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Case Number 14,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

WILKS LAW, LLC
David E. Wilks (DE Bar No. 2793)
Andrea S. Brooks (DE Bar No. 5064)
Adam J. Waskie (DE Bar No. 6217)
4250 Lancaster Avenue, Suite 200
Wilmington, DE 19805
Telephone: (302) 225-0850
Email: dwilks@wilks.law
Email: abrooks@wilks.law
Email: awaskie@wilks.law

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PRELIMINARY STATEMENT

Plaintiffs' argument in opposition to Altenberg's cross-appeal consists primarily of an *ad hominem* attack on Altenberg depicting him as a fraud despite the Court of Chancery's findings that Altenberg never committed fraud. Instead of focusing on the Court's analysis and legal argument, Plaintiffs simply disparage Altenberg's reputation as an honest, reputable businessman who, like many others, did not succeed in a risky business venture.

Plaintiffs also skirt the issues by reframing Altenberg's argument on cross-appeal to impose an inappropriate deferential standard of review. There can be no legitimate dispute that the inadmissible, pre-contractual parol evidence that the Court of Chancery improperly considered manifestly infected its determination of Altenberg's credibility leading to a reversible finding on Plaintiffs' breach of fiduciary duty claim. This is not a case in which pervasive fraud occurred. It took inadmissible evidence to find a breach of fiduciary duty – the only claim on which Plaintiffs prevailed at trial.

Moreover, the Court of Chancery found no basis in the trial record upon which it could calculate damages, but impermissibly put extra time on the clock for Plaintiffs to meet their burden of proof, suggesting even that Plaintiffs could conduct additional discovery on the issue if they wished. That process constituted reversible error.

Altenberg respectfully requests that this Court reverse the Court of Chancery's finding that Altenberg breached his fiduciary duty of loyalty and vacate the award of damages that the Court of Chancery entered.

ARGUMENT

I. THE TRIAL COURT'S CONSIDERATION OF INADMISSIBLE PAROL EVIDENCE INFECTED ITS ANALYSIS OF PLAINTIFFS' FIDUCIARY DUTY CLAIMS AND CONSTITUTED REVERSIBLE ERROR.

A. The Parol Evidence Rule Precluded The Court Of Chancery's Consideration Of Inadmissible Pre-Contractual Evidence.

1. The Fund's Operating Agreement Is A Final, Integrated Contract.

The unambiguous terms of the Fund's Operating Agreement defined the parties' obligations to one another at all times during the life of the Fund. "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." *See, e.g.*, *Galantino v. Baffone*, 46 A.3d 1076, 1081 (Del. 2012).

The Fund's Operating Agreement contained an integration clause confirming that the Agreement constituted the entire agreement between the parties and that it superseded any prior agreement or understanding among the parties. A-202 § 9.10. The Court of Chancery acknowledged that the Operating Agreement's integration clause "is a standard integration clause . . . ." Dkt. 7, Notice of Cross-Appeal, Ex. A at 77 ("Mem. Op."). An integration clause contained in the contract creates a "presumption of integration." *Carrow v. Arnold*, 2006 WL 3289582, at *5 (Del. Ch. Oct. 31, 2006).

Plaintiffs have provided no evidence to rebut the presumption of integration. In their failed attempt to do so, Plaintiffs contend that Altenberg only "summarily asserts that the Operating Agreement includes an integration clause and thus, is a final, integrated contract." Dkt. 15, Appellants' Reply Brief on Appeal and Answering Brief on Cross-Appeal ("Pl. Ans. Br.") at 27. They contend that the Court should analyze the facts and circumstances surrounding the execution of the Operating Agreement. Pl. Ans. Br. at 27. However, Plaintiffs then stop their argument short, provide no evidence of the facts and circumstances surrounding the execution, and instead state that "the Court need not engage in such analysis here" as to whether the Operating Agreement is fully integrated. *See* Pl. Ans. Br. at 27. In this way, Plaintiffs accuse Altenberg of a summary argument, but then offer nothing to support the notion that the contract does not mean what its plain language says. There is, therefore, no basis to depart from the presumption that the Operating Agreement is fully integrated.

But even if Plaintiffs did provide enough evidence to rebut the presumption, the factors in the Court's analysis weigh heavily in favor of a fully integrated agreement. Those factors 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." *Taylor v. Jones*, 2002 WL 31926612, at *3 (Del. Ch. Dec. 17, 2002).

Here, Plaintiffs are sophisticated investors. Both sides to the Operating Agreement engaged counsel to negotiate the terms of the Agreement. The parties exchanged numerous drafts of the Agreement and bargained for the contractual language that would govern the parties' relationship. The parties included an integration clause in the final Operating Agreement, because the Agreement is meant to express the final intentions of the parties. Plaintiffs have offered no evidence to the contrary.

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 terms.

2. The Inadmissible Parol Evidence Varied Or Contradicted The Terms Of The Operating Agreement.

Plaintiffs contend that the Court's reliance upon pre-contractual evidence did not trigger the parol evidence rule, because the Court relied on the evidence to assess Altenberg's credibility and not for the purpose of varying or contradicting the terms of the written contract. Pl. Ans. Br. at 28. That argument misses the mark.

As a foundational and indisputable fact, the Court *did* consider the inadmissible pre-contractual evidence (the "Disputed Evidence") for the purpose of varying or contradicting the terms of the written contract. In assessing Altenberg's credibility, the Court considered pre-contractual evidence to examine whether his alleged pre-contractual promises and representations aligned with his obligations

under the Operating Agreement. The Disputed Evidence that the Court considered *did* vary or contradict the Operating Agreement, because the Disputed Evidence purported to impose obligations that Altenberg did not agree to in the Operating Agreement. Plaintiffs admit that "the topics of the Disputed Evidence never made it into the Operating Agreement . . . ." Pl. Ans. Br. at 29. If the parties wanted to bind Altenberg to specific pre-contractual promises and representations, they would have included those particular promises and representations in the final Operating Agreement. They did not.

Accordingly, the Disputed Evidence was not relevant to any claim before the trial court. It should not have been admitted and the Court of Chancery should not have allowed it to affect its resolution of issues for which it was inadmissible. Stated differently, the only purpose for which the Court of Chancery provisionally heard the Disputed Evidence was limited to a claim of fraudulent inducement that Plaintiffs never pled. The Disputed Evidence was offered for no other purpose and Plaintiffs never suggested that it was relevant to their fiduciary duty claims or even Altenberg's credibility. The Court provisionally heard the evidence over Altenberg's several objections. Since the only claim to which the Disputed Evidence was even arguably relevant had never been pled, the Court of Chancery should not have considered the Disputed Evidence for any purpose. It nevertheless did so and its decision on the fiduciary duty claim should, we respectfully submit, be reversed.

3. The Fraud Exception To The Parol Evidence Rule Is Inapplicable.

Plaintiffs' reliance upon the fraud exception to the parol evidence rule is misplaced. The Disputed Evidence does not fall under the fraud exception – or any other exception – to the parol evidence rule, because the Court of Chancery found that Plaintiffs *never alleged* a fraudulent inducement claim. *See* Mem. Op. at 78-90. "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.*

Plaintiffs contend that the fraud exception applies to any allegations of fraud and is not limited to allegations of fraud in the inducement. Pl. Ans. Br. at 31. However, because Plaintiffs have alleged no fraud claim based on oral promises or representations made *before the formation of the Fund*, evidence of such prior statements is not admissible under the fraud exception to the parol evidence rule to vary or contradict the terms of the Fund's Operating Agreement. *See Carrow*, 2006 WL 3289582, at *8. As the Court of Chancery agreed, Count V of Plaintiffs' Amended Complaint for fraud focuses on Altenberg's conduct *during the operation of the Fund*. *See* A-483-84 ¶ 138; Mem. Op. at 80-82; A-1114.

To support their argument that the fraud exception applies to the Disputed Evidence, Plaintiffs cite to three cases. Pl. Ans. Br. at 30-31. However, in all three of those cases, the plaintiff had alleged a claim for fraud involving pre-contractual fraudulent statements made for the purpose of inducing the other party to enter into the contract. *See Carrow*, 2006 WL 3289582, at *8 (alleging a claim for fraudulent inducement); *Scott-Douglas Corp. v. Greyhound Corp.*, 204 A.2d 309, 312 (Del. 1973) (alleging a claim for fraudulent inducement); *Patel v. Shree Ji, LLC*, 2013 WL 40465573, at *3 (Del. Com. Pl. Aug. 9, 2013) (alleging that the defendant had made pre-contractual fraudulent misrepresentations to induce plaintiff to enter into the contract).

Here, the Court of Chancery correctly found that Plaintiffs never alleged or fairly presented a fraudulent inducement claim. Therefore, there was no fraud claim to support the admission of the Disputed Evidence. The fraud exception to the parol evidence rule is, therefore, unavailing to Plaintiffs.

B. The Delaware Supreme Court's Scope Of Review Of The Court Of Chancery's Consideration Of Parol Evidence Is *De Novo*.

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 principals *de novo*. *Genger v. TR Investors, LLC*, 26 A.3d 180, 190 (Del. 2011). "Th[e Delaware Supreme] Court reviews *de novo* a trial court's use of parol evidence in contract interpretation, because the question

presented is one of law." *Peden v. Gray*, 2005 WL 2622746, at *2 (Del. Oct. 14, 2005).

Plaintiffs attempt to reframe Altenberg's argument in order to receive a more deferential standard of review. Plaintiffs contend that the Court of Chancery's assessment of Altenberg's credibility should be reviewed under the "clearly erroneous" standard as a finding of fact. Pl. Ans. Br. at 31-33. However, Plaintiffs' reformation of Altenberg's argument recalibrates the issue too broadly. The question presented on cross-appeal is whether the Court of Chancery erred as a matter of law 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. *See* Dkt. 14, Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal ("Altenberg Op. Br.") at 49.

Altenberg's argument is that the Court of Chancery should not have considered the parol evidence. The Court of Chancery openly acknowledged, however, that the inadmissible evidence in question affected its findings regarding Plaintiffs' fiduciary duty claims. The Delaware Supreme Court's review of a trial court's application of the parol evidence rule is reviewed *de novo*. *Peden*, 2005 WL 2622746, at *2. Accordingly, the Delaware Supreme Court's scope of review on that issue is *de novo*.

Plaintiffs contend that the Court found that Altenberg was not credible for reasons other than the Disputed Evidence. Pl. Ans. Br. at 33. However, the evidence at trial showed that Altenberg provided weekly reports to Plaintiffs that detailed progress on the projects (B294-331, B332, B333-435, B2523:16-2524:3, B2525:3-5, B2537:16-19); provided NAV Reports to Plaintiffs that were reviewed and compiled by third-party accountants (B2527:15-2528:2, B2545:15-24, B856-60, B876-81, B882-87, B947-49, B1007-12, B1058-71, B1081-92, B1112-23, B1275-95); and routinely communicated with Plaintiffs telephonically on the status of projects (B2531:4-2532:1). Those facts directly contradicted Plaintiffs' claims that Altenberg was an untrustworthy fraudster.

To resolve the equipoise of the parties' positions, the Court of Chancery openly allowed inadmissible, pre-contractual parol evidence improperly to affect its assessment of Altenberg's credibility. The Court of Chancery's Memorandum Opinion provided complete visibility as to the impact of the Disputed Evidence. The Court of Chancery acknowledged that, "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. Because the Court of Chancery admitted that the irrelevant Disputed Evidence affected its decision, that decision should be overturned.

C. Altenberg Preserved His Right To Object To Parol Evidence At Trial.

Plaintiffs contend that Altenberg waived his right to contest the Court's consideration of the Disputed Evidence, because he did not lodge an objection to unspecified exhibits on the Joint Exhibit List. Pl. Ans. Br. at 34. (Plaintiffs make no mention of the large volume of testimonial parol evidence that the Court of Chancery considered.) As a threshold matter, "[t]he parol evidence rule is a rule of substantive law and not a rule of evidence." *Carey v. Shellburne*, 224 A.2d 400, 402 (Del. 1996). 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.* Delaware law did not require Altenberg to object to any improper use of parol evidence on the Joint Exhibit List.

Nevertheless, Altenberg objected to Plaintiffs' use of parol evidence at trial and he preserved his objection on numerous occasions. *See* 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). Specifically, Altenberg's counsel objected to Plaintiffs' use of inadmissible parol evidence on two occasions at trial. B2120; B2136. Altenberg's counsel lodged the first objection:

> MR. WILKS: Excuse me, Your Honor. I know where I am, but I do lodge an objection to this because there's no fraud in the inducement claim here. So where we have parol evidence that is not contrary to the

> terms - - there is contrary to the terms of the contract, then it's inadmissible. So we can brief that later, Your Honor, but I don't want to sit here and not stand up.
>
> THE COURT: All right. Well, I'm going to allow the testimony.
>
> MR. LIEBESMAN: And, Your Honor, there is a fraud claim, Your Honor.

B2120. Altenberg's counsel again reiterated his objection, and the Court confirmed that the objection had been preserved:

> MR. WILKS: Your Honor, excuse me. Excuse me, Mr. Liebesman. I've probably tried too many jury trials. I just want to make sure I have preserved, Your Honor, on the parol evidence objection.
>
> THE COURT: Preserved.
>
> MR. WILKS: Thank you.

B2136. In addition, the Pretrial Order incorporated by reference all objections that the parties would make at trial or in their post-trial briefs. A-684 ¶ 1. Thus, there can be no doubt that Altenberg preserved his objection below as to Plaintiffs' attempt to introduce inadmissible parol evidence.

Accordingly, the Court's consideration of 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. The Appropriate Scope of Review Is *De Novo*.

Because Altenberg challenges the Court of Chancery's failure to hold Plaintiffs to the legal elements of their cause of action, the Supreme Court's scope of review is *de novo*. *See Genger*, 26 A.3d at 190. An element of Plaintiffs' fiduciary duty claim is the damages they claim to have sustained. *See Beard Research, Inc. v. Kates*, 8 A.3d 573, 613 (Del. Ch. 2010). Plaintiffs failed at every stage of the litigation in that proof.

Plaintiffs contend that "Altenberg only challenges the trial court's award of damages for breach of fiduciary duty." and that accordingly, "this Court reviews the Court of Chancery's fashioning of remedies for abuse of discretion." Pl. Ans. Br. at 35. However, Altenberg not only challenges the award of damages, but he also challenges the manner in which Plaintiffs were permitted to prove damages. This is an important distinction. The Court of Chancery's failure to hold Plaintiffs to the legal elements of their cause of action at trial constituted reversible error.

This is not an issue of a trial court' discretion to fashion a remedy. Rather, the question is the propriety of the Court of Chancery's extraordinary relaxation of the Plaintiffs' burden of proof by putting more time on the clock for Plaintiffs to prove the damages element of their case. It is axiomatic that Plaintiffs are required

to prove every element of their case *at trial*. The Court of Chancery relieved Plaintiffs of that obligation here. Accordingly, the Supreme Court's scope of review of that decision is *de novo*.

Nevertheless, even if this Court applies an abuse of discretion standard, the result is the same. The Court of Chancery abused its discretion by re-opening the trial record and allowing Plaintiffs to prove an element of their cause of action after the close of post-trial briefing and oral argument. This Court, we respectfully submit, would never countenance the Superior Court's re-opening of the trial record after the return of a jury verdict. It should not do the equivalent here.

B. Plaintiffs Failed To Prove Their Damages At Trial.

Plaintiffs bore the burden of proving their damages by a preponderance of the evidence *at trial*. *See Beard Research, Inc.*, 8 A.3d at 613. At every step of this litigation – pre-trial, trial and post-trial – Plaintiffs failed to meet their burden of proving damages, even though they had all the evidence available to them. Plaintiffs' Supreme Court briefing offers no basis to relieve them of that burden.

The Pretrial Order contemplated a non-bifurcated trial where Plaintiffs would prove their entire case at trial. Indeed, 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 repeatedly maintained that Plaintiffs had failed in their proof of damages before, during and after trial. *Id.*;

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). Plaintiffs could, therefore, not have been surprised that they would be held to their burden of proof.

The very fact that the Court of Chancery permitted supplemental briefing on the issue of damages *after trial* means that Plaintiffs did not meet their burden *at trial*. The Court went so far as to state in its Memorandum Opinion that some limited discovery may be necessary to provide a supplemental submission on the question of remedy. Mem. Op. at 115. No such additional discovery occurred, because Plaintiffs had access to all the discovery and documents they could have possibly wanted before trial.

But the Court's accommodating posture regarding Plaintiffs' burden of establishing their damages is extraordinary and contrary to the fair and orderly adjudication of disputes. Indeed, Plaintiffs were not pressed for time nor were these proceedings expedited. They simply failed to meet their burden of proof at the appointed hour. Altenberg brought Plaintiffs' shortcomings to the Court's (and, of course, to Plaintiffs') attention before, during and after trial, so Plaintiffs were never blindsided by this argument. Their failure to establish damages when they were required to do so would have had fatal consequences in a jury trial. It should have

the same consequences here.[1]

Plaintiffs advance several arguments in their Answering Brief that all fail to rebut Altenberg's contention that Plaintiffs failed to prove their damages at trial. First, Plaintiffs contend that they have always sought damages in the form of a return of their entire investment as well as an accounting. Pl. Ans. Br. at 37. But the Court rejected that claim. *See* Dkt. 7, Notice of Cross-Appeal, Ex. B. Therefore, the single liquidated form of damages that Plaintiffs sought was unsuccessful.

It is no surprise that the Court of Chancery rejected that argument. The documents that Plaintiffs possessed before trial – and that were introduced as trial exhibits – establish that Altenberg received little personal benefit during the operation of the Fund. Of the approximately $2.37 million in fees and expenses paid to Finance pursuant to § 2.9 of the Fund's Operating Agreement, the only money that Altenberg himself received came from his and his wife's salaries from Finance, a total of $400,000. *See* B1463-1558, B2495:7-13, B2589:14-18. All other proceeds of the Fund had been used to pay the projects' expenses to third parties. *See* B1463-1558.

[1] It was Plaintiffs, of course, who successfully defeated Altenberg's application to postpone trial to accommodate new counsel. The Court of Chancery justifiably required counsel to prepare for trial in the allotted 16 weeks. Requiring Plaintiffs to meet their burdens without additional time and briefing opportunities, therefore, would not only have been appropriate; it would simply have been evenhanded.

Second, Plaintiffs argue that the Amended Complaint details specific damages and that they adequately proved damages at trial. Pl. Ans. Br. at 37-39. However, if that were the case, the Court would not have requested supplemental briefing and would have been able to calculate damages in its Memorandum Opinion. Thus, Plaintiffs failed to meet their burden of proof at trial.

Third, Plaintiffs contend that their post-trial briefing set forth their damages. Pl. Ans. Br. at 40. However, again, if that were the case, the Court would not have requested supplement briefing on the issue of remedy. In reality, the issue of damages amounted to a miniscule part of Plaintiffs' post-trial briefs. *See* A-769-74 (devoting 6 pages out of 62 pages on the issue of damages in their Opening Post-Trial Brief); A-918-19 (devoting 2 pages out of 62 pages on the issue of damages in their Answering Post-Trial Brief).

Fourth, Plaintiffs attempt to contrast *Ravenswood Inv. Co., L.P. v. Estate of Bassett S. Winmill*, 2018 WL 1410860, at *2 (Del. Ch. Mar. 21, 2018) with the instant matter. In *Ravenswood*, the Court of Chancery stated that "[the Court] cannot create what does not exist in the evidentiary record, and cannot reach beyond that record when it finds the evidence lacking." *Ravenswood*, 2018 WL 1410860, at *2. Plaintiffs contend that, unlike *Ravenswood*, the Court of Chancery held that evidence to quantify an award for breach of fiduciary duty existed in the trial record, but that the Court of Chancery was "not in a position to sift through the information to make

or confirm the specific calculations." Pl. Ans. Br. at 44 (quoting Mem. Op. at 115).

However, the Court less definitively stated that the necessary information to calculate damages "*could* well exist" in the record. Mem. Op. at 115 (emphasis added). Plaintiffs bore the burden to sift through the information to make specific calculations – not the Court. The fact that the Court could not identify specific damages calculations after a three-day trial and over 124 pages of post-trial briefing from Plaintiffs is evidence that Plaintiffs did not meet their burden. Moreover, similar to the instructions that the *Ravenswood* Court deemed impermissible, the Court then attempted to reach beyond the trial record when it stated that further post-trial limited discovery may be necessary to calculate damages. *See* Mem. Op. at 115.

Finally, Plaintiffs cite to *Ross Sys. Corp. v. Ross*, 1993 WL 49778, at *24 (Del. Ch. Feb. 22, 1993) for the proposition that the Court of Chancery had the discretion to afford the parties an opportunity to submit supplemental briefs solely on the issue of damages based upon the present trial record. Pl. Ans. Br. at 45. However, in *Ross*, the Court acknowledged that requiring supplemental briefing on the issue of damages represented the fact that the plaintiff had failed his burden of proving damages. *Ross*, 1993 WL 49778, at *24. Nevertheless, the Court "reluctantly" ordered supplemental briefing on the issue of damages, because the interests of justice required it based on the Court's finding of *fraud* against the defendant and

that neither side's briefing had addressed damages. *Id.* Here, the Court of Chancery found that Plaintiffs had *failed* to prove fraud during the operation of the Fund and failed to fairly present a fraudulent inducement claim against Altenberg. In addition, Altenberg pointedly addressed damages in his pre- and post-trial briefs; and Plaintiffs virtually ignored the issue. Therefore, *Ross* does not support Plaintiffs' argument. Rather, it emphasizes the importance of requiring a plaintiff to prove its damages at trial.

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. Having made that finding, the Court should not have admitted parol 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 record in order to establish their 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.

Date: May 13, 2021

WILKS LAW, LLC

/s/ David E. Wilks

David E. Wilks (DE Bar No. 2793)
Andrea S. Brooks (DE Bar No. 5064)
Adam J. Waskie (DE Bar No. 6217)
4250 Lancaster Avenue, Suite 200
Wilmington, DE 19805
Telephone: (302) 225-0850
Fax: (302) 225-0851
Email: dwilks@wilks.law
Email: abrooks@wilks.law
Email: awaskie@wilks.law

Attorneys for Defendant Below-Appellee, Cross Appellant