of fraud during the operation of the Fund).

Despite his concessions that a fraud claim exists, Altenberg nonetheless argues that the fraud exception does not apply because the trial court "found that Plaintiffs did not properly plead a fraudulent inducement claim." Altenberg Br. at 53-54. The fraud exception applies to any allegations of fraud and is not limited to allegations of fraud in the inducement. *Carrow*, 2006 WL 3289582, at *8. It is clear that fraud has been a part of this litigation from the commencement. *See* A-297-99 (Count IV); A-483-85 (Counts V and VI). Further, Altenberg plainly ignores the Court of Chancery's finding that "[t]he record at trial established the Altenberg induced the plaintiffs to invest in the Fund by making fraudulent misrepresentations . . ." O.B. Ex. A at 117; *see also id.* at 56 (finding that "[t]he evidence at trial established that Altenberg fraudulently induced the plaintiffs to execute the Operating Agreement and invest in the Fund."). For these reasons, if the parol evidence rule does apply (it does not), the fraud exception permitted the trial court's consideration of the Disputed Evidence.

### B. Altenberg Fails to Demonstrate That the Trial Court's Assessment of Altenberg's Credibility Was Clearly Erroneous.

The Court of Chancery's assessment of Altenberg's credibility should be affirmed. Delaware law is clear that the Court of Chancery "enjoys the unique

opportunity to examine the record and assess the demeanor and credibility of witnesses" and is "the sole judge of the credibility of live witness testimony." *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 35–36 (Del. 2005) (citations omitted). As such, this Court accepts the Court of Chancery's "factual determinations if they turn on a question of credibility and the acceptance or rejection of particular pieces of testimony." *Id.* "This Court will only make contradictory findings of fact when the findings below are clearly wrong and the doing of justice requires their overturn." *Id.*; *see also CDX Holdings, Inc.*, 141 A.3d at 1042 (Del. 2016) ("This Court will uphold the Court of Chancery's factual findings so long as they are not clearly erroneous. The clearly erroneous standard applies to factual determinations based on credibility and the evidence."); *Nixon v. Blackwell,* 626 A.2d 1366, 1378 n.16 (Del.1993) ("This Court respects and gives deference to findings of fact by trial courts when supported by the record, and when they are the product of an orderly and logical deductive reasoning process, especially when those findings are based in part on testimony of live witnesses whose demeanor and credibility the trial judge has had the opportunity to evaluate.").

Altenberg appeared in-person before the trial court. The trial lasted for three days. During this time, the Court had a front row seat to Altenberg and was in the best position to evaluate his credibility. The trial court's consideration of Altenberg's credibility was well within its discretion. To the contrary, Altenberg

has not offered any evidence demonstrating that the Court of Chancery abused its discretion or that its credibility determination was clearly erroneous. The trial court's finding that Altenberg breached his fiduciary duty should be upheld.

### C. Even If the Parol Evidence Rule Prohibits Consideration of the Disputed Evidence to Assess Altenberg's Credibility, Reversal of the Trial Court's Findings on the Breach of Fiduciary Duty Claim is Not Warranted.

The Court of Chancery twice concluded that Altenberg is not a credible witness. O.B. Ex. A at 77, 109. In reaching this conclusion, the Court of Chancery did not solely rely upon the Disputed Evidence, but rather a full record of evidence of Altenberg's dishonesty and misrepresentations. Specifically, in addition to the Disputed Evidence, the following misconduct undermined Altenberg's credibility before the Court of Chancery: (1) Altenberg's communications *during the life of the Fund*, which it concluded "were not a model of candor" (O.B. Ex. A at 74-75); (2) the fact that Altenberg provided misleading NAV reports that "did not provide the Investment Members with meaningful insight into the value of the Fund." (*id.* at 75-76); (3) the fact that "Altenberg lied about little things" (*id.* at 76); and (4) Altenberg's demeanor at trial. (*id.* at 77). Further, the Court of Chancery's front row seat to Altenberg's continuous bad acts throughout the course of this litigation likely contributed to Altenberg's lack of credibility at trial. For example, the trial court noted:

> After Altenberg failed to comply with his discovery obligations, the court required the parties to enter into a discovery plan. The plaintiffs learned that Altenberg was causing the Fund to advance his fees and expenses in this litigations and sought a temporary restraining order to review it…This court granted the motion.

Ex. A at 50 (citations omitted). Given the substantial evidence discrediting Altenberg, even if this Court concludes that the Disputed Evidence was improperly considered, there is no basis to reverse the trial court's finding on the breach of fiduciary duty claim.[8] Instead, it should be affirmed.

### D. Altenberg Waived His Right to Object to the Court's Consideration of the Disputed Evidence.

As a threshold matter, Altenberg has waived his right to contest the Court's consideration of the Disputed Action. The Pretrial Stipulation and Order provides that "unless an objection to a proposed trial exhibit has been noted on the Joint Exhibit List, all exhibits on the Joint Exhibit List shall be deemed admitted into evidence without objection." A-682. Notably, Altenberg made no objections to use of the evidence set forth in Joint Exhibit List (AR-16-182) and therefore, he waived his right to challenge the evidence at trial and beyond.

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[8] Altenberg seeks reversal of the trial court's findings on the Investors' breach of fiduciary duty claims solely on the basis of the trial court's findings concerning his credibility. Altenberg Br. 49-55. Altenberg takes no issue with any findings specifically regarding elements of the Investor's breach of fiduciary claim. *Id.*

## II. THE COURT OF CHANCERY'S AWARD OF DAMAGES WAS PROPER AND WITHIN ITS DISCRETION.

### Question Presented

Did the trial court abuse its discretion in through its award of damages to Investors? B3175-76 (Plaintiffs' Reply ISO Post-Trial Motion for Entry of Judgment for Plaintiffs); A-1032-1035 (Trans. Post-Trial Oral Argument) Answer: No.

### Scope of Review

This Court "defer[s] substantially to the discretion of the trial court in determining the proper remedy . . . to be awarded for a found violation of the duty of loyalty by a corporate fiduciary. *Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 439 (Del. 2000). Thus, this Court reviews a trial court's "damages determination for abuse of discretion, and will uphold [a trial court's] factual findings unless they are clearly erroneous." *Siga Techs., Inc*, 132 A.3d at 1128.

Altenberg incorrectly argues that this issue requires *de novo* review on the basis that the trial court "failed to hold Plaintiffs to the legal elements of their cause of action." Altenberg Br. at 56. Altenberg does not challenge the trial court's finding that there was a breach of fiduciary duty. Even so, Delaware law is clear that "in cases of the breach of the duty of loyalty, the plaintiff need not prove damages to establish a breach of that duty." *In re Fuqua Indus., Inc.*, 2005

WL 1138744, at *6 (Del. Ch. May 6, 2005). Rather, Altenberg only challenges the trial court's award of damages for Altenberg's breach of fiduciary duty. As previously set forth, "this Court reviews the Court of Chancery's fashioning of remedies for abuse of discretion." *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 175 (Del. 2002).

## Merits of the Argument

### A. Plaintiffs Proved Damages at Trial.

A plaintiff must prove damages by a preponderance of the evidence. *Beard Research, Inc. v. Kates*, 8 A.3d 573, 613 (Del. Ch. 2010); *In re Mobilactive Media, LLC*, 2013 WL 297950, at *24 (Del. Ch. Jan. 25, 2013); *Medicalgorithmics S.A. v. AMI Monitoring, Inc.*, 2016 WL 4401038, at *26 (Del. Ch. Aug. 18, 2016). Delaware law does not "require certainty in the award of damages where a wrong has been proven and injury established." *In re Mobilactive Media, LLC*, 2013 WL 297950, at *24. "Indeed, the quantum of proof required to establish the amount of damage is not as great as that required to establish the fact of damage. Responsible estimates of damages that lack mathematical certainty are permissible so long as the court has a basis to make such a responsible estimate." *Beard Research, Inc.*, 8 A.3d at 613. Where a calculation cannot be mathematically proven, public policy has led Delaware courts to show a general willingness to make a wrongdoer "bear the risk of uncertainty." *Id*. Under this standard, the Investors

adequately proved damages, and as a result, the trial court's award of damages should be affirmed.

First, since initiating this action, the Investors have sought damages in the form of their entire investment returned to them as well as an accounting. A-489 (seeking a declaration that "Plaintiffs are entitled to an accounting and ordering such an accounting" and an award of "rescissory or compensatory damages to Plaintiff, including pre- and post-judgment interest.").

Beyond the Investors' demand for relief, the Amended Complaint details many of the specific damages the Investors have suffered. *See* A-446, ¶ 8 ("Solar Finance's and Altenberg's willful and intentional misconduct…has significantly diminished the Investment Members' investment in the Complaint…"), A-446, ¶ 9 ("Solar Finance and Altenberg's actions continue to significantly erode the Company's remaining assets…"), A-446, ¶ 10 ("Solar Finance and Altenberg improperly advanced money to themselves for the defense of this litigation"), A-455, ¶¶ 34-35 (Altenberg was paying legal fees to various law firms out of the Company's account), A-456, ¶ 39 ("Solar Finance and Altenberg caused the Company to pay an inordinate amount of construction management fees to themselves…"); A-473, ¶ 85 ("Solar Finance and Altenberg charged and paid themselves…construction management fees"). The list goes on.

Further, a review of the Opinion defeats Altenberg's assertion that "Plaintiffs made virtually no attempt to calculate or establish damages at trial." Altenberg Br. at 57-58. The Opinion found that Altenberg breached his duty of loyalty in connection with five areas and quantifies the Investors' damages by category based upon the evidence presented at trial. O.B. Ex. A at 97-113. First, the trial court held that Altenburg breached his duty of loyalty by "paying excess fees to Finance" and that "Altenberg admit[ed] that he caused the Fund the pay approximately $2.37 million in fees to Finance." *Id.* at 97 (citation omitted).

Second, the trial court held that Altenberg breached his duty of loyalty by "holding the Fund's assets in Finance's name." O.B. Ex. A at 104-107. The trial court specifically held that "by using the Fund's money, but keeping title in Finance's name, Altenberg conferred benefits on Finance at the expense of the Fund." *Id.* at 105. The trial court further found that the trial evidence established that with regard to the claim DynaSolar asserted against Finance, "Altenberg agreed that DynaSolar could keep $1.25 million from the sale of the Beltline Portfolio to Boviet" and "[a]s a result, the Fund lost $1.25 million on the Beltline Portfolio." *Id.* (citation omitted).

Third, the trial court found that Altenberg breached the duty of loyalty by "not transferring the projects [held in Finance's name] to subsidiaries of the Fund" but held that that "plaintiffs [are] not entitled to any remedy for amounts that Altenberg

caused the Fund to pay to third parties unaffiliated with Altenberg in connection with any of its projects." *Id.* at 108. Relatedly however, the trial court determined that Altenberg's taking of the entire development fee relating to the Beltline Portfolio was a breach of his fiduciary duty of loyalty to the fund. *Id.* at 109. The Court further held that Altenberg is "personally liable for the actual amount of the development fee." The Court noted that Altenberg "testified that this amount was around $400,000" but other evidence in the record "suggest[ed] the amount was higher." *Id.* (citations omitted).

Fourth, the trial court held that Altenberg breached the duty of loyalty by "causing the Fund to pay legal fees and expense." *Id.* at 109-112. Specifically, the Court found that "Altenberg appear[ed] to have advanced himself a total of $179,500.21." *Id.* at 112 (citations omitted).

Fifth and lastly, the trial court held that Altenberg breached the duty of loyalty by "transferring the Dans Mountain Project to Energy Nexus." *Id.* at 112-113. Specifically with regard to damages, the Court stated,

> The plaintiffs have introduced evidence that Altenberg used Fund assets during the relevant time period. Between April 30 and November 31, 2018, Altenberg transferred another $350,000 from the Fund to Finance. Altenberg also transferred another $39,700 from the Fund to VERT Investment Group. *Id.* at 58. And he tapped the Fund during this period by using Bill.com and by using his ATM card.

*Id.* (citations omitted).

Following trial, the Investors post-trial briefing once again set forth the Investors' damages. A-769-74; A-861 ("Plaintiffs are entitled to the return of their capital, plus interest, as damages. In the alternative, the Investors are entitled to an accounting to reveal all of the fruits of Altenberg's poisonous tree."); A-893 ("But for Altenberg's misconduct, Plaintiffs would not have lost the nearly $7 million they invested with Altenberg"). Indeed, Altenberg acknowledges that the Investors' post-trial briefing sought repayment of their investment in the form of rescissory damages. *See* Altenberg Br. at 58 (citing A-771-72). But Altenberg takes the position that this is "not an appropriate remedy." *Id.* The fact that Altenberg does not agree with the form of damages sought does not translate to the Investors not proving damages for Altenberg's breach of duty of care.

### B. It Was in the Trial Court's Discretion to Consider Supplemental Briefing Concerning Plaintiff's Damages.

Delaware law is clear that "the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly." *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996). This Court has "very broad" powers "in fashioning equitable and monetary relief under the entire fairness standard as may be appropriate." *Int'l Telecharge, Inc.*, 766 A.2d at 440. Delaware law does not "require certainty in the award of damages where a wrong has been proven and injury established." *In re Mobilactive Media, LLC*, 2013 WL 297950, at *24. The wrongdoer will "bear the

risk of uncertainty of a damages calculation where the calculation cannot be mathematically proven." *Id*. Ultimately, a trial court "may exercise its own independent judgment in determining the calculation of damages." *Medicalgorithmics*, 2016 WL 4401038, at *28.

In a duty of loyalty case, damages "serve the dual purposes of compensating for injury and deterring future breaches of the duty of loyalty." *OptimisCorp v. Waite*, 2015 WL 5147038, at *82 (Del. Ch. Aug. 26, 2015). Damages "are to be liberally calculated." *Thorpe*, 676 A.2d at 444.

The Court of Chancery fashioned damages primarily based upon the evidence the parties presented to it at trial. However, given Altenberg's going lies and gamesmanship, and in order to "make or confirm the specific calculations" of the Investors' damages, the Court of Chancery exercised its discretion in requiring the parties submit additional briefing on damages. O.B. Ex. A at 115. Following the parties' briefing on damages, the trial court appropriately issued its Damages Award. A-1117-1119.

A comparison of the Opinion and the Damages Award clearly demonstrates that the Court of Chancery heavily relied upon the evidence of damages presented at trial and did not "create what [did] not exist in the evidentiary record" (*see* Altenberg Br. at 56-7):

1. Breach of Duty of Loyalty: Payment of excessive management fees to Finance (O.B. Ex. A at 97-104)

- Opinion: "Altenberg admit[ed] that he caused the Fund the pay approximately $2.37 million in fees to Finance." *Id.* at 97 (citation omitted).
- Damages Award: "Altenberg is liable to the Fund for $2,388,190.42 in management fees paid to Finance." A-1117, ¶ 2.a.

2. Breach of Duty of Loyalty: Holding the Fund's assets in Finance's name (O.B. Ex. A at 104-107)

- Opinion: "By using the Fund's money, but keeping title in Finance's name, Altenberg conferred benefits on Finance at the expense of the Fund." (*Id.* at 105); With regard to the claim DynaSolar asserted against Finance, "Altenberg agreed that DynaSolar could keep $1.25 million from the sale of the Beltline Portfolio to Boviet" and "[a]s a result, the Fund lost $1.25 million on the Beltline Portfolio." Id. (citation omitted).
- Damages Award: "Altenberg is liable to the Fund for $1,250,000 for holding Fund assets in the name of Finance." A-1117, ¶ 2.b.

3. Breach of Duty of Loyalty: Causing the Fund to pay for project-related fees (O.B. Ex. A at 108-109)

- Opinion: "Altenberg breached his fiduciary duty of loyalty to the Fund by taking the entire development fee . . . Altenberg testified that this amount was around $400,000, but he was not a credible witness, and there is evidence in the record suggesting that the amount was higher." *Id.* at 109 (citations omitted).
- Damages Award: "Altenberg is liable to the Fund for development fees of $634,200." A-1117, ¶ 2.c.

4. Breach of Duty of Loyalty: Causing the Fund to pay legal fees and expenses (O.B. Ex. A at 109-112).

- Opinion: "Altenberg appears to have advanced himself a total of $179,500.21." *Id.* at 112 (citations omitted).
- Damages Award, "Altenberg is liable to the Fund in the amount of $159,500.21." A-1118, ¶ 2.d.

5. Breach of Duty of Loyalty: Transferring the Dans Mountain Project to Energy Nexus (O.B. Ex. A at 112-113)

- Opinion: "The [Investors] have introduced evidence that Altenberg used Fund assets during the relevant time period," finding that "[b]etween April 30 and November 31, 2018,

Altenberg transferred another $350,000 from the Fund to Finance", that Altenberg "transferred another $39,700 from the Fund to VERT Investment Group," and that he "tapped the Fund during this period by using Bill.com and by using his ATM card." *Id.*

- Damages Award: "Altenberg is not liable in any amount in connection with the Dan Mountain Project." A-1118, ¶ 2.e.

Altenberg's reliance upon *Ravenswood Inv. Co., L.P. v. Est. of Winmill*, 2018 WL 1410860, at *2 (Del. Ch. Mar. 21, 2018) to assert that the trial court improperly requested the parties submit additional briefing on the issue of damages after trial and the close of evidence fails. Altenberg Br. at 59-60. In *Ravenswood*, the Court made a specific finding that "Plaintiff [ ] failed to develop any evidence supporting cancellation, rescission, rescissory damages or some other form of damages as possible remedies for the proven breaches of fiduciary duty" and further that "Plaintiff [ ] failed to present *any evidence upon which the Court could fashion a damages award in some other form*." *Id.* (emphasis added).

Here, in contrast to *Ravenswood*, the Court of Chancery held that evidence "to quantify an award for Altenberg's breaches of fiduciary duty" did in fact exist in the trial record, but that the trial court was "not in a position to sift through the information to make or confirm the specific calculations." O.B. Ex. A at 115; *see*

*also id*. at 2 ("the record currently contains sufficient information to quantify roughly the damages from certain breaches."). Further, the Court of Chancery recognized that, at the fault of Altenberg, the financial records of the Fund and Finance were maintained poorly. *Id.* at 115.

Based on these considerations and in an effort to avoid further prejudice to the Investors resulting from Altenberg's misconduct, it was well within the Court's discretion to request the parties provide supplemental submissions to order a more precise damages award. *See Ross Sys. Corp. v. Ross*, 1993 WL 49778, at *24 (Del. Ch. Feb. 22, 1993) (holding that it was within the Court's discretion to afford the parties an opportunity to submit supplemental briefs addressed solely to the issue of fraud damages, based upon the present trial record). The trial court's award of damages should be affirmed by this Court.

## CONCLUSION

For the reasons stated herein, Appellants respectfully request the Court overrule the Court of Chancery's holding that Appellants are not entitled to recover on their fraudulent inducement theory, and hold that Appellants are entitled to recover on that claim. Appellants also request that the Court overrule the Court of Chancery's decision that Appellants did not prove their fraud claim. In addition, Appellants request that the Court uphold the Court of Chancery's findings on Plaintiffs' claims for breach of fiduciary duty, and uphold the Court of Chancery's award of damages.

Date: May 3, 2021

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