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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE PRIORITY RESPONSIBLE FUNDING LLC	No.147, 2026 Court Below: Court of Chancery of the State of Delaware C.A. No. 2024-0651-NAC (consolidated) **PUBLIC VERSION** **Filed on July 22, 2026**

APPELLANTS' REPLY BRIEF

Dated: July 14, 2026

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Appellants' Opening Brief explained that GFO/Gard failed to disclose material information to PPSF/Findler despite owing a fiduciary duty of full, fair and accurate disclosure.[1] To that end, Gard's own trial testimony established various categories of material information that he had failed to disclose and/or misrepresented (*i.e.,* Gard's "incubator fund" strategy, the terms of his proposed hedge fund, and his self-serving recommendation of a business transition that had a hidden downside to Appellants). [Open. Br. at 11, 13-14.] When the sheer volume of his nondisclosures is viewed in tandem with the case law discussed on pages 22-26 of the Opening Brief that imposes a stringent duty of full, fair, and accurate disclosure on all fiduciaries, reversal is the only legally sustainable option. The Chancery Court erred by applying an incorrect and lesser legal standard to this fiduciary's conduct.

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[1] Appellant Brett Findler ("Findler") and Casey Gard ("Gard") -- through their respective solely-owned companies Appellant Priority Pre-Settlement Funding, LLC ("PPSF") and Appellee Gard Family Office, LLC ("GFO") -- are the two equal owners/members of the LLC at issue, Priority Responsible Funding, LLC ("PRF"). As the Chancery Court did in its Order for ease of reference, "Findler" and his company "PPSF" are used interchangeably in this brief, and "Gard" and his company "GFO" are likewise used interchangeably.

A. <u>Appellees Have Ignored All Case Law in Opening Brief on Duty to Disclose and Have Cited No Case Law to Support Their Position</u>

Even though the Opening Brief zeroed in on the lower court's error as to the legal standard applicable to fiduciaries and cited extensive case law on that point, the Answering Brief does not even address what the proper legal standard is, much less cite or distinguish a single case on the point. Appellees just remarked that the cases cited in the Opening Brief are "recycled" from Appellants' briefing in the lower court and that they were rejected in footnote 193 of the Order. [Ans. Br. at 20, 22.] The failure to directly engage in any analysis of the authority is telling.

Indeed, footnote 193 of the Order below nitpicked the facts of Appellants' cited cases in an attempt to distinguish them, but the Chancery Court failed to honor the controlling legal standard for a fiduciary's disclosure duty under Delaware law. What Appellants' cited cases in the Opening Brief confirm is that a fiduciary <u>*must*</u> disclose all material information fully, fairly, and accurately in the first instance and that neither half-truths nor partial disclosures suffice.[2] Unfortunately, the Chancery

[2] This includes the following cases that were discussed and analyzed on pages 22-26 of the Opening Brief: *In re Mindbody, Inc.*, No. 484, 2023, 2024 WL 4926910, *28-29 (Del. Dec. 2, 2024) (fiduciaries must "disclose fully and fairly all material information within their control," and "partial disclosures" are not enough); *Cygnus Opportunity Fund, LLC v. Washington Prime Group, LLC*, 302 A.3d 430, 451 (Del. Ch. 2023) (fiduciary's omission of material information constitutes a fiduciary breach regardless of whether its disclosure would have caused the recipient to act differently); *City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings, Inc.*, 319 A.3d 271, 292 (Del. 2024) (materiality is analyzed from viewpoint of recipient, not fiduciary); *Largo Legacy Group, LLC v. Charles*, No. CV 2020-0105,

Court imposed a *far* lesser standard that merely examined what Findler allegedly "should have" gleaned from what Gard told him and what actions Findler took after his fiduciary had dispensed incomplete and misleading information to him.[3] Such an approach turns the governing legal standard upside down by allowing a fiduciary to push blame for his or her own wrongdoing onto the recipient and to retroactively cure nondisclosures. This would essentially render a fiduciary's duty to disclose illusory, which is unprecedented and repugnant to all of the cases discussed and analyzed in the Opening Brief. What that does is impermissibly conflate notions of fiduciary responsibility and arm's length relationships. Nothing in Delaware law permits that. As more fully argued in the Opening Brief, it was not up to Findler to glean or assume facts from the half-truths that Gard dispensed or to investigate the truth of what Gard told him. Rather, it was up to Gard to tell Findler <u>*all*</u> relevant information in the first place. The Chancery Court failed to apply the correct legal

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2021 WL 2692426, at *13-15 (Del. Ch. June 30, 2021) ("fiduciary may not play hardball with those to whom he owes fiduciary duties" and may not benefit himself to recipient's detriment by omitting material information); *O'Malley v. Boris*, 742 A.2d 845, 851 (Del. 1999); *McNeil v. Bennett*, 792 A.2d 190, 211-212 (Del. Ch. 2001) (rejecting fiduciaries' defense that beneficiary "should have been able to discern" material information on his own because fiduciaries had "affirmative obligation" to accurately inform beneficiary of such information), *rev'd in part on other grounds*, 798 A.2d 503 (Del. 2002).

[3] Just like the Chancery Court, Appellees' Answering Brief improperly points to later actions by Findler as retroactively justifying Gard's prior nondisclosures and misrepresentations. [Ans. Br. at 23-24.]

standard when evaluating Gard's conduct, and it is this legal flaw in the Order that mandates reversal. Gard's attempt to rely on footnote 193 of the Order to get around this flaw is without merit.

To the extent that Appellees try to argue that none of the challenged misrepresentations/omissions actually exist [Ans. Br. at 20-23], this fails at its core because they are largely based on admissions by Gard and/or were confirmed by his own sworn testimony. In this regard:

- *Use of PRF as Gard's "Incubator fund"*. The Chancery Court itself acknowledged this nondisclosure. [Open. Br., Ex. A at 31.] Moreover, when Gard explained at trial exactly what he disclosed to Findler, he did not mention anything about this. [A183-187, A268-269, A280-281, A286, A287-288.]

- *Details of the Proposed Hedge Fund*. Gard admitted at trial that he did not address the terms when pitching a hedge-fund concept to Findler: "I did not tell [Findler] the terms or the term structure of the hedge fund."[4] [A186-187, A214.]

- *Restructuring Would Divert All Profits to Gard*. Gard acknowledged that he never told Findler that restructuring/transitioning PRF's

[4] Appellees state on page 21 of the Answering Brief that Gard's failure to disclose the terms of the hedge fund "lacks any record citation," but that is incorrect. The applicable record citation was explicitly recited in the Opening Brief at page 14. It is unclear why Appellees would make such an unfounded accusation in their brief.

business would mean that all profits from its litigation-funding business would bypass PRF altogether and be diverted solely to himself outside of Findler's reach. [A86-87, A94-97, A98, A99-100, A101, A104-105, A184-185, A218-220, A253-255.]

- *Recommendation as Financially Beneficial to PRF*. Despite that monumental downside to PRF and Findler, Gard admitted at trial that he affirmatively recommended this restructuring as being financially beneficial to PRF and Findler. [A129, A215.]

Any one of these acknowledged omissions/misrepresentations by Gard was sufficient to establish a breach of fiduciary duty under the case law discussed in the Opening Brief, but viewed together his fiduciary breaches are compelling in requiring reversal.

B. Constructive Trust

Appellees argue on pages 24-27 of the Answering Brief that the Chancery Court's rejection of Count IV for constructive trust must be affirmed because (a) the issue has been waived and (b) Appellants are not entitled to such relief. As for the alleged waiver, that argument ignores the context. As to Count IV, the Chancery Court ruled:

> Because [Findler] and PPSF's fiduciary duty, breach of contract, and tortious interference claims fail, they are not entitled to a constructive trust remedy. Thus, the Court rejects Count IV. [Open. Br., Ex. A at 48.]

In other words, the Court's rejection of the claim for constructive trust was completely tied to the conclusions on the underlying substantive claims in Counts I, II and III (which were erroneous). Constructive trust was not otherwise addressed on the merits in the Order. Since the Chancery Court simply treated the constructive-trust claim as essentially rising or falling with the substantive claims, Appellants similarly requested reversal of the ruling on Count IV in tandem with the reversal sought on the underlying claims. Since the basis for the Court's error regarding Count IV was clearly identified in the Opening Brief, there is no waiver.

Notwithstanding the brevity of the Chancery Court's ruling as to Count IV, Appellees proceeded to interject their own views of the merits of that claim in the Answering Brief. But those arguments fail because they ignore the purpose and adaptability of a constructive trust as an equitable tool. For instance, Appellees argue that Appellants are barred from seeking a constructive trust against PRF Fund 1 and PRF Fund 2 because the underlying substantive claims were not asserted against them. [Ans. Br. at 25.] However, a constructive trust can reach other parties as "an equitable remedy *of great flexibility,*" and is used to "extinguish all possibility of profit and equity flowing from the fiduciary's breach." *See Enhabit, Inc. v. Nautic Partners IX, L.P.*, No. 2022-0837, 2024 WL 4929729, at *32–33 (Del. Ch. Dec. 2, 2024) (emphasis added). Where (as here) a fiduciary has used separate entities to obtain ill-gotten gains, a constructive trust against such other entities is available.

That is the teaching of Appellees' *own* cited authority. *See Teachers' Ret. Sys. of Louisiana v. Aidinoff*, 900 A.2d 654, 670-673 (Del. Ch. 2006) (denying motion to dismiss constructive-trust claim as to separate company that was controlled by defendants and through which they had unjustly enriched themselves to the detriment of the nominal defendant).

Next, Appellees argue that a constructive trust is unavailable because, although money can be the subject of such relief, there is no "identifiable fund to which [Appellants] can trace equitable ownership." [Ans. Br. at 26.] That whole argument, however, is built on Appellees' premise that "PRF, PPSF, and [Findler] have no place in this structure" of how the money flowed. [*Id.*] But their exclusion from the money flow was the direct result of Gard's breaches of fiduciary duty and wrongful diversion of profits -- which can be traced to PRF and to the proprietary fundings it originated. This case presents a situation in which such *equitable* relief is needed and appropriate. Finally, Appellees argue that constructive trust is unavailable because the Chancery Court found no "fraudulent, unfair, or unconscionable conduct" by Appellees. But again, that is the result of the Chancery Court having failed to evaluate the evidence under the correct legal standard applicable to fiduciary relationships, and a constructive trust is a proper mechanism available to address resulting consequences from a fiduciary's breach. As such, that argument falls flat.

II. The Chancery Court Erred by (a) Concluding that Appellee GFO Did Not Usurp PRF's Business Opportunities for Gard's Own Personal Benefit and (b) Failing to Place the Burden of Proof on GFO for an Affirmative Defense that Underpinned the Court's Ruling.

Appellees begin their argument on this point by making several key admissions. In this regard, Appellees correctly acknowledge that a fiduciary must "place the interests of the entity before his or her own," that directors and officers cannot compete with the corporation and "advantage[e] themselves at the corporation's expense," and that "***disclosure*** to" and "***informed*** approval" by the corporation are essential to prevent liability. [Ans. Br. at 29-30 (emphasis added).] Indeed, it is Appellees' failure to comply with such principles that supports liability on this record and requires reversal. After all, as discussed in Point I *supra*, it was Gard's admitted failure to disclose all material facts to Findler that enabled the diversion of litigation-funding opportunities to the detriment of PRF and Findler. [*See also* Open. Br. at 24-26, 33-34.] By exonerating him of such misconduct, the Chancery Court erred. And compounding that error was the Chancery Court's failure to place the burden of proof on GFO/Gard to prove that Appellants were fully informed about all material information and that they knowingly acquiesced to what transpired. [*See* Open. Br. at 28-29.] Accordingly, reversal is required.

In their brief, Appellees raised two main arguments on this claim, neither of which have any merit. Each is separately discussed.

A. Appellees' *Broz* Argument Fails

Appellees' argument on this issue starts with this Court's decision in *Broz v. Cellular Info. Sys., Inc.*, 673 A. 2d 148 (Del. 1996), and they claim that the *Broz* "factors" cannot be met. Before addressing the merits of that point, Appellees have initially contended that Appellants have waived any right to address *Broz* in this Reply Brief because Appellants did not cite *Broz* in their Opening Brief. [Ans. Br. at 39.] That is not correct -- waiver can apply to issues and arguments, but not to specific case citations. In an opening brief, an appellant is certainly not expected to foresee and preemptively distinguish every single case that an appellee might conceivably cite in an answering brief. The reply brief is the appropriate vehicle to address a case cited by Appellees. *See generally Camtech School of Nursing & Tech. Sciences v. Delaware Bd. of Nursing*, No. N13A-05-004, 2014 WL 604980, at *6 n.78 (Del. Super. Jan. 31, 2014) (recognizing that "the purpose of the reply brief is to respond to matters raised in the answering brief") (citation omitted). The waiver argument therefore falls flat.

Turning to the merits of their *Broz* argument, Appellees first claim that "[w]ithout GFO's capital PRF is insolvent and not financially able to exploit the litigation fundings that the Funds deployed." [Ans. Br. at 30.] Such an argument, however, ignores that the PRF Operating Agreement expressly contemplated in § 3.5(B)(ii)(C) that third-party capital could be used for PRF's litigation-funding business and that, consistent with such a provision, affiliated entities could serve as the vehicle and source of the capital for such *PRF* fundings.[5] But Gard -- who managed the financial end of PRF's business -- controlled the flow of the funds coming *from third parties,* and he saw to it that all such funds were deposited into and deployed from affiliated entities outside Findler's reach so that he could reap all the profits. Gard's self-serving diversion of the money flow certainly does not give him the right to claim that PRF was insolvent or to use that as an excuse to seize a profit-making opportunity for himself to PRF's detriment. After all, the trial evidence established that he had an undisclosed agenda from the very beginning to craft a financial structure that would bypass the PRF's distribution rights under the Operating Agreement. [*See* Open. Br. at 33-34.]

Next, Appellees argue that "PRF had no interest or expectancy in the [litigation-funding] opportunity." [Ans. Br. at 30.] That is refuted by the Operating Agreement itself which -- per §§ 1.3 & 3.5(B)(ii)(C) -- highlights that PRF's very business was handling such third-party financed investments. [A388, A392-393.] So it certainly had an "interest or expectancy" in such opportunities.

[5] The Opening Brief details Gard's contemporaneous statements that were introduced at trial showing that, at the time of the transactions, Gard represented that the Funds were intended to be the vehicle to accept external capital for *PRF's* litigation-funding business. [Open. Br. at 14, n.10.]

Finally, citing no record support, Gard/GFO claims that in pursuing such business opportunities for himself, he was not "placed in a position inimi[cal] to his duties to the corporation." [Ans. Br. at 30, *quoting, Broz, supra,* at 155. 157.] Nothing could be further from the truth. By diverting the money flow so that profits bypassed PRF altogether and flowed directly into his own pockets, Gard was most assuredly in a position inimical to his duties to PRF. Nothing in this Court's *Broz* decision even remotely suggests that such a blatant example of self-dealing could pass muster under the corporate-opportunity doctrine. Moreover, Appellees' hardline approach to *Broz* is contrary to what *Broz* itself says. As this Court made clear in *Broz*, its factor-based analysis must be applied with flexibility to ensure an equitable result. *See Broz*, 673 A.2d at 155 (courts are charged with "*balancing the equities* of an individual case"; "[c]ases involving a claim of usurpation of a corporate opportunity range over a multitude of factual settings" and "*[h]ard and fast rules are not easily crafted* to deal with such an array of complex situations") (emphasis added). That is precisely the approach that Appellants are improperly suggesting here.

The rest of Appellees' argument on this point focuses on Findler's actions that were all taken after -- and thus necessarily based upon -- Gard's many misrepresentations/omissions of material fact. As argued above in Point I and in the Opening Brief at pages 29-31, all such subsequent actions were incurably tainted by Gard's misconduct and, from a legal standpoint, cannot be used to retroactively excuse his failure to make full disclosure in the first instance. And again, it was Gard/GFO's burden of proof in this usurpation context to establish that *full and fair* disclosure was made [*see* Open. Br. at 28-29], yet the Chancery Court erroneously placed the burden of proof on Appellants.

B. Acquiescence Fails without Full Disclosure

On pages 31-38 of the Answering Brief, Appellees launch into an excessive discussion about how Appellants acquiesced to PRF's alleged business transition to a mere origination-and-servicing (O&S) company. This diatribe is flawed to its core. ***First***, the law is clear that acquiescence cannot exist without full disclosure. *See, e.g.*, *Lennox Indus., Inc. v. All. Compressors LLC*, No. N19C-03-045-AML-CCLD, 2021 WL 4958254, at *8 (Del. Super. Ct. Oct. 25, 2021) ("acquiescence arises where a complainant has *full knowledge of his rights and the material facts*") (emphasis added), *aff'd*, 282 A.3d 1053 (Del. 2022). But, again, by his own admissions Gard failed to disclose all material information. ***Second***, acquiescence is an affirmative defense for which Appellees (the defendants below) had the burden of proof. But as noted, the Chancery Court did not impose the burden of proof on them. ***Third***, Appellees rely on piecing together after-the-fact events [Ans. Br. 33-34], but all such conduct was necessarily tainted by virtue of Gard's prior failure to disclose. ***Fourth***, Appellees argue that they cannot be liable because Gard made a "panoply of disclosures" to Findler. [Ans. Br. at 32-34 & 36-38.] But that too is unavailing because Gard did not show that any of those purported "disclosures" were full, fair, and accurate at times material to the events as they were unfolding. To the contrary, all were either partial disclosures, half-truths, or misrepresentations, and some were years after the alleged "business transformation." ***Fifth***, Appellees claim that "[a]ppellants had actual notice <u>*or constructive notice*</u> of all relevant and material facts" and that Appellants "knew or <u>*should have known*</u> of PRF's business transition." [Ans. Br. at 23, 35.] But imposing such a mere constructive-knowledge standard on the recipient is repugnant to the very concept of fiduciary responsibility. Appellees rely on that lesser and erroneous legal standard because the record evidence does not satisfy the elevated fiduciary standard. Once again, a fiduciary is required to affirmatively disclose <u>*all*</u> material facts on the front end. As the case law makes clear [*see* note 2, *supra;* Open. Br. at 22-26], the recipient is not expected or required to "read between the lines," make any "inferences," or take any steps to investigate the truth of what the fiduciary has told him. Simply put, constructive notice does not suffice.

Appellees contend that all of the information allegedly withheld "was, in fact, disclosed" and that Findler acted at all times with "eyes wide open." [Ans. Br. at 33-34.] But that is not true when the trial record shows that Findler was necessarily acting on an incomplete "mix of information" (*see Cygnus, supra,* at 451) that had been self-servingly curated by Gard. While it is true that PRF was receiving O&S fees and that the litigation-funding investments were funded through affiliated entities controlled by Gard, that does not equate to a relinquishment of Findler's right to receive litigation-funding profits that he was owed under the PRF Operating Agreement. After all, their entire litigation-funding business was structured in accordance with the provisions of the PRF Operating Agreement that was never amended. Indeed, business was centrally operated under the PRF umbrella (using PRF's logo, PRF's assets/resources, PRF's financial system, PRF's marketing materials, PRF's confidential information, etc.); all litigation-funding profits from third-party investments were required to be distributed 50-50 pursuant to the PRF Operating Agreement; the Gard-controlled affiliates were simply the financial vehicles to accomplish PRF's business purpose; litigation funding constituted the most valuable asset of PRF and its primary revenue source; *and* this whole litigation-funding business was Findler's brainchild in the first place. [*See* Open. Br. at 7-10, 14, 32 & n.3, n.10, n.21.] It was Gard's role as a fiduciary to protect his partner Findler -- not to outsmart him. The evidence conclusively establishes that Gard failed in that prophylactic role and tortiously usurped the litigation-funding business for himself.

For these reasons, there is simply no way to reconcile the Chancery Court's blessing of Gard's actions with Gard's fiduciary obligations of full disclosure and of not usurping business opportunities for himself. Indeed, a fiduciary in Delaware is expected to prevent harm to those he is charged with protecting -- not to cause it. Yet that is exactly what occurred here. By manipulating the information that he chose to dispense to Findler, Gard -- who was a hedge-fund guru and who handled the financial end of the litigation-funding business while Findler was busy rainmaking -- deliberately put PRF on a beeline toward financial destruction to divert the most valuable company assets to benefit only himself. Moreover, as the Order reflects throughout, the Chancery Court evaluated every issue in the case solely through the lens of Findler bearing the burden of proof. Even Appellees concede on page 35 of their Answering Brief that the party asserting the affirmative defense of acquiescence "bears the burden of proving the defense." It was Appellees who raised that affirmative defense, but the Chancery Court never imposed the burden of proof on them. A court's placement of the burden of proof on the wrong party constitutes legal error -- not just some "procedural gotcha" as Appellees disingenuously characterize it on page 38 of their brief.

For all of these reasons, reversal is required.

III. The Chancery Court Erred in its Interpretation and Application of the LLC Operating Agreement.

A. <u>Failure to Comply with Written-Amendment Requirement in § 5.3</u>

As the Chancery Court's Order reflects, the record is undisputed that no written amendment to PRF's Operating Agreement was ever executed and that when Gard submitted a proposed amendment to Findler, Findler refused to sign it. [Open. Br., Ex. A at 22; A159-160 (Gard admits there was no signed written amendment to the Operating Agreement).] In the Opening Brief, Appellants argued that the Chancery Court erred in upholding a verbal "business transition" for PRF rather than enforcing § 5.3 of the Operating Agreement requiring all amendments to be in writing. More specifically, Appellants explained that -- in the face of concluding that PRF's litigation-funding business ended via *verbal* communications -- the Chancery Court erred in ruling that it "need not address" Appellants' written-amendment issue at all. [Open. Br., Ex. A at 35.] In support, Appellants pointed out that under well-established rules of contract interpretation, the *specific* business purpose (litigation funding) as set forth in the Operating Agreement controlled over the general-purpose provision, and the Agreement cannot be interpreted in such a way as to render that specific stated business purpose meaningless. Indeed, many key substantive provisions in the Agreement are directly tied to PRF's litigation-funding business and speak in terms unique to that context, including "non-recourse funding," "third-party investments" and "loan/case matters." [*See, e.g.,* A391-396 at §§ 3.2, 3.5 & 5.2.] So, if PRF's litigation-funding business was completely eliminated as the Chancery Court found, then it necessarily follows that a written amendment pursuant to § 5.3 was essential to ensure that all substantive provisions were appropriately edited and tailored to the new O&S business purpose. But as noted, the Chancery Court abruptly cut off the analysis stating that "it need not address the parties' arguments concerning whether there was a valid amendment to the operating agreement." [Open. Br., Ex. A at 35.] That was erroneous.

In the Answering Brief, Appellees attempt to justify the Chancery Court's ruling in that regard by relying extensively on *In re Arrow Inv. Advisors, LLC*, No. CIV. A. 4091-VCS, 2009 WL 1101682 (Del. Ch. Apr. 23, 2009). *Arrow* is irrelevant to this case, however, because it did not address a breach-of-contract claim at all, nor did it involve any contract term that required a written amendment or any interplay between various provisions of an LLC agreement. *Arrow* instead involved a motion to dissolve an LLC, and the court refused to dissolve the company because it was still "reasonably practicable to carry on the business" consistent with the general business purpose provision in the LLC agreement. *Id.* at *2 (LLC agreement allow company to conduct any "lawful business as the Management Committee chooses to pursue" in addition to being an "investment advisor"). Neither dissolution nor its "reasonably practicable" standard are at issue in this appeal. Moreover, *Arrow* did not involve a situation resulting in a total business transformation without any written amendment, as found by the Chancery Court in this case. As *Arrow* reflects, that court was merely addressing an expansion scenario involving "additional" business avenues and strategies. *Id.* at *2-3. That is certainly a material distinction from the Chancery Court's finding here that PRF was no longer in the litigation-funding business. Such a destructive outcome mandated a written amendment which the Chancery Court was required to enforce.

Ironically, at the end of their discussion of *Arrow*, Appellees concede -- as they must -- that this Court requires all LLC agreements to "be read as a whole, giving effect to *all* provisions, and interpreted to not render language superfluous," citing this Court's decision in *Johnson & Johnson v. Foris Advisors LLC*, 352 A.3d 229, 265-66 (Del. 2026). [Ans. Br. at 42-43.] But what Appellees have urged here is repugnant to that principle. To that end, Appellees are asking this Court to ignore the written-amendment provision altogether, uphold an interpretation of the contract that renders numerous provisions tied to litigation funding completely meaningless, and rubber-stamp a blatant inconsistency in the Chancery Court's interpretation -- namely, that PRF's litigation-funding business ended but nothing significant occurred that would require a written amendment to the Operating Agreement. This issue alone requires reversal on Count II.

As further explained in the Opening Brief on page 37, even if an oral modification to the Operating Agreement were permitted (which it was not), such a modification was required to be proven through "clear and convincing evidence" -- a quantum of proof that the Chancery Court never even mentioned in its order much less applied. This failure to apply the requisite legal standard is yet another ground for reversal.

B. **GFO Breached Distribution Provisions of Operating Agreement**

Gard attempts to justify reaping all profits from his joint business with Findler despite the explicit 50/50 distribution provision of their Operating Agreement by claiming that "PRF made no litigation fundings during the relevant period" and that "the Funds [controlled solely by Gard] were the source of all fundings." [Ans. Br. at 47.] As a corollary, he argues that he never agreed to any distributions to Findler/PSSF. [*Id.* at 44.] But that whole line of reasoning is without merit. As explained in Points I and II above and throughout the Opening Brief, the very reason that PRF's accounts lacked funds to make any 50-50 distributions was a direct result of Gard's structuring those transactions to divert them from PRF -- a situation he orchestrated while breaching his full-disclosure obligations as a fiduciary. In other words, Gard's own misconduct circumvented the distribution provision and rendered compliance impossible, thereby denying Appellants the benefit of the bargain under the Operating Agreement. Such conduct constituted a breach of contract.

As this Court has recognized, there is an implied covenant in every contract that "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain," and a party is "liable for breaching the covenant when their conduct frustrates the overarching purpose of the contract by taking advantage of their position to control implementation of the agreement's terms." *See, e.g., Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005). That is precisely the situation here. GFO through Gard took advantage of its fiduciary position by affirmatively diverting the money flow of the litigation-funding business so that all profits bypassed PRF and flowed directly to Gard himself and outside of Findler's reach.[6] Nothing in Delaware law permits such a result, nor have Appellees cited any such authority.

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[6] To the extent GFO argues that "as they did below, Appellants conflate the Management Fees and Performance Allocations owed to Fund GPs and GFOAM with 'distributions' of profits under the OA" [Ans. Br. at 44], that is simply not true. What Appellants are arguing is that all such profits which flowed into those PRF-affiliated entities -- which all operated under the *PRF umbrella* using PRF's assets, resources, PRF's logo, PRF's marketing materials to investors, and PRF's confidential information -- were, in reality, the product of PRF's litigation-funding business and thus subject to the 50/50 distribution provision in § 3.5(b)(ii)(C) of the PRF Operating Agreement. While Appellees repeatedly blame Appellants for ignoring corporate "separateness" [Ans. Br. at 43, 45], it is actually Appellees who are ignoring the reality and synergy of how all of these affiliated companies operated together as one to accomplish PRF's business purpose as set forth in § 1.3 of the Operating Agreement.

C. **Gard's Conduct is Inexcusable**

In one short paragraph, Appellees argue that PRF owes GFO "approximately $[redacted]" for operations capital that it contributed and that this amount must be fully distributed to GFO before any distributions can be made to Appellants. [Ans. Br. at 45.] However, Appellees fail to explain how such circumstance provides any excuse for Gard's separate breach of the distribution provision. Actually, the ultimate accounting of PRF operating expenses has absolutely nothing to do with the determination of whether Gard breached his fiduciary duties or breached the contract. Moreover, as the trial evidence showed, Gard took advantage of his financial position by unfairly allocating all major operational expenses of all affiliated companies (*i.e.*, employee salaries/benefits, marketing costs, and other huge expenses) to PRF itself, while booking the lion's share of the profits only to his solely-owned affiliated entities. [*See* Open. Br. at 21, 39.] As such, the very excuse that Gard raises here is infected by his own misconduct.

Gard's attempted excuse also overlooks that, according to Gard at trial, he had already pocketed at least $[redacted] in litigation-funding profits -- and that amount continues to grow each and every time a case concludes and the profits from such fundings are realized. So even if GFO were entitled to $[redacted] in reimbursements off the top (which Appellants do not concede and which are currently being investigated by the court-appointed liquidation trustee), there are far more profits beyond that figure which were required to be distributed 50/50. In any event, as Gard knows, this proceeding was bifurcated between liability and damages, so discovery into such alleged figures was not performed and an accounting of operational expenses were not part of the Chancery Court's Order.

D. Appellees Did Not Prove Acquiescence

The last subsection of Appellees' brief is one sentence long and merely concludes that the Chancery Court "correctly found" that "Appellants acquiesced to PRF's business transition." [Ans. Br. at 47.] While this point was refuted in Point II above, the Order shows on its face that the Chancery Court never shifted the burden of proof on this affirmative defense to Appellees, and thereby erred. Moreover, a party's acquiescence requires that such conduct is based on full, timely disclosure by the other party -- which Gard's own testimony established did not happen here. In reality, Findler's actions were a result of material omissions and having been told a string of half-truths by Gard/GFO. Acquiescence does not and cannot exist under such circumstances.

CONCLUSION

Based on the foregoing and their Opening Brief, Appellants again request that this Court reverse the judgment entered below and remand with instructions to enter judgment in favor of Appellant PPSF on Counts I, II and IV.

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Respectfully submitted,

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