INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

International Arbitration Tribunal

Case No. 01-17-0004-4839

BETWEEN:

1955 Capital Fund I GP LLC and 1955 Capital China Fund GP LLC

CLAIMANTS

AND:

China Fortune Land Development and Global Industrial Investment Limited

RESPONDENTS

FINAL AWARD

Gerald W. Ghikas, Q.C.
Vancouver Arbitration Chambers
1650 – 885 West Georgia Street
Vancouver, British Columbia, Canada
V6C3E8

Sole Arbitrator

Table of Contents

FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreements dated 23 November 2015 and 1 December 2015, and having been duly sworn, and having duly heard the proofs and allegations of the parties, do hereby, AWARD, as follows:

I. INTRODUCTION

1. I issued a Partial Final Award (Jurisdiction) dated 1 August 2018 (**First Award).** This Final Award should be read together with the First Award.

2. Claimants 1955 Capital Fund I GP LLC (**Fund I GP**) and 1955 Capital China Fund GP LLC (**China Fund GP**) are, respectively, the general partners of 1955 Capital Fund I LP (**Fund I**) and 1955 Capital China Fund LP (**China Fund**). Fund I and China Fund (collectively, "**Funds"**) are Delaware limited partnerships created for the purpose of engaging in venture capital investments. Andrew Chung (**Chung**) was instrumental in creating the two Funds.

3. Respondent China Fortune Land Development, also known as China Fortune Land Development Co., Ltd., (**CFLD**) is a Chinese company. Respondent Global Industrial Investment Limited (**GIIL**) is a Hong Kong company. GIIL is a wholly-owned subsidiary of CFLD.

4. GIIL and China Fund GP executed a subscription agreement dated 23 November 2015 (**China Fund SA**) and an escrow agreement in the form of a side letter (**China Fund EA**) with respect to a US$150 million investment in China Fund. [Ex. C-27/R-37; Ex. C-31/R-30] GIIL and Fund I GP executed a subscription agreement dated 23 November 2015 (**Fund 1 SA**) and an escrow agreement in the form of a side letter (**Fund 1 EA**) with respect to a US$50 million investment in Fund I. [Ex. C-28/R-36; Ex. C-32/R-29]

5. The Claimants rely on versions of the China Fund SA and Fund I SA (collectively, "**SAs**") that have as an attachment identical documents described as "Appendix 1"

(**Appendix 1**). [Ex.C-27, C-28] The versions of the SAs produced by the Respondents do not include Appendix 1.[1] [Ex. R-37, R-36]

6. China Fund GP and Fund I GP (collectively, "**GPs**") also executed Amended and Restated Partnership Agreements for, respectively, the China Fund (**China Fund LPA**) and Fund I **(Fund I LPA**) dated 1 December 2015. [Ex. C-29/R-41; C-30/R-42] The China Fund LPA and the Fund I LPA (collectively, "**LPAs"**)[2] also were purportedly executed on behalf of GIIL by Chung as signatory for, respectively, China Fund GP and Fund I GP, in reliance on powers of attorney set out in Appendix 1 (**Appendix 1 POAs**).

7. Pursuant to the EAs, the sum of US$80 million was deposited by GIIL into escrow accounts in respect of the investments described in the SAs.

8. Disputes arose among the parties, which Claimants referred to arbitration in reliance on arbitration agreements contained in the SAs and LPAs (**Arbitration Agreements**).

9. In their Answering Statement, Counterclaims and Objections to Jurisdiction (**Answer and Counterclaim**) the Respondents timely stated objections to jurisdiction on the basis that CFLD and Chung are not signatories to the Arbitration Agreements. The parties agreed that the merits of Respondents' objections to jurisdiction should be determined before other issues in the case. Phase 1 of the arbitration concerned jurisdiction. Phase 2 of the arbitration concerns the merits of the claims and counterclaims apart from jurisdictional issues.

10. The First Award was issued to complete Phase 1 (Jurisdiction). For the reasons stated therein, the First Award declared that:

    a. The Sole Arbitrator has jurisdiction to determine the claims made by China Fund GP and Fund I GP against GIIL and CFLD;

    b. The Sole Arbitrator does not have jurisdiction to determine the claims made by

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[1] There are several versions of Appendix 1. These are discussed below.

[2] There are several versions of the LPAs. These are discussed and defined below as the "**13 November LPAs**" and the "**Executed LPAs**."

Chung against either CFLD or GIIL; and

c. The Sole Arbitrator does not have jurisdiction to determine the provisional counterclaims of CFLD and GIIL against Chung.

11. This award concerns Phase 2 of the arbitration. The purpose of this award is to determine the claims and counterclaims among the remaining parties.

II. THE PARTIES AND THEIR REPRESENTATIVES

(A) Claimants

12. China Fund GP and Fund I GP are Delaware companies formed on 27 October 2015, having registered offices at 1209 Orange Street, Wilmington, Delaware, 19801, USA.

(B) Claimants' Representatives

13. Claimants are jointly represented by their counsel:

Robert P. Varian
Russell P. Cohen
Ellen S. Caro
Orrick, Herrington and Sutcliffe LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669
Telephone: +1 415 773 5700
Email: rvarian@orrick.com
Email: rcohen@orrick.com
Email: ecaro@orrick.com

Charles Ha
Orrick, Herrington and Sutcliffe LLP
701 Fifth Avenue, Suite 5600
Seattle, WA 98104-7097
United States of America
Telephone: 206-839-4343
Email: CharlesHa@orrick.com

(C) Respondents

14. CFLD is a Chinese real estate company. It is publicly listed on the Shanghai Stock Exchange. It has an address of Block A, 7th Floor, Gateway Plaza Beijing, Beijing 100027, China. [RWS1 ¶4]

15. GIIL is incorporated in Hong Kong under the Companies Ordinance (Chapter 32 of the Laws of Hong Kong) and is a wholly-owned Hong Kong based subsidiary of CFLD. It has an address of 5/F., Heng Shan Centre, 145 Queen's Road East, Wanchai, Hong Kong. GIIL is described by the Respondents as "an independent investment holding company." [RWS1 ¶12]

(D) Respondents' Representatives

16. Respondents are jointly represented by their counsel:

Carl W. Oberdier
Kellen G. Ressmeyer
Sara K. Hunkler
Oberdier Ressmeyer LLP
655 Third Avenue, 28th Floor
New York, NY 10017
United States of America
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Beijing, 100020
People's Republic of China
Telephone: +86 10 5878 5588
Email: FundArb.pt@cn.kwn.com

17. Appearing as Counsel to the Respondents at the evidentiary hearing were Philip Edey, Q.C., and Luke Pearce, both of 20 Essex Street, London WC2R 3AL.

III. THE INVESTMENT AGREEMENTS AND THE ARBITRATION AGREEMENTS

(A) The Investment Agreements

18. The relevant commercial agreements in this arbitration are the SAs, Appendix 1, the EAs and the LPAs (collectively, **Investment Agreements**).[3]

(B) The Arbitration Agreements

19. The Pleadings (defined below) invoke 4 similar Arbitration Agreements contained in the SAs and the LPAs. As recorded in Procedural Order No. 1 dated 31 December 2017 the parties have confirmed and agreed that I am concurrently appointed as Sole Arbitrator in this single consolidated proceeding to resolve the disputes described in the Pleadings that fall within the scope of any of the Arbitration Agreements.

20. The Arbitration Agreements in the China Fund LPA [§14.5] and the Fund I LPA [§15.5] are on substantially the same terms (the following text is from the Fund I LPA):

> 15.5 **Arbitration**. Any claim, dispute, or controversy of whatever nature arising out of or relating to this Agreement, including, without limitation, any action or claim based on tort, contract, or statute (including any claims of breach), or concerning the interpretation, effect, termination, validity, performance and/or breach of this Agreement (**"Claim"**), shall be resolved by final and binding arbitration ("**Arbitration**") before a single arbitrator ("**Arbitrator**") selected from and administered by the American Arbitration Association or its successor (the "**Administrator**") in accordance with its then existing arbitration rules or procedures regarding commercial or business disputes. The arbitration shall be conducted in the English language and held in San Francisco, California.
>
> **(a)** The Arbitrator shall, within 15 calendar days after the conclusion of the Arbitration hearing, issue a written award and statement of decision

[3] Although there are several versions of the LPAs and Appendix 1, the term "Investment Agreements" is used throughout. Where the differences between versions are relevant, the context makes clear which versions of the LPAs and Appendix 1 are relevant.

> describing the essential findings and conclusions on which the award is based, including the calculation of any damages awarded. The Arbitrator shall be authorized to award compensatory damages, but shall not be authorized (i) to award non-economic damages, such as for emotional distress, pain and suffering or loss of consortium, (ii) to award punitive damages, or (iii) to reform, modify or materially change this Agreement or any other agreements contemplated hereunder; provided, however, that the damage limitations described in parts (i) and (ii) of this sentence will not apply if such damages are statutorily imposed. The Arbitrator also shall be authorized to grant any temporary, preliminary or permanent equitable remedy or relief he or she deems just and equitable and within the scope of this Agreement, including, without limitation, an injunction or order for specific performance.
>
> (**b**) Each party shall bear its own attorney's fees, costs, and disbursements arising out of the arbitration, and shall pay an equal share of the fees and costs of the Administrator and the Arbitrator; provided, however, the Arbitrator shall be authorized to determine whether a party is the prevailing party, and if so, to award to that prevailing party reimbursement for its reasonable attorneys' fees, costs and disbursements (including, for example, expert witness fees and expenses, photocopy charges, travel expenses, etc.), and/or the fees and costs of the Administrator and the Arbitrator. Absent the filing of an application to correct or vacate the arbitration award under applicable law, each party shall fully perform and satisfy the arbitration award within 15 days of the service of the award.
>
> **(c)** By agreeing to this binding arbitration provision, the parties understand that they are waiving certain rights and protections which may otherwise be available if a Claim between the parties were determined by litigation in court, including, without limitation, the right to seek or obtain certain types of damages precluded by this paragraph 15.5, the right to a jury trial, certain rights of appeal, and a right to invoke formal rules of procedure and evidence.
>
> **(d)** This paragraph 15.5 shall not apply to any Limited Partner, acting individually, that is prohibited by law from entering into binding arbitration. (emphasis omitted).

21. The Arbitration Agreements in the Fund I SA and the China Fund SA also are on substantially the same terms, and closely parallel the first paragraph of the Arbitration Agreements in the China Fund LPA and Fund I LPA:

> **Arbitration**. Any claim, dispute, or controversy of whatever nature arising out of or relating to the Fund, including, without limitation, any action or claim based on tort, contract, or statute (including any claims of breach), or concerning the interpretation, effect, termination, validity, performance and/or breach of this Agreement ("**Claim**"), will be resolved by final and

> binding arbitration ("**Arbitration**") before a single arbitrator ("**Arbitrator**") selected from and administered by the American Arbitration Association or its successor (the "**Administrator**") in accordance with its then existing arbitration rules or procedures regarding commercial or business disputes. The arbitration shall be conducted in the English language and held in San Francisco, California.

22. By email letter dated 30 December 2017, I asked counsel to seek instructions to agree to extend the time for the delivery of any award in this proceeding by 60 days, so that the time limit will be a total of 75 days from the date that the relevant evidentiary hearing is declared to be closed.

23. By email letter dated 30 December 2017, counsel for Claimants confirmed Claimants' agreement to the proposed extension of time. By email letter dated 31 December 2017, counsel for Respondents confirmed Respondents' agreement to the proposed extension of time.

24. By email letter dated 25 May 2019, as part of Post Hearing Procedural Order No. 1, I asked counsel to see instructions to agree to further extend the time for delivery of this award until 26 June 2019. By email letters dated 26 and 27 May 2019, Respondents and Claimants, respectively, confirmed the parties' agreement to extend the time for delivery of this award until 26 June 2019.

(C) Applicable Substantive Laws

25. As recorded in Procedural Order No. 1, the parties agree that Delaware laws apply to the LPAs and the SAs. Each of the SA's states:

> **Governing Law** This Agreement will be governed by and construed under the laws of the State of Delaware as applied to agreements among residents of such state made and to be performed entirely within such state.

26. Each of the China Fund LPA [s. 14.1] and Fund 1 LPA [s. 15.1] states:

> **Governing Law** This Agreement shall be governed by and construed under the laws of the State of Delaware as applied to agreements among the residents of such state made and to be performed entirely within such state.

(D) Place and Seat of Arbitration

27. As recorded in Procedural Order No. 1, and in accordance with the Arbitration Agreements, the parties agree that the place and juridical seat of arbitration is San Francisco, California, USA.

(E) Language of the Arbitration

28. In accordance with the Arbitration Agreements, the language of the arbitration is English.

(F) Applicable Procedural Rules

29. For the reasons set out in the First Award, I have determined that the applicable rules (**Rules**) are the International Dispute Resolution Procedures of the American Arbitration Association's International Centre for Dispute Resolutions. [First Award ¶¶26–41]

IV. PROCEDURAL HISTORY

(A) Procedural History Leading to First Award

30. The complete procedural history leading to the First Award is set out in the First Award. [First Award ¶¶42–61] An abbreviated description is set out below, with details of procedural steps since the issuance of the First Award.

(B) Appointment of Sole Arbitrator

31. By letter dated 21 November 2017, the ICDR advised me that I had been invited to serve as Sole Arbitrator. By letter dated 29 November 2017, along with the Notice of Appointment, the ICDR informed the parties that I had been appointed in that capacity. As described in Procedural Order No. 1, during the first procedural conference the parties confirmed that Gerald W. Ghikas, Q.C. (**Sole Arbitrator**) has been duly and validly appointed as Sole Arbitrator of the disputes identified in the Pleadings.

32. The address of the Sole Arbitrator is:

Gerald W. Ghikas, Q.C.
Vancouver Arbitration Chambers
HSBC Building

1650 – 885 West Georgia Street
Vancouver, British Columbia V6C 3E8
Canada
Telephone: +1 778 724 4147
Mobile: +1 604 725 8862
Email: gghikas@ghikasarbitration.com

(C) Procedural Order No 2 (Supplementary Procedural Rules)

33. Procedural Order No. 2 established a process for the delivery of statements of case (**Statements of Case**). Each Statement of Case was to be comprised of Witness Statements and Expert Reports setting out the direct evidence of witnesses relied upon by the tendering party, documents tendered as Exhibits by that party, and a memorandum of argument of fact and law with supporting legal authorities.

(D) Procedural Timetable

34. After consultation with the parties, the first procedural timetable **(Procedural Timetable**) was issued on 9 January 2018.

(E) First Statements of Case

35. In accordance with the Procedural Timetable, the parties delivered First Statements of Case dated 22 March 2018.

(F) Document Production Requests and Redfern Schedules

36. In accordance with the Procedural Timetable, on 9 April 2018 each of the parties delivered Redfern Schedules (**First Redfern Schedules**) setting out contentious requests for document production and the positions of the parties with respect to those requests.

37. On 16 April 2018, with an email communication setting out comments and directions, I returned the Redfern Schedules to the parties, completed to include my rulings on the document production requests.

(G) Second Statements of Case

38. In accordance with the Procedural Timetable, the parties delivered Second Statements of Case (Jurisdiction) dated 4 May 2018.

(H) The Phase 1 Evidentiary Hearing (Jurisdiction)

39. By agreement of the parties, the Phase 1 (Jurisdiction) evidentiary hearing took place in San Francisco, California on 15 May 2018.

(I) The First Award (Jurisdiction)

40. The First Award was issued on 1 August 2018.

(J) Third Statements of Case

41. In accordance with the Procedural Timetable, the parties delivered Third Statements of Case dated 15 August 2018.

(K) Supplemental Document Production Requests and Redfern Schedules

42. In accordance with the Procedural Timetable, on 7 September 2018, the parties delivered Redfern Schedules (**Second Redfern Schedules**) setting out contentious supplemental requests for document production and the positions of the parties with respect to those requests.

43. On 10 September 2018, with an email communication setting out comments and directions, I returned the Second Redfern Schedules to the parties, completed to set out my rulings on the document production requests.

(L) Procedural Order No. 4 (Respondents' Application for Orders Relating to Claimants' Privilege Claims)

44. Procedural Order No. 4, dated 23 September 2018, ordered that certain documents in respect of which Claimants had asserted attorney-client privilege be produced to Respondents.

(M) Fourth Statements of Case

45. In accordance with the Procedural Timetable, the parties delivered Fourth Statements of Case dated 15 October 2018.

(N) Procedural Order No. 5 (Claimants' Application to Compel Attendance of Chairman Wang at Evidentiary Hearing)

46. Procedural Order No. 5, dated 26 October 2018, refused the application of Claimants to compel the attendance of Chairman Wang at the evidentiary hearing.

(O) Phase 2 Evidentiary Hearing

47. The Phase 2 Evidentiary hearing took place in San Francisco, California from 5–9 November 2018.

(P) Post-Hearing Briefs

48. The parties delivered Post-Hearing Briefs (**CPHB1**, **RPHB1**) on 21 December 2018 and Reply Post-Hearing Briefs on 23 January 2019 (**CPHB2, RPHB2**).

(Q) Costs Submissions

49. The parties delivered materials in support of their claims for costs on 26 March 2019.

(R) Close of Hearings

50. I declared the hearings closed effective 27 March 2019.

(S) Post-Hearing Procedural Order No. 1 and Re-Opening of Hearing

51. On 23 May 2019, Respondents applied for orders granting interim measures and to reopen the hearing, as result of steps taken by Claimants to draw down funds held in escrow. On 24 May 2019, Claimants delivered a statement of opposition to the application.

52. On 25 May 2019, I issued Post-Hearing Procedural Order No. 1, ordering that Claimants were to make no further withdrawals of escrow funds without leave until this award has been delivered and that proceedings were re-opened pursuant to Rule 27(2) for the limited purposes described in the Order.

(T) Supplemental Post-Hearing Submissions

53. In accordance with Post-Hearing Procedural Order No. 1, the parties delivered First Supplemental Post-Hearing Submissions on 3 June 2019 (**CSPHB1**, **RSPHB1**), Second Supplemental Post-Hearing Submissions on 8 June 2019 (**CPHB2**, **RPHB2**) and Supplemental Costs Submissions on 10 June 2019.

V. THE FACTUAL BACKGROUND

54. Except where stated to be contentious, the background facts set out in this part of this award either are undisputed or are facts as found by me based on a careful consideration of all of the evidence. This is not intended to be an exhaustive summary of the facts or evidence. Additional findings of fact are set out in the Analysis part of this award.

55. In the First Award, I made, *inter alia*, the following findings of fact: [First Award, ¶¶63–100]

> 63. Before 2015, Chung had worked in the venture capital industry in the United States. [Chung, CWS1 ¶¶5–7]. He was introduced to Mr. Wang Wenxue (**Wang**), a wealthy industrialist in China. Wang is CFLD's founder, majority shareholder, and Chairman of its Board of Directors. Wang is commonly known as, and is referred to by the parties as, "Chairman Wang." [Chung, CWS1 ¶8; Cheng, RWS1 ¶11]
>
> 64. CFLD is a publicly listed company headquartered in Beijing and established under the laws of the People's Republic of China. It was founded in 1998. In 2011, CFLD was listed on the Shanghai Stock Exchange. CFLD's President, Mr. Meng Jing (**Meng**), is responsible for the overall management of CFLD's daily operations, including its medium- and long-term strategic plans. [Chung, CWS1 ¶4; Cheng, RWS1 ¶¶4, 11]
>
> 65. CFLD's core business is industrial parks, industrial towns and industrial communities, which are mainly distributed in several regions: the economic belt of Beijing-Tianjin-Hebei, the Yangtze River; Guangdong, Hong Kong and Macao Bay Area; and One Belt and One Road Initiative area. CFLD has more than 25,000 employees, reported revenues of about RMB 30.8 billion (about US$4.87 billion) for the first three quarters of 2017, and is the leading developer of new industry cities in China. CFLD currently has more than 50 new industry cities under various stages of development. CFLD has begun expanding into other countries, including India, Indonesia, Vietnam, Egypt, and more than 70 regions around the world. [Cheng, RWS1 ¶¶5, 10]
>
> 66. During the period 2013–15, Wang and Chung met several times in California and at Wang's residence and at CFLD headquarters in Beijing. At meetings in Beijing in August 2015, Chung and Wang discussed the possibility of Chung starting his own venture capital fund and being funded by a substantial seed investment from Wang. [Chung, CWS1 ¶9–29]
>
> 67. After the August meetings, Wang assigned senior members of CFLD's private equity team, Mr. Shaoyi Xu (**Xu**) and Mr. Tao Cheng (**Cheng**) of Chinity Capital or Chinity Investments (**Chinity**) to take the lead role in further discussing the

terms of an investment in the proposed new venture capital fund. [Chung, CWS1 ¶¶24, 32–37; Xu, RWS2 ¶6]

68. Xu's native language is Mandarin Chinese, but he speaks and writes in English. Chung and Xu communicated frequently in English about the proposed investment by CFLD. [Chung, CWS1 ¶¶26,33; Xu, RWS2 ¶1] Chung's discussions and written communications with Wang and Cheng were in Chinese. [Chung, CWS1 ¶36]

69. The negotiations that culminated in the investments in the Funds were conducted through face-to-face meetings, on the telephone and through WeChat messages and email. [Chung, CWS1 ¶38]

70. After discussions between Chung and Xu, on 9 September 2015, Xu sent Chung a draft document he referred to as "Meeting Minutes" (**Minutes)** in a WeChat message. A revised version was prepared on 10 September 2015. [Chung, CWS1 ¶¶45–49; Xu, RWS2 ¶7; Ex C-7, R-9, R-10, R-11] The Minutes contemplated that Wang, not CFLD, would be the principal investor. It recited that the size of the investment would be US$200 million, which would be made within a dual-fund structure; namely, Wang would invest $150 million in one fund, with CFLD investing US$50 million in a second fund. [Chung, CWS1 ¶48; Ex C-7]

71. Negotiations continued through October 2015. The international law firm of Morrison & Foerster LLP (**MF**) had been working with Chung since August 2015. In late September 2015, MF began advising Chung about the establishment of the proposed Funds and the possible investment by CFLD. Zeeshan Ahmedani (**Ahmedani**) of the MF Los Angeles office and Xiaowei Yin (**Yin**) of MF's Beijing office were the two MF lawyers primarily involved. Beginning in late October 2015, MF "*as fund counsel*" took steps to create the various entities relating to the Funds under Delaware law. [Ahmedani, CWS2 ¶¶4–7].

72. There is controversy between the parties and a conflict in the evidence as to whether MF acted solely for Chung and his companies, whether they acted for the Funds and whether they also acted for the Respondents. Xu's evidence is that Chung led Respondents to believe that MF had been retained by the Funds and that Chung gave assurances that he and MF would structure the deal fairly, consistent with custom and practice in the venture capital industry, and beneficially to both sides. Xu's evidence is that MF provided "us" with "*substantial legal advice on the content of CFLD's required disclosures*." [Xu, RWS2 ¶¶16–19]

73. Yin acknowledges that she had discussions with Xu, at the request of Chung, about the disclosure requirements of the Shanghai Stock Exchange and the need for a "customized" SA. She states, however, that "*at no time during my discussions with Mr. Xu did I offer to represent or provide legal advice to Mr. Xu or CFLD*." She says that it "*was apparent*" to Xu that MF acted for Chung and the general partner of the Funds, not CFLD as a prospective investor. [Yin, CWS3 ¶¶6–8]

74. Ahmedani's evidence is that "[a]*t no time did I represent CFLD, Chinity Investments, GIIL, or any of its officers or employees*" and that "[i]*t was apparent throughout the negotiations of CFLD's investment that Morrison Foerster served as counsel to the general partner and did not represent the prospective limited partner*." [Ahmedani, CWS2 ¶32]

75. On 29 and 30 October 2015, Chung sent Xu drafts of the LPAs in English and drafts of the two EAs. [Xu, RWS2 ¶¶21, 22; Ex C-18, C-19, R-16, R-22] Xu told Chung that the LPAs were too long and "impossible to translate" and present to CFLD's Board of Directors. He asked Chung to prepare shorter versions. [Xu, RWS2 ¶24; Ex C-6]

76. ….

77. ….

78. In response to Xu's request for shorter versions of the documents, Chung and MF worked to prepare revised documents. [Ahmedani, CWS2 ¶¶17–20] On 11 November, Chung sent Xu a "*potential draft example of what to expect as a format for the shorter form agreement that will be tied to an appendix + full LPA.*" [Ex C-6] The same message stated that Chung would have the lawyers send the draft appendix as well. [Ex C-20] Shortly thereafter, Chung wrote Xu saying, "*Note that it is a subscription agreement that will bind you to the appendix and LPA, as you requested*." [Ex C-6]

79. On 12 November 2015, Ahmedani sent Chung an email attaching revised versions of the short form subscription agreements. Chung sent an email to Xu forwarding the proposed customized SAs. [Chung, CWS1 ¶117, 126; Xu, RWS2 ¶25; Ex C-21] Shortly thereafter, Ahmedani sent Xu the draft LPAs, Appendix 1 and the EAs. [Ahmedani, CWS2 ¶26; Xu, RWS2 ¶26; Ex C-22, R-24]

80. ….

81. CFLD's Board Office asked follow-up questions regarding the deal terms before the SAs were presented to CFLD's Board. Chung also provided comments to Xu regarding CFLDs proposed public disclosures with respect to the investment. [Ex C- 6, C-23]

82. On 23 November 2015, Chung forwarded Xu an email from Ahmedani captioned "CFLD Closing," which included final versions of the EAs and provided signing instructions. The email stated that "*the CFLD investing entity (Global Industrial Investment Limited) should sign* [the SA's and EA's]" but "*GIIL will not need to sign the LPA, which the GP will sign on its behalf pursuant to the power of attorney granted to it in Appendix* I." [Ahmedani, CWS2 ¶30; Xu, RWS2 ¶29; Ex C-25]

83. On 23 November 2015, Xu advised Chung over WeChat that CFLD's Board of Directors approved CFLD's investment on 23 November 2015. [Ex C-6] Xu's evidence is that "*we arranged for Mr. Meng Jing, the director of GIIL to execute*

the SAs and side letters in Beijing." [Xu, RWS2 ¶30]

84. On 26 November 2015, Xu returned signed versions of both the SAs and the EAs to Chung. [Xu, RWS2 ¶30; Ex R-32] As earlier noted there is a dispute about whether Appendix 1 was attached to the signed SAs.

85. CFLD's public company disclosure regarding the CFLD Board's [sic] approval of the investment was issued on 24 November 2015…..

86. CFLD advanced US$80 million to GIIL. … According to the escrow accounts' bank statements, the money was received in the accounts on or before 1 December 2015. [Chung, CWS1 ¶146; Xu, RWS2 ¶39; Ex C-75, R-49, R-50]

87. Chung executed the LPAs on behalf of the General Partners. The General Partners also purported to execute the LPAs on behalf of GIIL as Limited Partner "*pursuant to the powers of attorney now and hereafter granted to the General Partner*." Chung was the signatory for the General Partners for that purpose. [Ex C-29, C-30, R-41, R-42]

88. …

89. ….

90. ….

91. ….

92. On 24 February 2016, Chung formally announced the formation of the Funds. [Chung, CWS1 ¶164; Ex C-34]

93. CFLD began raising concerns early in 2016. Among other things, CFLD representatives expressed their purported expectations that the Funds would channel investee companies to CFLD's industrial parks. They also expressed concerns about the slow pace of investment. [Chung, CWS1 ¶234; Xu, RWS2 ¶¶54, 56]

94. The evidence shows that from the perspective of CFLD, one of the primary objectives in investing in the Funds from the outset was to make investments in companies that "*were suitable for landing in CFLD's industrial parks.*" [Cheng RWS1 ¶¶5–9, 14, 18–20, 24(b), 29, 30–36, 42-–44, 45]

95. On 27 August 2016, Wang and Chung met in person at Wang's villa in Beijing. [Chung, CWS1 ¶237] Wang appointed Ms. Di Bai (**Bai**) to manage the relationship with the Funds. Bai requested background information on the investments and the status of the Funds. Chung created an electronic data room for her to review the information. [Chung, CWS1 ¶¶238, 239; Ex C-68].

96. A meeting occurred in Beijing on 27 October 2016. In addition to Bai, with whom Chung expected to meet, Chung's evidence is that he was "ambushed" by three individuals who represented themselves as CFLD "risk and compliance" employees. Two months later, Chung learned that these individuals were in fact attorneys employed by CFLD's outside law firm, King & Wood Mallesons (**KWM**). At the meeting, the KWM attorneys challenged the format of the investment agreements and suggested that the format had been used to deceive CFLD. [Chung, CWS1 ¶¶242–244]

97. Chung collected WeChat messages and emails to convince the "risk and compliance" employees that their concerns were misplaced. The parties met again on 28 October 2016. Yin was present and Ahmedani attended by telephone. CFLD representatives accused Chung of fraud, demanded that he resign, demanded the return of the money in escrow, and threatened to force a shutdown of the Funds. [Chung, CWS1 ¶245; Yin, CWS3 ¶¶19–21, 23; Ahmedani, CWS2 ¶¶34, 35]

98. On 11 November 2016, Chung, China Fund GP and Fund I GP received a letter from KWM stating that Chung and his companies were in material default of their obligations to GIIL by virtue of six enumerated alleged "*breaches of contracts*" and breaches of "*duties at law*," including the "*ultra vires*" execution of the LPAs, the inducement of GIIL's investment through misrepresentations, self-dealing management of the Funds, mismanagement of the Funds, making unwarranted demands for additional capital contributions and the failure to provide material or timely information. A letter dated 14 November 2016 from KWM threatened legal action if the Funds accessed the funds held in the escrow accounts without GIIL's consent. [Chung, CWS1 ¶248; Yin CWS3 ¶22; Ex C-70, C-71]

99. On 13 December 2016, China Fund GP and Fund I GP sent letters to GIIL advising that as the second installments of its investments, in the amounts of US$50 million and US$10 million, had not been paid when due on 1 December 2016, GIIL was in default and that if GIIL failed to pay within 10 days the general partners would consider exercising their remedies. [Ex C-72]

100. Arbitration proceedings commenced with the issuance of the Demand for Arbitration on 28 July 2017.

56. The evidence presented in Phase 2 of the arbitration established, *inter alia,* the following additional background facts:

a. The last version of the LPAs that was sent to Respondents (**13 November LPAs**) and the last version of Appendix 1 that was sent to Respondents (**13 November Appendix 1**) prior to the 1 December 2015 Closing Date were the versions attached to Ahmedani's email message sent on 12 November 2015 and received on 13 November 2015; [CWS2 ¶26; RWS2 ¶26, 33; Ex. C-22, R-24]

b. After the delivery of the 13 November LPAs to Respondents and before the execution of the LPAs, the text of the 13 November LPAs and 13 November Appendix 1 was revised by Ahmedani on instructions received from Chung; [Ex. R-149, R-150]

c. The LPAs containing the revisions were executed by Chung on behalf of the GPs on or about 18 December 2015 (**Executed LPAs**), although they were dated as of 1 December 2015; [Ex. C-29, C-30, R-41, R-42; TR. 261]

d. The revisions included (**Post-Closing Changes**):

   i. The addition of new default provisions in both LPAs; [Ex. R-41 Art. 4.4(b)(vii) and (xi); Ex. R-42 Art. 4.5(b)(vii) and (xi); Ex. R-149]

   ii. The addition of a new "fee waiver" provision in the Fund 1 LPA allowing the GP to satisfy its 1% capital contribution obligation by waiving payment of a portion of its management fee; [Ex. R-42 Art. 6(1)(e); Ex. R-149]

   iii. The deletion of restrictions in the China Fund LPA on the GP's ability to borrow money on behalf of the fund, including the deletion of a requirement for LP consent; [Ex. R-41 Art, 8(3)(b); Ex. R-149]

   iv. Modifications to the risk disclosures in the Appendix 1; [Ex R-260]

e. Claimants provided the Executed LPAs to Respondents for the first time on 16 October 2016. [TR. 175-76, 264-65; Ex. C-68, R-330]

VI. THE PARTIES' CONTENTIONS AND AWARDS SOUGHT

57. The following summaries identify the main points of contention arising from the pleadings and submissions of the parties. They are not intended to describe every point of controversy. To the extent necessary, further sub-issues are identified in the course of the Analysis. For convenience, some citations are to the Post-Hearing Briefs, which in turn cite to prior submissions and evidence, all of which have been taken into account.

(A) Summary of Claimants' Contentions in Support of Their Claims

58. Claimants contend that the Investment Agreements are valid and binding agreements to which all parties assented. [CPHB2 ¶¶180–93] They assert that they were supported by ample valuable consideration. [CPHB2 ¶194]

59. Claimants contend that the findings made in the First Award justify a finding that GIIL made the Investment Agreements as agent for CFLD. They contend that CFLD, as GIIL's principal, should be held directly liable with GIIL for breach of the Investment Agreements. [CPHB1 ¶315; CPHB2 ¶¶206–12]

60. Claimants contend that CFLD and GIIL:

    a. materially breached the Investment Agreements, by failing to make the agreed-upon transfer of US$60 million into escrow on 1 December 2016 as required by: [CPHB1 ¶262; CPHB2 ¶¶202–204]

        i. Sections 4.2(a) and (e) of the LPAs;
        ii. the "Capital Contribution" terms of the SAs; and
        iii. Section 2 of the EAs;

    b. repudiated and anticipatorily breached the Investment Agreements on 27 and 28 October 2016 by unequivocally declaring that they would not make further transfers of funds, by demanding that Chung resign and liquidate the Funds and by asserting that the Investment Agreements had been induced by fraud; [CPHB1 ¶263; CPHB2 ¶205] and

    c. alternatively, tortiously interfered with Claimants' prospective economic advantage by interfering with their ability to complete advanced negotiations with prospective limited partners for Fund 1 and to secure investors for future funds; [CPHB1 ¶¶325–31; CPHB2 ¶¶218–21]

61. Claimants contend that CFLD breached the covenant of good faith and fair dealing implied under Delaware law on 27 and 28 October 2016 by making false accusations of fraud, demanding Chung's resignation, engaging in deception and thwarting Claimants' efforts to raise additional capital and complete recruitment. [CPHB1 ¶¶309–13, ¶484]

62. Alternatively, if CFLD is not directly liable for breach of contract or breach of implied covenant, Claimants contend that CFLD tortiously interfered with GIIL's agreements with Claimants by causing GIIL to breach and repudiate the Investment Agreements. [CPHB1 ¶¶315–25; CPHB2 ¶¶214–17]

63. Claimants contend that the Funds' fundraising was successful until Respondents breach and repudiation interfered. Claimants contend that as result of Respondents wrongful conduct, they are entitled to damages representing the present value of the future net revenues Claimants would have received over the balance of the term of the Investment Agreements, but for Respondents breaches.[4] [CPHB1 ¶¶143–55, 472–81; CPHB2 ¶¶222–88]

64. Claimants contend that it is in the best interests of both parties that their relationships and the underlying Investment Agreements be brought to an end in an orderly way, but that this should occur after the delivery of this award, and that I should retain jurisdiction to assist the parties in that regard.

(B) Awards Sought by Claimants

65. Claimants seek awards as follows:

a. That CFLD and GIIL, jointly and severally, pay Claimants damages including lost profits and pre-award interest, in an amount between US$347.6 million and US$457.8 million; [CPHB1 ¶¶483, 484]

b. Alternatively, that CFLD, pay Claimants damages in the same amount; [CPHB1 ¶484] and

c. That CFLD and GIIL pay Claimants their costs of this arbitration, including reasonable attorneys' fees, disbursements, administration fees and payments toward the Sole Arbitrator's remuneration and expenses. [CPHB1 ¶¶485–90]

66. Claimants also seek awards as follows: [CSPHB1, pp. 12, 13]

[4] As described below, Claimants originally sought declarations akin to a claim for specific performance, as well as damages, but the claim for specific performance has been abandoned.

a. That Claimants are permitted to draw on the escrow accounts to satisfy the monetary award in their favour, with any undrawn amounts being returned to Respondents; and

b. That the Sole Arbitrator retains jurisdiction after the delivery of this award to assist the parties in bringing their relationships and agreements to an orderly conclusion.

(C) Summary of Respondents' Contentions in Answer to Claimants' Claims

67. Respondents contend that the Investment Agreements are void for lack of mutual assent as essential terms were never agreed [SIXTH Cause of Action; RPHB2 ¶¶217–22]

68. Respondents contend that the Investment Agreements are void for lack of consideration. [FIFTH Cause of Action; RPHB2 ¶¶223–28]

69. Respondents contend that the Investment Agreements are invalid because of Claimants' purported making of the Post-Closing Changes in that: [FOURTH Cause of Action]

a. The scope of the authority granted by the Appendix 1 POAs did not extend to agreeing to the Post-Closing Changes; [RPHB1 ¶396; RPHB2 ¶¶232–36]

b. In bad faith, Claimants breached fiduciary duties owed to Respondents in their capacity as "purported attorneys-in-fact" under the Appendix 1 POAs by making unauthorized and undisclosed Post-Closing Changes to the LPAs before signing them, as a result of which the LPAs are voidable by Respondents; [RPHB1 ¶¶11(b), 154-203, 247–49, 288–94, 326–29, 395; RPHB2 ¶¶165–68, 249]

c. There was no mutual assent to the Post-Closing Changes; [RPHB1 ¶¶321–25; ¶¶169–76]

d. As the LPAs are void, the entire transaction under the Investment Agreements is unenforceable, because the SAs and EAs are not valid stand-alone contracts. [RPHB1 ¶¶295, 296, 330–31; RPHB2 ¶¶229–31]

70. Respondents contend that Claimants made the following pre-contractual fraudulent, or alternatively negligent, misrepresentations or fraudulent non-disclosures: [FIRST, SECOND and THIRD Causes of Action; RPHB1 ¶¶11(a), 74–79, 298, 299–11; RPHB2 ¶¶177–81]

    a. representations that the terms of the Investment Agreements were "market," "industry standard," and "boilerplate" and that Claimants and MF would "structure the deal fairly, consistent with custom and practice in the venture capital industry, and beneficially to both sides;" [RPHB1 ¶¶91–118; RPHB2 ¶¶97–100]

    b. representations that over-stated the commitments made by other investors [RPHB1 ¶¶83–87; 204-209; 221–24; RPHB2 ¶¶118–52];

    c. a representation that increasing Respondents' commitment to Fund 1 from US$30 million to US$50 million would make fundraising more successful [RPHB1 ¶¶88–90];

    d. a failure to disclose Chung's termination from his former employer, Khosla Ventures (**Khosla**) and lack of prior fundraising experience; [RPHB1 ¶¶64–67, 80–82; RPHB2 ¶¶113–17]

    e. a representation that the requirement that the China Fund focus on CFLD's corporate mission of bringing new technologies to its industrial parks was "untenable;" [RPHB1 ¶¶119–40] and

    f. representations that the SAs (without the Appendix) included all the material terms of Respondents' investment and were adequate to disclose the material terms of the deal. [RPHB1 ¶¶141–53]

71. Respondents contend that. as a result of Claimants' pre-contractual misrepresentations and non-disclosures and post-contractual breaches of fiduciary duty, the Investment Agreements are void or voidable. [FIRST, SECOND and THIRD Causes of Action; RPHB1 ¶¶298–311]

72. Alternatively, Respondents contend that the Investment Agreements are invalid under: [RPHB1 ¶¶312–14; RPHB2 ¶¶182–214]

a. Section 10(b)(5) of the U.S. *Exchange Act* and Exchange Rule 10b-*5*; [NINTH Cause of Action]

b. §§ 25110, 25401 and 27101 of the *California Corporations Code*; [TENTH, ELEVENTH and TWELFTH Causes of Action]

c. §§ 114, 115, 277 and 298 of the Hong Kong *Securities and Futures Ordinance*; [SIXTEENTH Cause of Action] and

d. the laws of the Peoples Republic of China [FIFTEENTH Cause of Action]

as a result of which Respondents are entitled to rescission of the Investment Agreements.

73. Alternatively, Respondents contend that Claimants breached the Investment Agreements by:

a. breaching contractual fiduciary duties; [RPHB1 ¶¶288–95, 316; RPHB2 ¶249];

b. failing to establish an "escrow account" as required by the EAs; [RPHB1 ¶¶317–19; RPHB2 ¶¶250–53]; and

c. materially breaching an implied covenant of good faith and fair dealing by repudiating the Funds' stated investment objectives; [RPHB2 ¶¶253–60]

as a result of which Respondents are entitled to rescission of the Investment Agreements. [RPHB1 ¶320]

74. Alternatively, Respondents contend that Claimants waived any repudiation or breach, affirmed the Investment Agreements and continued to take the benefit of the Investment Agreements, rather than electing to treat the Investment Agreements as being at an end. [RPHB1 ¶¶333–36; RPHB2 ¶275; RSPHB1] As a result, Respondents allege:

a. Claimants were obliged to, but did not, comply with the notice and cure provisions of the LPAs (Sections 4.4(a)(ii) and 4.5(a)(ii)) before declaring a default; [RPHB1 ¶337] and

b. Claimants cannot recover damages for prospective losses, but may only recover losses caused by the breach. [RSPHB1].

75. Alternatively, Respondents contend that Claimants are precluded by Delaware's "doctrine of substantial performance" from seeking to enforce the "Capital Commitment" provisions of the SAs when Claimants themselves failed to fulfil their own Capital Commitment obligations and, instead, sought to alter those obligations through the Post-Closing Changes to the LPAs. [RPHB1 ¶¶391–96]

76. Alternatively, the Respondents contend that the damages claimed include claims for losses suffered by Chung and affiliates of the GPs, including 1955 Capital LLC, which are not recoverable by the GPs. [RPHB1 ¶332; RPHB2 ¶274]

77. Alternatively, Respondents contend that Claimants have failed to prove that they suffered any recoverable loss or have failed to prove their damages with the certainty required by Delaware law. [RPHB1 ¶¶338, 33–45; RPHB2 ¶¶273, 276–90]

78. Alternatively, Respondents contend that the amount of damages claimed is unduly high. [RPHB1 ¶¶346–86; RPHB2 ¶¶118–61]

79. In any event, Respondents contend that only GIIL, as signatory, and not CFLD, can be found liable to pay any damages for breach of the Investment Agreements, and that CFLD is immune from tort liability by virtue of the "Stranger Doctrine" and "Affiliate Privilege." [RPHB1 ¶¶397–407, 412–15; RPHB2 ¶¶261–72]

80. Respondents contend that Claimants cannot as a matter of Delaware law recover damages in tort that arise from a breach of contract. [RPHB1 ¶¶409–11]

(D) Summary of Respondents' Contentions in Support of Their Counterclaims

81. As a consequence of the Investment Agreements being void and invalid for the reasons stated above, Respondents assert that they are entitled to the return of all remaining escrow funds and the restitution of the entire US$80 million investment. [RPHB1 ¶¶422, 425 (b)]

82. Alternatively, the Respondents contend that as a result of Claimants' fraud, equitable fraud, deceit, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty, material breach of the Investment Agreements, material breach of implied covenant, or violation of applicable securities laws Respondents are entitled to: [RPHB1 Appendix A]

    a. Rescission of the Investment Agreements, and restitution of the US$80 million deposited thereunder; or

b. Alternatively, damages in the amount of US$80 million; and

c. Pre- and post-judgment interest.

83. Respondents have expressly abandoned the following claims set out in their First Statement of Case: [RPHB2 ¶215]

a. SEVENTH Cause of Action ("Anticipatory Breach of Contract");

b. EIGHTH Cause of Action ("Declaratory Judgment That the Fund Documents Are Void as Unconscionable");

c. THIRTEENTH Cause of Action ("Relief from Unfair Business Practices");

d. FOURTEENTH Cause of Action ("Relief from Unfair Competition");

e. and TWENTIETH Cause of Action ("Punitive Damages").

84. Respondents acknowledge that the SEVENTEENTH and EIGHTEENTH Causes of Action asserted against Chung personally ("Federal Securities Fraud") are moot in the light of the First Award. [RPHB2 ¶216] The Answer and Counterclaim did not contain a "NINETEENTH Cause of Action."

(E) Awards Sought by Respondents

85. Respondents seek awards as follows: [Appendix "A" to RPHB1; RPHB2 ¶292; RSPHB1 p. 13]

a. Dismissing all of Claimants' claims;

b. Declaring that the Investment Agreements are void and/or rescinded and of no further force or effect;

c. Ordering Claimants to return its entire US$80 million deposited into escrow;

d. Alternatively, ordering Claimants to pay money damages in the amount of US$80 million;

e. Ordering Claimants to pay pre-judgment interest at the legal rate for the period from 26 November 2015 up to and including the date of the Final Award;

f. Ordering Claimants to pay post-judgment interest calculated from the date of the Final Award up to the date of payment; and

g. Ordering Claimants to pay to GIIL the remaining balance of Escrow Funds on account of the monetary awards in Respondents' favour;

h. Ordering Claimants to pay all of Respondents' attorneys' fees, costs, and disbursements.

(F) Summary of Claimants' Contentions in Answer to Respondents' Affirmative Defences and Counterclaims

86. Claimants contend that Respondents' defences and counterclaim based on fraud, fraudulent misrepresentation, deceit and related causes of action have no basis in fact or law, because, *inter alia*: [CPHB1 ¶¶332–43]

a. There was no representation that "all material terms" were in the SA's as alleged; [CPHB1 ¶348; CPHB2 ¶¶42–44]

b. All material terms were disclosed and nothing was hidden as alleged; [CPHB2 ¶¶45–61]

c. CFLD had its own process to review the Investment Agreements, and fully approved and understood their structure; [CPHB1 ¶70–102; CPHB2 ¶¶29–41]

d. In any event, the Investment Agreements contained commonly observed provisions; [CPHB1 ¶¶113–32, 347; CPHB2 ¶¶107–22]

e. Chung's employment with Khosla was not terminated as alleged; [CPHB1 ¶¶65–66; CPHB2 ¶¶71–86]

f. Chung had the requisite experience and was positioned for success; [CPHB1 ¶¶138–42, 346]

g. Chung did not misrepresent commitments made by other investors as alleged; [CPHB2 ¶¶87–92]

h. Chung did not make a pre-contractual representation that increasing Respondents' commitment to Fund 1 from US$30 million to US$50 million would make fundraising more successful, as alleged; [CPHB2 ¶¶93–95]

i. Chung did not represent that including in the Investment Agreements the requirement that the China Fund focus on CFLD's corporate mission of bringing new technologies to its industrial parks was "untenable," but, rather, explained that such a requirement would hinder the Funds' success; [CPHB2 ¶¶96–103]

j. Alternatively, the Respondents have not proven:

i. reasonable reliance on any allegedly false pre-contractual representations; [CPHB1 ¶¶366–75; CPHB2 ¶¶130–33]
ii. *scienter*, in the form of knowledge or belief that the representation was false, or indifference to the truth, and an intent to induce reliance; [CPHB1 ¶¶376–83; CPHB2 ¶¶134–36];
iii. that any alleged misrepresentations caused the Respondents harm; [CPHB1 ¶¶384–88; CPHB2 ¶137]
iv. that there was a special relationship between Respondents and Claimants of the kind needed to establish negligent misrepresentation or equitable fraud; [CPHB1 ¶¶389–92; CPHB2 ¶138]

87. Alternatively, Claimants contend that Respondents' fraud allegations are barred by non-reliance and integration clauses in the Investment Agreements. [CPHB1 ¶¶363-365]

88. Claimants contend that Respondents' attempt to rely on securities laws of various jurisdictions is mis-placed. [CPHB1 ¶¶393-440; CPHB2 ¶¶139-148]

89. Claimants contend that including revised provisions during the process of finalizing the LPAs (i.e. the Post-Closing Changes) did not give rise to a breach of fiduciary duty because:

a. Claimants were authorized to make the modifications to the LPAs prior to execution, both under the Appendix 1 POAs and during discussions with Respondents, and because the changes themselves were not material, have not been invoked in this dispute, and simply conformed the LPAs to the SAs and tracked what was commonly used in the market; [CPHB1¶¶103–12, 448–51; CPHB2 ¶¶150, 154–76]

b. Respondents were contractually obliged to ratify the changes; [CPHB1 ¶460] and

c. There was no intentional concealment of the executed version of the LPAs containing the contentious Post-Closing Changes as alleged; [CPHB2 ¶¶62–70, 164]

90. Alternatively, Respondents are precluded by the doctrine of unclean hands from asserting a defence or claim based on a breach of fiduciary duty. [CPHB1 ¶¶461–62; CPHB2 ¶¶165–68]

91. In the further alternative, Claimants contend that even if there was a breach of fiduciary duty it does not result in the unwinding of the entire transaction as Respondents allege. [CPHB2 ¶¶151–53, 169–76]

VII. ANALYSIS

(A) Allegations Relating to Contract Formation: Consensus and Consideration

92. Respondents contend that there was no meeting of the minds between Claimants and Respondents concerning material terms of the Investment Agreements such that no binding agreement was reached. Claimants contend that GIIL's execution of the SAs and EAs on 23 November 2015, followed by the payment of funds into escrow, provides objective evidence establishing a binding agreement under Delaware law.

93. Under Delaware law mutual assent is governed by an objective, not subjective, standard. See, e.g., *William Lloyd, Inc. v. Hrab*, No. CIV.A. 98A-07-001HLA, 1999 WL 1611315, at *3 (Del. Super. Ct. Apr. 7, 1999) ("[T]his Court's inquiry is an objective one: whether a reasonable person would, based upon the objective manifestation of assent conclude that both parties intended to be bound by the Agreements they executed.") (internal quotations omitted); *Barnard v. State*, 642 A.2d 808, 816 (Del. Super. Ct. 1992), aff'd, 637 A.2d 829 (Del. 1994) ("It is well settled that a contract requires a 'mutual manifestation of assent,' which is to be evaluated by an objective standard.") (citation omitted). Thus, under Delaware law: "A contract is formed if a reasonable person would conclude, based on the objective manifestations of assent and the surrounding circumstances, that the parties intended to be bound to their

agreement on all essential terms." *Diamond Elec., Inc. v. Delaware Solid Waste Auth., No. 1395-K*, 1999 WL 160161, at *3 (Del. Ch. Mar. 15, 1999).

94. Under Delaware law, mutual assent exists when there has been an offer and an acceptance of the offered terms. *Worcester Cty. Dev. Co. v Economios*, No. CIV.A. 05-08-22, 2007 WL 2417338 (Del Com. Pl. Aug. 15, 2007), *Gleason v Ney*, No. CIV. A. 78-C-MR-110, 1981 WL 88231 (Del. Ch. Aug. 25, 1981).

95. In the present case, on 11 November 2015, Chung told Xu that the SAs "will be tied to an appendix + full LPA." [Ex C-6] Shortly thereafter, Chung wrote Xu saying, "Note that it is a subscription agreement that will bind you to the appendix and LPA, as you requested." [Ex C-6] On 12 November 2015, Chung sent an email to Xu forwarding the proposed customized SAs. [CWS1 ¶117, 126; RWS2 ¶25; Ex C-21] Shortly thereafter, Ahmedani sent Xu the draft LPAs, Appendix 1 and the EAs. [CWS2 ¶26; Xu, RWS2 ¶26; Ex C-22, R-24] Then, on 23 November 2015, Chung forwarded Xu an email from Ahmedani which included final versions of the EAs and provided signing instructions. The email stated that "the CFLD investing entity (Global Industrial Investment Limited) should sign [the SA's and EA's]" but "GIIL will not need to sign the LPA, which the GP will sign on its behalf pursuant to the power of attorney granted to it in Appendix I." [Ahmedani, CWS2 ¶30; Xu, RWS2 ¶29; Ex C-25]

96. Viewed objectively, these communications constitute an offer by Claimants to enter into agreements on the terms set out in:

    a. The SAs that were delivered on 12 November 2015 and received on 13 November 2015;
    b. Appendix 1 that was delivered shortly thereafter (**13 November Appendix 1**);
    c. The LPAs that were delivered shortly thereafter (**13 November LPAs**); and
    d. The EAs that were delivered on 23 November 2015.

97. Part of the offer also was that the GPs would sign the 13 November LPAs on GIIL's behalf. To accept the offer, GIIL was required to sign and return the SAs and EAs.

98. CFLD's Board of Directors approved CFLD's investment on 23 November 2015. On 26 November 2015, Xu returned signed versions of both SAs and the EAs to Chung. [RWS2 ¶30; Ex R-32] Viewed objectively, this constituted acceptance by GIIL of

Claimants' offer, resulting in a binding agreement on the terms set out in the signed SAs, the 13 November Appendix 1, the 13 November LPAs and the signed EAs (collectively, the **26 November Agreements**).

99. Respondents' submissions address several circumstances which they say preclude a finding that there was a final and binding agreement as of 26 November 2015. They allege that they did not actually, subjectively, understand, and had no actual intention to accept, certain terms of Claimants' offer.

100. Under Delaware law, in the context of a commercial agreement between sophisticated parties, a subjective misunderstanding of the terms of the offer, not induced by some wrongful act of the offeror, does not result in lack of consensus if, viewed objectively, there has been an offer and an acceptance. See *Gloria James v Nat'l. Fin., LLC,* 132 A.3d at 813 ("As a matter of ordinary course, parties who sign contracts and other binding documents, or authorize someone else to execute those documents on their behalf, are bound by the obligations that those documents contain."); *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A*., 103 A.3d 1010, 1015 (Del. 2014) (same). *See* Comment b to *Restatement (Second) of Contracts* § 157 (1981) ("Generally, one who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that he did not read them; his assent is deemed to cover unknown as well as known terms."); *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 677 (Del. 2013) ("[A] failure to read bars a party from seeking to avoid or rescind a contract."); *Bernal v. Feliciano,* No. CIV.A.N12C-09-062MJB, 2013 WL 1871756 (Del. Super. Ct. May 1, 2013) (holding a party who signs general release is bound to its terms despite inability to read, write or speak English).

101. There was consideration flowing from Claimant GPs to Respondents in return for their commitment to invest in the Funds. The Respondents received limited partnership interests in the two Funds as consideration for their agreement to contribute capital. Claimants assumed the duties owed by general partners to limited partners under Delaware law—including the fiduciary duties that Respondents have invoked in this arbitration. In the case of Fund 1, Fund 1 GP agreed to make a 1% capital contribution.

102. For the reasons I have stated, I find that the 26 November Agreements are not void for lack of consensus or consideration as Respondents contend. It remains to be determined, however, (i) whether the Post-Closing Changes were or became part of the LPAs and (ii) whether the *prima facie* binding agreement is nonetheless void, voidable or unenforceable for other reasons.

(B) Contractual Status of the Post Closing Changes

103. It is common ground that the Post-Closing Changes were not included in the 13 November LPAs and 13 November Appendix 1. Claimants contend, however, that they were authorized by Respondents to make the Post-Closing Changes. The authority to make changes is alleged by Claimants to be found in the Investment Agreements themselves and to be derived from discussions between the parties about the need for changes to be made as the Investment Agreements were "finalized."

104. The 13 November Appendix 1 to each of the SAs states: (emphasis added)

> **12. Power of Attorney.** The Investor hereby constitutes and appoints the General Partner as its true and lawful representative and attorney, in its name, place and stead to, upon the acceptance by the Fund of the Investor's subscription for an interest in the Fund, execute the Agreement and any amendments, restatements or supplements thereto, in the Investor's name and on the Investor's behalf (as a Limited Partner). The power of attorney granted hereby (i) is irrevocable except with the consent of the General Partner and is given by way of security to secure performance of the obligations owed by the Investor to the Fund, (ii) survives and shall not be affected by the subsequent death, incapacity, disability, dissolution, termination or bankruptcy of the Limited Partner granting the same or the transfer of all or any portion of such Limited Partner's interest in the Fund, and (iii) extends to such Limited Partner's successors, assigns and legal representatives. The Investor shall ratify and confirm whatever the General Partner does or purports to do in good faith in the exercise of the power of attorney granted hereby. The Investor agrees that a Person who deals with the General Partner in good faith may accept a written statement signed by the General Partner to the effect that this power of attorney has not been revoked as conclusive evidence of that fact.

105. Claimants contend that the Appendix 1 POAs are sufficient authority for Claimants to make the Post-Closing Changes to the 13 November LPAs and the 13 November Appendix 1. Respondents disagree.

106. Under Delaware law, "[p]owers of attorney must be strictly construed and will be held to grant only those powers that are specified." *Nash v. Schock,* No. 14721, 1997

WL 770706, at *3-4 (Del. Ch. Ct. Dec. 3, 1997) Respondents submit, first, that the plain language of Appendix 1 makes clear that it authorizes the GPs to execute on GIIL's behalf only the SAs—not the LPAs. They contend that under the 13 November Appendix 1 the defined term "Agreement" refers to the SAs and separately defines the LPAs as the "Partnership Agreement." Under Delaware law, "a contract must be read in harmony to determine the contract's meaning, with one portion of a contract not being read to negate a different portion." *Honeywell Int'l Inc. v. Air Prod. & Chem., Inc.,* 872 A.2d 944, 956 (Del. 2005). Respondents submit that the plain meaning of the Appendix 1 POAs is that Claimants are authorized to sign the SAs only, not the LPAs. [RSOC4 ¶¶218–15]

107. I do not agree. Appendix 1 is an Appendix to the SAs. "Agreement" is defined in each SA as the SA "including all appendices and attachments hereto." (emphasis added) the term "Agreement" thus includes not only the SAs, but also Appendix 1 itself. While it is correct that Appendix 1 separately defines the LPA as the "Partnership Agreement" and the EAs as the "Side Letter" it also repeatedly uses the phrase "the Agreement, including the Partnership Agreement and the Side Letter." This clearly reflects a contractual intention that in Appendix 1 (and, indeed in the SAs of which the appendices form a part), the word "Agreement" includes not only the SAs and its appendices but also the LPAs and the EAs. This creates no disharmony, because of the use of the word "including" in both the SAs and Appendix 1. I find that the plain meaning of the language used in the Appendix 1 POAs is that Respondents authorized the GPs to execute, *inter alia*, the LPAs "and any amendments, restatements or supplements thereto." In addition, this interpretation makes commercial sense when viewed in the context of the facts known to both parties when the 26 November Agreements were made. Both parties knew that the SAs were actually being signed by GIIL, not by the GPs on its behalf. They both knew that the LPAs were not being signed by GIIL and were to be signed by the GPs. In this context, it makes commercial sense that the word "Agreements" is not limited to the SAs themselves. For these reasons, I find that the plain meaning of the Appendix 1 POAs is that the GPs were authorized to "execute" the LPAs and any amendments or supplements thereto as well as any amendments or supplements to the SAs, including Appendix 1, on behalf of the Respondents.

108. Claimants contend that such a finding means that they had sufficient authority to execute the LPAs containing the Post-Closing Changes and to make Post-Closing Changes to Appendix 1. I do not agree. According to the plain meaning of the words

used in the Appendix 1 POAs, the authority given to the GPs is to "execute" specified documents. There is a difference between having the authority to sign an agreement and having the authority unilaterally to make substantive changes to its terms. A strict interpretation is particularly appropriate when the attorney itself is a counterparty to the relevant agreements. It is even more appropriate when, in the agreed forms of LPA, strict limits are placed on the attorney's powers to amend.

109. The LPAs that existed at the time the 26 November Agreement was made were the 13 November LPAs. [Ex. C-22] I find that, viewing objectively what was said and done, it was the common intention of the parties that the 13 November LPAs would be signed by the GPs on behalf of GIIL using the Appendix 1 POAs.

110. The 13 November LPAs have their own power of attorney provisions, which are expressly limited in scope, as follows (emphasis added): [Ex C-22 s. 14.10, 15.10]

> By signing this Agreement, each Limited Partner designates and appoints the General Partner its true and lawful attorney, in its name, place, and stead to make, execute, sign, and file the Certificate of Limited Partnership and any amendment thereto and such other instruments, documents, or certificates that may from time to time be required of the Partnership by the laws of the United States of America, the laws of the state of the Partnership's formation, or any other state in which the Partnership shall do business in order to qualify or otherwise enable the Partnership to do business in such jurisdictions. Such attorney is not hereby granted any authority on behalf of the Limited Partners to amend this Agreement except that as attorney for each of the Limited Partners, the General Partner shall have the authority to amend this Agreement and the Certificate of Limited Partnership (and to execute any amendment to the Agreement or the Certificate of Limited Partnership on behalf of itself and as attorney-in-fact for each of the Limited Partners) as may be required to effect:
>
> (a) Admission of additional Partners pursuant to paragraph 3.2;
>
> (b) Transfers of Limited Partnership interests pursuant to Article 9; or
>
> (c) Extensions of the Partnership term pursuant to Article 10.24.

111. Each of the 13 November LPAs also restricts the circumstances in which they can be amended. They state that, except in the limited circumstances set out in the power of attorney provision, "this Agreement may be amended only with the written consent of the General Partner and a Majority in Interest of the Limited Partners." [Ex C-22 § 14.11 and 15.11] Both the power of attorney provision and the

restrictions on amendment set out in the 13 November LPAs were carried forward into the Executed LPAs. [Ex C-29, C-30]

112. The Appendix 1 POAs, the powers of attorney in the 13 November LPAs and the restrictions on LPA amendment set out in the 13 November LPAs must be read together.

113. The evidence shows that for this particular transaction, at the request of the Respondents, rather than having the investor sign the LPAs, the parties had agreed to use a special form of summary document, the SAs, which could be reviewed and approved by CFLD's Board and executed by GIIL. The 13 November LPAs were still to apply, but it was agreed by the parties that the GPs would execute them using the Appendix 1 POAs. In the circumstances, it is clear that the business purpose of the Appendix 1 POAs was to allow the GPs to sign the 13 November LPAs as had been agreed. Once that was done, both parties were to be bound by the terms of those LPAs. The restrictions on amendment in the 13 November LPAs would apply. The result would be that the GPs would still hold powers of attorney to "execute" documents, but the GPs could not amend the LPAs except as permitted by the terms of the LPAs. The Post-Closing Changes to the 13 November LPAs were not of the kind that the GPs were authorized to execute on behalf of Respondents without consent of the Respondents as limited partners. In my view, much clearer language would have had to be used in the Appendix 1 POAs if it was to be interpreted as over-riding the express restrictions on amendment in the LPAs.

114. Claimants contend, however, that it was clearly understood by Respondents, and tacitly agreed by them, that some changes would be made to the text of the 13 November LPAs as they were "finalized." In other words, they contend that the 13 November LPAs did not reflect what had been agreed, but rather were known and agreed to be drafts that the GPs alone could finalize, within agreed parameters. Chung's evidence is that he discussed with Wang, Cheng and Xu the importance of having protections to ensure that CFLD would perform its obligation to make future escrow deposits. I accept his evidence on that issue. [TR. 505]

115. Chung also says, however that in the context of the discussions it was agreed, expressly or tacitly, that there would be some changes to the default provisions in the LPAs to reflect the need for protection. He says that there also was discussion

of tax considerations associated with an intended fee waiver. Chung states: [TR. 261–62]

> It was understood by Mr. Xu and our side, that once the subscription agreement was signed, and we got the board approval from CFLD, that there would be a process for finalizing the LPA. And in that process, we would stay in accordance with the various provisions that are contemplated by the subscription agreement, but there were going to be final details that needed to be worked out in the final LPA.

116. Chung's evidence was that he can recall a discussion in Beijing with Xu about changes to the default provisions and a fee-waiver on or about 22 December 2015. Chung says that as he did not have tax expertise, he delegated to Sean Park, Claimants' CFO, the responsibility for further discussion on the fee waiver point. He recalls that Park had a separate discussion with Xu and his team on 23 December 2015. He states that after those discussions, it was Park's responsibility to finalize the LPAs and send them to the Respondents but that, unknown to Chung, final copies of the Executed LPAs were not sent to the Respondents until much later. He denies that there was any intention to conceal the changes. [TR. 262–64]

117. Chung's Witness Statement makes clear that the changes to the default provisions, at least, resulted from information provided to him by Sean Park, Claimants' CFO, after the SAs had been signed. [CWS6 ¶39] Although his evidence is less specific as to timing of discussions concerning the fee-waiver, I infer from the evidence concerning the sequence of events that this issue, too, was made known to him by Park after the SAs were signed. I accept that there were general discussions before the SAs were signed about the importance of having a strong commitment from the Respondents to timely deposit escrow, but I find that there were no specific discussions about changing the 13 November LPAs.

118. The only evidence of specific discussions with Respondents about the Post-Closing Changes is that of Chung, concerning the discussions he believes took place on 22 and 23 December 2015. Chung did not mention the specific discussions he now says occurred on 22 December 2015 in any of his witness statements, despite addressing in those statements the circumstances surrounding the Post-Closing Changes. Chung's recollection of the 22 December discussions is recent and uncorroborated and, for that reason, I find it to be unreliable and unconvincing. His evidence of what was discussed by Park and Respondents on 23 December is hearsay. No evidence was presented by Park and no cogent explanation was offered for his not having done so. Xu was not pressed during cross-examination about these matters.

119. On the whole of the evidence, I find that Chung was advised after the 26 November Agreement was made that it would be prudent to revise the terms of the 13 November LPAs. Rather than signing the 13 November LPAs as agreed and then following the amendment process called for therein, he instructed counsel to draft amendments and then signed the Executed LPAs including those amendments. I do not accept that there were specific discussions with Respondents about the intention to change the provisions of the 13 November LPAs before they were signed. I find that the Post-Closing Changes to the 13 November LPAs were not agreed to or authorized by Respondents. In addition, there is no evidence that Respondents were aware of, agreed to or authorized changes to be made to the 13 November Appendix 1.

120. Claimants contend that in any event, Respondents ratified the Executed LPAs by continuing to work with the GPs. [CPHB1 ¶288] The difficulty with this argument is that Respondents did not receive the Executed LPAs until October 2016, and, even then, they were not told that the new documents included Post-Closing Changes. It was only after the present disputes arose that a comparison was made that revealed the Post-Closing Changes. As a matter of law and commonsense, Respondents cannot be taken to have ratified by conduct amendments of which they were not aware. See *Pipeline Corp v Bedford*, 145 A.2d.206 (Del. Ch. Ct. 1958)

121. Claimants note that Respondents received a fee-waiver schedule from 1955 Capital on 1 January 2016. The transmittal email explained: "Pursuant to Section 6.1(e) of the Amended and Restated Limited Partnership Agreement (the 'Agreement') of 1955 Capital Fund I LP (the 'Fund'), the attached notice sets forth the Fee Waiver Amount that 1955 Capital Fund I GP LLC (the 'General Partner') has elected to waive and the portion thereof allocated to each of the Fund's fiscal quarters." Respondents did not raise any questions regarding the fee-waiver at the time. [Ex. R-57; RWS2 ¶46]

122. I find that the Respondents' failure to object to the claimed fee-waiver cannot be construed as a ratification of all of the Post-Closing Changes to the 13 November LPAs or 13 November Appendix 1. The Post-Closing Changes were broader than the addition of the fee-waiver provision. The Respondents' failure to object to the fee-waiver cannot be regarded as a general ratification of the unauthorized Post-Closing Changes.

123. The legal consequence of my finding that there was no express or implicit agreement, through ratification or otherwise, to the Post-Closing Changes, is that Claimants' unilateral attempt to amend the terms of the 13 November LPAs and 13 November Appendix 1 was not authorized. As Respondents contend, there was no mutual assent to the amendments. The terms of the relevant Investment Agreements are those that were originally agreed, and which, together, comprise the 26 November Agreements, including the 13 November LPAs and the 13 November Appendix 1. See *Cont'l Ins. Co.,* 750 A.2d at 1228–34 (finding that alleged oral amendment to limited partner's withdrawal rights was invalid and that original provision governed). This is not a case where severance is required to remove terms to which the parties agreed but which are for some reason invalid, as in the present case the ineffective terms were never part of the agreement.

124. Respondents assert that the attempt to make the Post-Closing Changes results in the entire transaction under the 26 November Agreements being void. They also rely on Claimants' attempt to make the Post-Closing Changes, including their failure to disclose the changes, as part of their defences and counterclaims based on post-contractual breaches of fiduciary duty. Those matters are discussed separately, below.

(C) Claimants' Alleged Fraud and Equitable Fraud (Negligent Misrepresentation)

125. Respondents invoke Delaware law concerning common law fraud (deceit), fraudulent misrepresentation, negligent misrepresentation and equitable fraud, in support of their arguments that as a result of pre-contractual misrepresentations and failures to disclose, the 26 November Agreements are void or voidable at their instance. Before discussing the various alleged pre-contractual misrepresentations, I set out the relevant principles of Delaware law.

(a) *Principles of Delaware Law*

126. Under Delaware law, to succeed in a claim for common law fraud, the following elements must be established: "(i) a false representation, (ii) the defendant's knowledge of or belief in its falsity or the defendant's reckless indifference to its truth, (iii) the defendant's intention to induce action based on the representation, (iv) reasonable reliance by the plaintiff on the representation, and (v) causally

related damages." *Prairie Capital III, L.P. v. Double E Holding Corp*., 132 A.3d 35, 49 (Del. Ch. 2015). See also, *Kronenberg v. Katz,* 872 A.2d 568 (Del. Ch. Ct. 2004).

127. Statements of opinion or belief cannot give rise to a common law fraud claim absent evidence that the representor lacked a belief that the statements were true when they were made, regardless of whether the representor's opinion, prediction, or future conduct turned out to be different from what he believed at the time. See *Great Lakes Chem. Corp. v. Pharmacia Corp.,* 788 A.2d 544, 554 (Del. Ch. 2001); *Mooney v. Pioneer Nat. Res. Co*., No. CV N17C-01-225 RRC, 2017 WL 4857133, at *5 (Del. Super. Ct. Oct. 24, 2017) (explaining that "Delaware courts have often held that 'expressing opinions or predictions about the future, however, cannot give rise to actionable common law fraud,'" and dismissing fraud claims based on statements that "appear to be merely opinions of Defendant's performance and forward-looking predictions related to newly-implemented business strategies") (citation omitted). See *Craft v. Bariglio*, No. 6050, 1984 WL 8207, at *8 (Del. Ch. Ct. Mar. 1, 1984) ("what might be considered a mere matter of opinion when expressed to one in an equal bargaining position may rise to the level of misstatement of fact when made by one with special or superior knowledge.") (citations omitted).

128. Representations self-evaluating the representor's skill and experience in an inflated manner may be regarded as inactionable "puffery" incapable of sustaining a fraud claim because reliance on such statements cannot be reasonable as a matter of law. See *Solow v. Aspect Res., LLC*, No. Civ.A.20397, 2004 WL 2694916, at *3 (Del. Ch. Oct. 19, 2004). But factual misrepresentations about past successes can lead to liability. See *Paron Capital Mgmt., LLC v. Crombie*, No. 6380 (VCP), 2012 WL 2045857, at *6 (Del. Ch. Ct. May 22, 2012) (investor who "created a false image of [himself] as having been a successful investor" was liable for fraud and that "[e]ach of [defendant's] misrepresentations related to either his investment track record, employment history, personal financial information, [or] information that he undoubtedly knew was material to [plaintiff's] decision to work with him.").

129. Fraud also can "'occur through deliberate concealment of material facts, or by silence in the face of a duty to speak." *Kronenberg,* 872 A.2d at 585 n.25. To state a claim for fraud based on an alleged omission, a party must first establish a duty to speak. *Airborne Health, Inc. v. Squid Soap, LP*, No. CIV.A. 4410-VCL, 2010 WL 2836391, (Del. Ch. July 20, 2010). Counterparties negotiating a commercial transaction do not owe each other a duty to speak or any obligation to disclose

information unless disclosure of that information is necessary to make a prior statement, in light of the circumstances under which the statement was made, not misleading. RESTATEMENT (SECOND) OF TORTS § 529 (1977) ("A representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation"); *Lock v. Schreppler,* 426 A.2d 856, 862 (Sup. Ct. New Castle City. Jan. 28, 1981) ("[I]f a person undertakes to speak, he then has a duty to make a full and fair disclosure as to the matters about which he assumes to speak"); See *Air Prod. & Chem., Inc. v. Wiesemann,* 237 F. Supp. 3d 192, 215 (D. Del. 2017) (finding for defendant on fraud claim where plaintiff failed to identify any partial disclosures that were misleading); *Airborne Health*, 2010 WL 2836391, at *9 ("Airborne was an arms' length counter-party negotiating across the table from Squid Soap. Airborne had no affirmative disclosure obligation. . . [And plaintiff] does not identify any actionably misleading partial disclosure . . . that would tend to create a false impression. Puffing about business prowess does not do the trick.").

130. To be material, omitted facts must be such that they "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." See *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988).

131. Non-reliance and integration clauses in commercial contracts are enforced under Delaware law. *Black Horse Capital, LP v. Xstelos Holdings, Inc.,* No. CIV.A. 8642-VCP, 2014 WL 5025926, at *24 (Del. Ch. Sept. 30, 2014) ("[A] party cannot promise, in a clear integration clause of a negotiated agreement, that it will not rely on promises and representations outside of the agreement and then shirk its own bargain in favor of a 'but we did rely on those other representations' fraudulent inducement claim."); See also: *Debakey Corp. v. Raytheon Serv. Co.,* No. 14947, 2000 WL 1273317 (Del. Ch. Aug. 25, 2000), *Progressive Int'l Corp. v. E.I. Du Pont de Nemours & Co.,* No. C.A. 19209, 2002 WL 1558382 (Del. Ch. July 9, 2002), *ATSI Comms, Inc. v. Shaar Fund, Ltd.,* 493 F.3d 87 (2d Cir. 2007), *Dresner v. Utility.com, Inc.,* 371 F. Supp. 2d 476 (S.D.N.Y. 2005).

132. Reasonable reliance cannot be established where the alleged victim knew the true facts. *Debakey*, 2000 WL 1273317, at *25 ("An essential element of a claim for fraud is that the alleged victim be ignorant of the true facts that are misrepresented."). Similarly, reasonable reliance cannot be established where the alleged victim, "dealing on equal terms with another," had "the means of knowledge … readily

within [its] reach." *Universal Enter. Grp., L.P. v. Duncan Petroleum Corp*., No. CV 4948-VCL, 2013 WL 3353743, at *14 (Del. Ch. July 1, 2013) (quoting 37 C.J.S. Fraud § 56). Reasonable reliance cannot be established where the alleged victim "'had the opportunity to read the contract and by doing so could have discovered the misrepresentation.'" *Carrow v. Arnold*, No. CIV.A. 182-K, 2006 WL 3289582, at *11 (Del. Ch. Oct. 31, 2006), aff'd, 933 A.2d 1249 (Del. 2007) (quoting 56 17A Am. Jur. 2d Contracts § 214 (2006).

133. "Proximate cause is an essential element to . . . claims of . . . fraud." *Rep. of Panama v. Am. Tobacco Co.,* No. CIV.A.05C-07-180-RRC, 2006 WL 1933740, at *7 (Del. Super. Ct. June 23, 2006), aff'd sub nom. *State of Sao Paulo of Federative Rep. of Brazil v. Am. Tobacco Co.,* 919 A.2d 1116 (Del. 2007). "In cases of fraud based on omission or nondisclosure, many courts have interpreted legal or proximate causation as including a 'loss causation' requirement, meaning that the loss ultimately must be caused by 'the materialization of the concealed risk.'" *Vichi v. Koninklijke Philips Elecs*., N.V., 85 A.3d 725, 818-19 (2014). To prove loss causation, the plaintiff must demonstrate "'that the fraudulent misrepresentation actually caused the loss suffered.' . . . Thus, 'the loss causation inquiry typically examines how directly the subject of the fraudulent statement caused the loss, and whether the resulting loss was a foreseeable outcome of the fraudulent statement.' . . . [T]he loss causation element requires the plaintiff to prove 'that it was the very facts about which the defendant lied which caused its injuries.'" *Berkeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 222–23 (3d Cir. 2006) (citations omitted).

134. Under Delaware law, a claim for negligent misrepresentation consists of the same elements as common law fraud—subject to the lesser scienter requirement of negligence. See *Lincoln Nat'l Life Ins. Co. v. Snyder*, 722 F. Supp. 2d 546 (D. Del. 2010). Under Delaware law,

> … a plaintiff claiming equitable fraud must sufficiently plead a special relationship between the parties or other special equities, such as some form of fiduciary relationship or other similar circumstances, which common law fraud does not require. Thus, "sophisticated contractual parties who bargain at arm's length generally do not qualify for the kind of equitable protection that the negligent misrepresentation or equitable fraud doctrine envisions." *LVI Grp. Investments, LLC v. NCM Grp. Holdings, LLC,* No. CV 12067-VCG, 2018 WL 1559936, at *18 (Del. Ch. Mar. 28, 2018) (internal citation omitted).

(b) The Alleged Pre-Contractual Misrepresentations and Non-Disclosures

135. In their First Memorial, Respondents alleged a long list of misrepresentations and non-disclosures in support of their defences and counterclaims based on fraud, equitable fraud and breaches of allegedly applicable regulatory statutes. [RSOL1 ¶¶117, 118; 182–88] Respondents identified the pre-contractual misrepresentations on which they rely, based on the totality of the evidence, in their Post-Hearing Briefs. [RPHB1 ¶¶74-153; RPHB2 ¶177] A useful summary is set out in their Second Post-Hearing Brief as follows: [at ¶177, with FN references re-positioned and edited, and definitions added]

> 177. Claimants' intentionally induced GIIL's investment by making the following, knowingly false misrepresentations, on which Respondents reasonably relied:
>
> a. False representations regarding nonexistent commitments from other investors; [FN 416: …. such statements were misleading because Mr. Chung omitted or otherwise failed to disclose highly material context: that such investors were unwilling to invest $100 million in Fund I alongside CFLD, and were interested in investing such funds only as anchors in their own funds. … Even Mr. Chung admitted that the existence of other co-investors was material to CFLD, because CFLD wanted assurances that Mr. Chung's proposed funds were attractive to other market participants and that its investment would be leveraged by substantial co-investments. …] [(**Other Investor Commitments Representations**)]
>
> b. Mr. Chung's assurances to Respondents that "the more capital the cornerstone investor contributed, the easier [it would be] for [Mr. Chung] to raise more funds from other investors." [FN 417: RWS1 ¶38. See also Tr. 384–88]. As Mr. Chung admitted at the hearing, he knew that this statement was false, but made it in order to induce Respondents to increase the amount of investment under consideration. [FN 418 RPHB-1 ¶¶ 88-90. See RWS1 ¶ 38; R11(b). See also RWS2 ¶10] [(**Increased Contribution Representations**)]
>
> c. False representations that the terms of the Fund Documents would be fair, industry-standard, market-based, and mutually beneficial; [FN 419: *See* RPHB1, Section II(E). Respondents' reasonable reliance on their "legal advisors," "attorney-in-fact," and trustee of their investment cannot be in fair dispute. *See* RPHB1 Section IX(D)] [(**Industry Standard Representations**)]
>
> d. False representations that the SAs contained all the material terms of the investment; [FN 420: See RPHB1 ¶¶141–53; 321–-25; R254; Tr. 195] [(**Material Terms Representations**)]

e. Claimants' admitted repudiation of their prior undertakings to focus the Funds' investments on portfolio companies with potential for CFLD's industrial parks, on the basis of Mr. Chung's false representations that any written requirement imposing such a restriction would "severely restrict [] the Funds' ability to invest in attractive companies; [FN 421: Compare CPHB1 ¶¶333, 343–45, with RPHB1 ¶¶11(a)(iii), (b)(2), 79(b)(iii), (c)(ii), (d)(i), 119-20, 299(e) & n.592, 372(b)(i) & n.732.] [(**Industrial Park Restriction Representations**)]

f. Claimants' misrepresentations that the fast pace of closing their anchor commitment was necessary to enable Claimants to immediately commence fundraising. [FN 422: See also RSOFL-4, Section II(B)(1)(e). As Mr. Chung elsewhere acknowledged, the Funds could not begin any fundraising or investment activity until February 24, 2016—when 1955 Capital was launched; FN 423 See RPHB1 ¶¶ 32–40; CSOC4 ¶57; RSOC1 ¶127 (citing RWS2 ¶¶6, 17, 18, 37, 33, 39; 52, 60(b); R67; RWS1 ¶¶34, 38-39; Ex. R-49, R-50)] [(**Fast Pace Representations**)]

g. Mr. Chung's representation that he was still a Khosla partner and his admitted concealment of the fact that he was no longer employed by Khosla—a highly material omission given its impact on Mr. Chung's qualifications as well as his motives to seek a hasty closing despite being unprepared to begin managing the Funds; [FN 424: See RPHB1, Section I] Mr. Chung's departure from Khosla was a highly material omission given that he knew that Respondents perceived him as credible due to his association with Khosla and he had been terminated from Khosla because Khosla was "not supportive" of the very strategy on which Mr. Chung based 1955 Capital. See Tr. 296–98. It is implausible that Respondents would have proceeded to invest in 1955 Capital had they known of this intentionally withheld information. [See also RPHB1 ¶81] [(**Khosla Representations and Non-Disclosures**)] and

h. Claimants' misrepresentations that the terms of the deal were final on November 23, 2015, in order to induce GIIL's transfer of $80 million to Claimants' purported "escrow accounts" on or about November 27, 2015, and knowing concealment of their self-dealing until October 16, 2016. [FN 426: See RPHB1 ¶¶50-51, 54, 62(c), 154 (citing RWS-2 ¶¶31, 37, 39), 155-58, 181-83. See also Section XIV, infra. But see CPHB1 ¶351 at bullet no. 5.] [**Finality of Terms Representations and Non-Disclosures**)]

136. These alleged pre-contractual misrepresentations and material non-disclosures are examined individually in the following sections of this award, applying the requirements of Delaware law earlier described.

(c) *Other Investor Commitments Representation*

137. In his witness statement, Cheng states: [RWS1 ¶25]

> Mr. Chung said that he would certainly recruit other limited partners for the multiple-investor fund and told me that he already met several other investors in China before meeting with me. He said there were already investors who had promised to invest USD 100 million. (emphasis added)

138. Cheng's evidence refers to discussions at a meeting in August 2015. Later in his witness statement Cheng states that "[Chung] stated that another investor was already actively considering an investment of USD 100 million. (*See* Ex. R-9, 10)" [RWS1 ¶37] Exhibit R-9, referenced in Cheng's statement, includes the following:

> The reason to increase the investment [in Fund 1] is based on Mr. Chung's suggestions that it should facilitate fundraising and team recruitment, that it should help maintain the fund's independent status as to all LPs, and that another company can contribute up to USD 100 million, so he hoped that CFLD would increase its contribution. (emphasis added)

139. Cheng then states "Mr. Chung based his request [for an increased capital commitment] specifically on his assurances that investments by other limited partners of USD 100 million to 150 million were imminent." [RWS1 ¶38] Xu's evidence is that "Mr. Chung assured us that he had already lined up additional investors prepared to invest as much as $100 million." [RWS2 ¶10] (emphasis added) I infer from Xu's evidence that it refers to Chung's statement to Cheng at the August meeting.

140. The thrust of this evidence is that Respondents understood from what Chung said that he had another investor who was prepared to invest up to $100 million in the proposed multi-investor fund alongside CFLD. Although those were not his precise words, Respondents allegedly drew that conclusion because he made the statement in the context of his proposal that CFLD increase its contribution to the multi-investor fund.

141. In his witness statement, Chung denies that he represented that he had investors prepared to invest any specific amount, but states that he had "explained" that "there were other potential investors prepared to make large commitments, which was accurate." [CWS6 ¶¶60–63; TR. 383, 384]

142. Chung agreed in his oral evidence that *if* he had made a representation that other investors had "committed" or "were willing" to invest US$100 million in Fund I alongside CFLD that would have been untrue. [TR. 363, 364] His evidence is that he was in discussion with the principal of a large Chinese [redacted] company, Mr. [redacted], about

a substantial investment in a venture capital fund as an anchor investor, but that [redacted] was not interested in investing alongside another anchor investor. [TR. 353, 354]

143. Chung's evidence is that in August 2015 he was having parallel discussions with [redacted] and CFLD about substantial investments. He states that while the discussions with CFLD had evolved into a discussion of "split" funds, only one of which would involve other investors, it was still not certain whether either CFLD or [redacted] would be an anchor investor in such a fund. It was clear to him, however, that they would not be anchor investors in the same fund. What I take from Chung's evidence is that he made it known to CFLD that there was another investor who was very interested in making a substantial investment—perhaps as high as US$100 million—because he wanted CFLD to know that CFLD was not his only option as an anchor investor for a multi-investor fund, and to encourage CFLD to be willing to commit a larger sum to the proposed multi-investor fund. He denies that he said that the other investor was willing to invest alongside CFLD in the multi-investor fund and agrees that if he had said that it would have been untrue. [TR. 352-364]

144. In support of their contention that Chung's evidence on this, and other, subjects should not be accepted, Respondents refer to evidence of instances in which Chung over-stated to other potential investors the level of interest in and commitment to Fund 1. [RPHB1 ¶¶204-224] The evidence shows that Chung made statements to other investors on this subject that were not true. For example, he said to another investor that the Funds "were oversubscribed for our inaugural launch" when, as he admitted in cross-examination, that was not true. He says that the statement was "a mistake." The evidence shows that similar incorrect statements about funds being oversubscribed were made by Chung to at least one other investor in another context, and that Chung often supported his efforts to solicit investor interest with statements suggesting that funds were "expected" or "likely" to be oversubscribed. [Ex. R-268; TR 596-598; Ex C-48, C-133] Announcements of the launch of the Funds referred to "anchor commitments" in the plural, when in fact there was a single anchor investor. [Ex. C-44, C-118, C-35, R-78] Chung explains that many potential limited partners will be less interested in investing if they know that the fund has a single existing limited partner, so he did not wish to highlight the fact that he had a single anchor investor. [TR. 532]

145. Chung also admits that, in response to inquiries from potential investors after the 26 November Agreements were made, he or others under his direction incorrectly

referred to the Funds as having an "anchor set" of investors. He says he also was mistaken in stating that the Funds "received a contribution of millions of dollars" from [redacted]. [TR. 424-429] Chung's draft responses to a questionnaire from one of the Funds' eight alleged "higher probability prospective LPs" listed six "LPs committed to date." [Ex. C-133]. Chung admits, again in response to questions asked during cross-examination, that five of the six LPs listed were not committed LPs. [TR. 590]

146. I find that early in discussions with CFLD in August Chung did make a statement to the effect that other, unidentified investors were actively considering an investment of up to US$100 million in Fund 1. I also find that his motive in doing so was to encourage Respondents to increase their contribution to that proposed fund, and that they were influenced by that statement, among others, to do so. I also find that the statement Chung made, as far as it went, was true. The question is whether the statement was a half-truth that was intended to mislead Respondents into believing that there was a genuine prospect that another investor would invest US$100 million in Fund 1 alongside Respondents, and whether Respondents actually understood it in that manner and relied on it when they made the 26 November Agreements. Answering that question is made more difficult by Chung's demonstrated propensity to over-state the level of commitment to and interest in funds that he was promoting to other potential investors.

147. After careful consideration, I find that Respondents have not shown, on balance, that Chung made the statement with the intent to deceive. I also find that Respondents have failed to prove, on balance, that they reasonably relied on this statement in entering into the 26 November Agreements. Respondents did not understand, nor could they reasonably have understood, the statement to be a guarantee or "promise" that another investor would contribute US$100 million. The representation was that an investment was being actively considered. I also find that Respondents could not reasonably have understood that the US$100 million was a possible investment in the same multi-investor fund as CFLD was discussing with Chung. There was no discussion of co-anchors in Fund 1. There is no evidence of specific follow-up questions about this when no other investor stepped forward to commit after Fund 1 was launched. The totality of the evidence is simply not consistent with Respondents' characterization of what they understood the representation to mean and their reliance upon it.

148. For the reasons I have stated, I find that the Respondents' defences and counterclaim based on the Other Investor Commitments Representation fail.

(d) *The Increased Contribution Representation*

149. Cheng gave evidence that Chung also convinced CFLD to increase its preferred commitment to Fund I from US$30 million to US$50 million by assuring CFLD that "the more capital the cornerstone investor contributed, the easier for [Chung] to raise more funds from other investors." [RWS1 ¶38] Chung does not deny the accuracy of Cheng's account. He said that the statement attributed to him was a correct statement and that he probably made it. [TR. 385]

150. Respondents contend that Chung's representation was intentionally false. They point to Chung's evidence that dependence on a large commitment by a single Chinese investor would increase the risk of unsuccessful fundraising, because it would be a red flag to other investors. They note that Chung admits that his objective was to get more money from CFLD despite the risk that this might impact fund-raising from other sources. [TR. 386–88] They point to evidence that Respondents' single anchor commitment of US$50 million to Fund I (and US$150 million to the China Fund) was of such concern to Chung that he did not disclose it to other potential investors. [RPHB1 ¶¶89, 90] As described above, Chung admits that, in response to inquiries from potential investors he or others under his direction incorrectly referred to the Funds as having an "anchor set" of investors.

151. Chung's evidence is that increasing the Respondent's contribution to Fund 1 from US$30 million to US $50 million enabled him to tell prospective investors that he already had US $50 million "in the bank" and that this would actually assist fund-raising efforts.

152. I find that the statement attributed to Chung is an expression of opinion, involving a prediction of future events. It is not a statement of an existing fact. On balance, Respondents have not shown that it was untrue, or that it did not represent Chung's true belief at the time.

153. For the reasons I have stated, I find that the Respondents' defences and counterclaim based on the Increased Contribution Representation fail.

(e) The Industry Standard Representations

154. Xu's evidence is that Chung represented that he and MF would "structure the deal fairly, consistent with custom and practice in the venture capital industry, and beneficially to both sides." [RWS2 ¶16] Chung denies having made that representation. [CWS6 ¶59] Chung's evidence is that although he "believe[d] the terms that CFLD negotiated and agreed to were reasonable and fair," he "never promised CFLD that the terms would be 'fair' and 'mutually beneficial.'" [CWS6 ¶ 58] Of course, the present issue is not whether a "promise" was given. There is no allegation that any pre-contractual statement by Claimants has contractual force. The allegation is that they intentionally mis-stated facts and that Respondents relied on those mis-statements.

155. When forwarding MF's initial draft term sheet to Xu, on 27 September 2015, Chung said "[t]he attorney has followed the general conditions for marketized Silicon Valley investment companies—it's very "boiler plate." [Ex. C-6 at CAP0053] In a communication to Xu dated 28 September 2015, as part of negotiating the management fee, Chung said (emphasis added): [Ex. C-6 at CAP0061]

> On mgmt fee, according to MoFo, 2.5% is pretty standard now in Silicon Valley, especially for funds where there is significant travel / cross-border component - potential need for multiple offices, larger team over time. Remember that our goal was to structure this as "market," so I will go with my legal counsel's view on this point.

156. Respondents' contend that these statements must be viewed in the context of the fact that Respondents had not retained independent outside counsel to assist with the transaction and that Chung was aware of that. Chung's evidence, however, is that he thought that Respondents had internal capability to understand the proposed contracts. He states: [TR. 463]

> They're a $20 billion market cap company that has a legal department. They have a—well, not a risk and compliance department, because they were not—anyway, they—I believed that, as a company that was going—as you pointed out, they were going to wire a significant amount of capital and make a $200 million commitment, and I believed that they had an internal capability to analyze it. …. Mr. Cheng, Mr. Xu, and Chairman Wang represented to me that they had vast resources, many consultants. They would frequently show off the consultants that they had in the office. And I clearly thought that they were going to undergo a legal review process …."

157. Respondents contend that Chung's alleged representations that the terms of the transaction were "market" or "standard" were false, and were made by Chung knowingly, to induce Respondents to participate in the transaction. They rely on expert opinion evidence concerning "industry standard" terms, and differences between allegedly industry standard terms and the terms of the present transactions. They allege that they reasonably relied on Chung's assurances by entering into the 26 November Agreements.

158. For many reasons, I find that the Respondents have not proven their claims based on the Industry Standard Representations.

159. First, the evidence does not establish that Chung represented that the terms of the Investment Agreements were or would be "industry standard."

160. I accept that Chung said at an early stage in the negotiations that the proposed term sheets prepared by MF were "very boiler-plate" in the sense that they "followed the general conditions for marketized Silicon Valley investment companies." That statement referred only to the initial drafts. It was not an assurance that the terms of the Investment Agreements comprising the ultimate 26 November Agreements were or were going to be "boiler-plate." The terms set out in the initial drafts were the subject of further negotiation.

161. I accept that Chung said at an early stage in the negotiation of financial terms that in his opinion and that of his counsel, the proposed 2.5% management fee was "market" for the Silicon Valley. Chung did not state, however, that the terms of the entire intended transaction were or were going to be "market."

162. I accept Cheng's evidence that Chung made statements to him to the effect that Claimants and MF "would structure the deal fairly, consistent with custom and practice in the venture capital industry, and beneficially to both sides." That evidence does not establish, however, that Chung represented that all of the terms of the transaction were "industry standard." The statement was that, *inter alia*, "the structure of the deal" would be "consistent with custom and practice" in the industry. (emphasis added)

163. Second, the expert evidence relied on by Respondents, and Respondents' submissions, assume that the Post-Closing Changes—which they say introduced

some non-industry standard provisions—became part of the 26 November Agreements. I have found that this is not the case. For the purposes of assessing the truth of the "Industry Standard Representations," it is the terms set out in the Investment Agreements comprising the 26 November Agreements, not those resulting from the ineffective Post-Closing Changes, that are relevant.

164. Third, even if one were to interpret the statement that the "structure" of the deal would be consistent with industry custom and practice as a statement that the specific terms of the Investment Agreements would be "industry standard," on the whole of the evidence it is clear that there is no objectively identifiable "industry standard" for the terms of deals. This is not a case where a standard form or model contract has been mandated by legislation or approved by an industry association. A reference to "standard" structure or terms does not prescribe any specific, objectively ascertainable set of terms. Whether a deal is fair, consistent with industry custom and practice and beneficial to both sides are matters of opinion, as well-demonstrated by the conflicting expert opinion evidence in this case. Such a representation is not a representation of fact. Moreover, it is a forward-looking statement—it is an opinion about what the structure of the deal will be.

165. Fourth, the evidence does not show that Respondents reasonably relied on the alleged representations. I accept, as Respondents contend, that Respondents did not have sufficient prior experience with venture capital investments in the United States to have any specific notion of what deal structure or terms were or were not consistent with industry custom and practice, or "standard." That lack of experience, however, means that statements such as those attributed to Chung did not convey any particular meaning to Respondents about how the deal would be structured or what terms would or would not be in the final documents. There is no evidence that Cheng or Xu or anyone else representing the Respondents understood, for example, that the custom and practice in the industry was to have or not have a particular form of default provision, an escrow arrangement, provision for removal of the GP for cause, restrictions on investments or GP representations and warranties. At most, the "message" conveyed by Chung's statement was that the structure of the deal he intended to offer to Respondents was one that others in the industry would accept in similar circumstances and that, in the opinion of Chung, such a structure would be fair and beneficial to both parties.

166. The evidence does not show that Respondents attached any particular importance to consistency with industry custom and practice in and for itself. Such consistency, *per se*, has not been shown to be a determinative factor in Respondents' decision-making. For them to avoid the consequences of their bargain, the evidence would have to show not only that the actual structure and terms of the 26 November Agreements had not been accepted by other industry participants in similar circumstances, but also that Respondents would not have entered into the agreements had they been aware of that fact, regardless of the substance of the terms themselves. The evidence makes no such showing.

167. Fifth, even if one were to interpret the scope of the representation as Respondents contend, as an assurance that as a matter of fact all material terms of the relevant Investment Agreements actually were consistent with an objectively identifiable "industry standard," I find that in the circumstances any reliance placed by Respondents on that assurance was not reasonable. This is so because Respondents had in their possession, before they committed to invest, the full text of the Investment Agreements that comprised the 26 November Agreements. They had before them the proposed structure and all relevant terms and conditions of the proposed agreements. They also had the resources to fully understand them.

168. This was a large and complex commercial transaction between two sophisticated parties. In addition to in-house legal resources, during the course of negotiation leading to the agreement Respondents had access to outside legal counsel if they wished. According to their evidence, they did not avail themselves of such services.

169. I do not accept that Respondents actually believed or could reasonably have believed in the circumstances that in relation to the negotiation and drafting of the Investment Agreements MF was acting both for them and for Claimants. In Procedural Order No. 4, in the context of an application for production of allegedly privileged documents, I considered, based on the evidence then before me, whether a solicitor-client relationship existed between MF and Respondents, and whether Respondents could reasonably have concluded that MF represented their interests in the negotiations. Procedural Order No. 4 states: (at ¶¶23–28, emphasis added)

> 23. Claimants submit that the evidence presented is not sufficient to establish the existence of a joint retainer at any time. They submit that a reasonable but incorrect belief by the Respondents that MoFo acted for them as well as the

Claimants is not sufficient to deprive Claimants of their right to assert privilege. They submit, in any event, that Respondents have failed to show that there was a basis for Respondents to reasonably believe that MoFo acted as their attorney.

24. There is no express, written contract of engagement between Respondents and MoFo with respect to the negotiation and preparation of the Fund Documents, nor is it possible to glean an implied joint engagement from the documents and testimony offered in evidence to date. After carefully considering all of the evidence presented by the parties on this issue in the context of the present application (and again leaving aside the implications of the later establishment of a partnership relationship) I find that the evidence does not establish a joint engagement of MoFo by both Claimants and Respondents relating generally to the preparation and negotiation of the Fund Documents.

25. Nor does the evidence establish a reasonable basis for a belief that such a broad engagement existed. The authorities cited concerning reasonable belief seem to me to deal with the question of the duties owed by attorneys to persons who, in the absence of an actual engagement, reasonably believe an attorney represents them. Of course, the right to assert attorney-client privilege belongs only to the client, not the attorney, and only the client can waive it. It would be odd, in my view, if the rights of a client could be lost because its attorney leads another person to believe that the lawyer also represents the other person, when that is not actually the case. At the very least some action by the true client in contributing to the misapprehension would be required.

26. In the present case, the evidence does not support a finding that Claimants contributed to any mistaken belief on the part of Respondents about whether MoFo acted for both sides in the negotiation and implementation of the terms of the agreements with respect to the Funds. Xu asserts that "Mr. Chung assured us that he and the law firm he engaged [MoFo] would structure the deal fairly, consistent with custom and practice in the venture capital industry, and beneficially to both sides." Chung "led us to believe that MoFo had been retained on behalf of the partnership (not merely Mr. Chung or the General partners) and represented our mutual interests in the transaction." [Xu, RWS2 ¶¶16,17, emphasis added] This evidence, if accepted, shows a representation by Chung that MoFo had been engaged by Chung or the GPs or on behalf of the partnership. It does not show that MoFo was also acting for Respondents, or that Chung made a representation that such was the case. Xu's evidence also must be viewed in the context of other evidence that strongly indicates that Respondents were told and knew that MoFo was not acting for them. [See, pp. 5–7 of the Response]

170. There is nothing in the evidence, including evidence presented since Procedural Order No. 4 was issued, that leads me to conclude that Respondents actually

believed, or reasonably could have believed, that MF was representing their interests when preparing the Investment Agreements that ultimately comprised the 26 November Agreements, or in relation to the arms-length pre-contractual negotiations between Respondents and Claimants. The Claimants did not induce and are not in any way responsible for the decision apparently taken by Respondents not to seek outside legal advice. Nor, if it was the case, does the evidence show that Claimants were aware that Respondents did not have their own legal advisors involved in reviewing the documents.

171. The evidence shows that after his introductory high-level discussions with Chung, Wang delegated to Cheng responsibility to complete the negotiation of business terms. Cheng then assigned to Xu the responsibility to finalize and implement the transaction. In the course of doing so Xu would report to and seek guidance from Cheng, who would, when necessary, consult with Wang. Xu was Respondents' main representative in the discussions that lead to settling the final terms of the 26 November Agreement.

172. While I accept that Xu is not a lawyer and had limited experience in venture capital investments, he is far from being a naïve and unsophisticated person. He is well educated, having obtained an MBA from an American University. He can read and write in the English language. He has considerable experience in complex business and financial matters. No doubt these strengths and attributes were taken into account when he was designated as the person to complete the negotiation of this significant investment.

173. CFLD had its own internal processes for reviewing and approving investments, and those processes were followed in this case. Before the transaction was presented to the CFLD Board for approval, it had been discussed at internal meetings as part of that review process. Xu had in his possession all of the documents that were proposed to form part of the overall transaction. At Xu's request, because the proposed LPAs he had initially been given were in his view too long and detailed to be submitted to the Board for approval, the originally intended form in which the deal was to be documented had changed. The SAs had been prepared, so that a shorter document could be reviewed and approved by the Board. Through Xu, Respondents were clearly told, however, that the signing of that document would bind them to the LPAs and Appendix 1. I deal separately below with Respondents'

contention that they were misled into believing that all material terms were in the SAs alone.

174. Although Xu had English versions of the SAs, the EAs, Appendix 1 and the LPAs in his possession, only the SAs had been translated into Chinese. Claimants had specifically offered to assist in arranging to have other documents translated, but Xu declined the offer, in answer to which Chung told Xu that the decision on what should be translated was "your call." Xu made the decision that only the SAs would be translated and that only the SAs would be presented to CFLD's Board. [Ex. C-6 CAP0122]

175. Evidence was tendered by Respondents with a view to showing that the transaction was implemented quickly at Chung's insistence. Respondents contend that Chung was in a hurry to close the transaction because he knew that his employment with Khosla was coming to an end and he needed to get the new Funds up and running to generate income. They say, however, that he represented to them that there was a need for haste for other reasons, which were untrue. These are the alleged Fast Pace Representations, discussed further below. Respondents contend that because Chung expressed a need for haste the transaction in fact moved quickly; the implication being, as I understand it, that if Respondents cut corners by not engaging outside counsel, not reading carefully the relevant documents, not getting full document translations or otherwise, their behaviour was nonetheless reasonable in the circumstances. I do not agree with that contention for several reasons.

176. Most importantly, the contemporaneous record of communications between the parties does not support the contention that Claimants were somehow imposing time limits on Respondents. Claimants asked Respondents how long they needed to complete their internal review process, including a legal review. [Ex. C-6 CAP0078] They asked whether full document translations were required, offered to assist in getting quotes to do so, and, rather than discouraging translation due to time concerns, told Respondents that the decision was theirs to make. [Ex. C-6 CAP0122]

177. In summary, even if Respondents subjectively did not understand the full import of material provisions of the SAs, EAs, 13 November LPAs or 13 November Appendix 1, I find that in the circumstances that is not a sufficient basis as a matter of Delaware law to allow Respondents to avoid the consequences of the bargain they

made, because any reliance on statements about the nature and content of the documents was not reasonable.

178. Finally, on the whole of the evidence, I do not find that Chung intended to deceive Respondents about the nature and content of the SAs, EAs, 13 November LPAs or 13 November Appendix 1. The evidence does not show that he said or did anything with the intent to cause Respondents not to read the documents they had been given or not to retain counsel to advise them. At most, he expressed his own, favourable characterization of the documents that were in the course of preparation. I find that Respondents have failed to establish the required *scienter* to support a claim of fraudulent misrepresentation or deceit based on the Industry Standard Representations. I also find that the relationship between Claimants and Respondents was not such as to justify a finding of equitable fraud through negligent misrepresentation. Respondents were not dependent on Claimants to explain to them the nature and implications of their agreement as they had the documents in their possession and the means and opportunity to understand them.

179. For the reasons I have stated, I find that the Respondents' defences and counterclaim based on the Industry Standard Representations fail.

(f) *Material Terms Representation*

180. Respondents allege that Chung made false representations that the SAs contained all the material terms of the agreement. The evidence does not show that an explicit representation to that effect was made. Respondents contend, however, that Xu asked for "streamlined" LPAs to present to CFLD's Board, that Claimants, knowing that all material terms of the transaction should be disclosed to the Board, and knowing that only the SAs would be translated and presented to the Board, provided SAs that did not in fact contain all material terms. They say, in effect, that this amounts to a representation through words and conduct. [RSOC4 ¶¶39–51]

181. The evidence shows that Xu was concerned about the length of the draft LPAs that were first sent to him. He asked that Claimants prepare shorter, "streamlined" LPAs. Claimants, however, on the advice of MF, did not consider it feasible to prepare "streamlined" LPAs because all the terms set out in the LPAs were essential. To achieve the objective of having a shorter document as Xu requested while not dispensing with relevant terms and conditions of the LPAs, Ahmedani proposed what became the ultimate structure—the SAs setting out certain key business terms

of the transaction incorporating, *inter alia*, Appendix 1 which set out or cross-referenced additional terms including the Appendix 1 POAs. [TR. 122–24, 193, 194; CWS2 ¶¶17–20]

182. I accept that Xu hoped to receive, for each Fund, a single "streamlined" document that contained all material terms of the transactions, so that the document could be translated and presented to CFLD's Board for approval. I also find that, on the advice of MF, Claimants concluded that it was not feasible to do what Xu wanted. Instead, again on MF's advice, Claimants determined to use an alternative approach. The question is whether Claimants, by what they said or did not say, deliberately misled Xu into believing that he was getting what he had asked for, or whether it was made known to him that what they were proposing was different.

183. On 11 November 2015, Chung sent Xu a "potential draft example of what to expect as a format for the shorter form agreement that will be tied to an appendix + full LPA." [Ex. C-6] Shortly thereafter, Chung wrote Xu saying, "Note that it is a subscription agreement that will bind you to the appendix and LPA, as you requested." [Ex. C-6] These communications did not, as Respondents have alleged, represent that the "key" or "material" terms of the transaction were all set out in the SAs. To the contrary, they conveyed the fact that signing the SAs would bind Respondents to Appendix 1 and the LPAs. Xu was thus clearly informed that the SAs did not replace the LPAs he had earlier been given. The conclusion that Xu says he reached, that the Appendix and LPAs contained irrelevant details and that the key business terms were in the SAs, was not based on any representation or non-disclosure of Claimants.

184. The evidence does not show that Claimants were told of Xu's decision to present only the SAs to CFLD's board. As earlier described, Chung was made aware of Xu's inclination to have only the SAs translated into Chinese, despite Chung's offer to assist in the translation of other documents. Chung made it clear that the decision on what needed to be translated was for Xu to make. Chung was not told what documents were actually presented to CFLD's Board, or what CFLD's Board was to be told about the content or inter-relationship of the various documents.

185. For the reasons I have stated, I find that Respondents' defences and counterclaim based on the alleged Industry Standard Representations fail.

(g) The Industrial Park Restriction Representation

186. Respondents contend that Claimants "repudiated" an "undertaking" given at an early stage of the negotiations to focus the Funds' investments on portfolio companies with potential for locating in CFLD's industrial parks. Respondents do not, however, argue that that alleged "repudiation" has any legal consequences. Rather, they allege that Respondents' ultimate agreement to a transaction that did not incorporate that undertaking was induced by "Chung's false representations that any written requirement imposing such a restriction would "severely restrict [] the Funds' ability to invest in attractive companies." [RPHB2 ¶177]

187. The evidence shows that it was an important business objective of Respondents to have the Funds invest in enterprises that had the potential to establish operations in CFLD's business parks in China, and that this objective was clearly made known to Chung. It is also common ground that the documents comprising the 26 November Agreements did not contain any restriction on target investments to further that objective. Chung does not deny that he made statements to the effect alleged, to persuade Respondents that the express restrictions they desired would be counterproductive, as they would unduly constrain the Funds' activities. [CWS1 ¶51]

188. I find that the statements made by Chung on this subject were honest expressions of an opinion he reasonably held. As such, they were not fraudulent or negligent misrepresentations.

189. Even if, as Respondents allege, Chung's motive was self-serving and counter to Respondents' business objectives, his statements were made in the course of an arms-length business negotiation. Chung was entitled, during the negotiation of the deal, to put his own business interests ahead of those of the Respondents, just as they were entitled to advocate for their own objectives in preference to his. If Respondents felt that this was an unacceptable change in direction from something that had been agreed in principle at the outset, or that it was a key requirement of their investment decision, it was open to Respondents to simply take the position that they were not prepared to proceed with a transaction unless the restrictions they desired were included. Instead, they agreed to proceed without them.

190. For the reasons I have stated, I find that Respondents' defences and counterclaim based on the alleged Industrial Park Restriction Representation fail.

(h) *The Fast Pace Representations*

191. Respondents contend that Chung falsely represented to them that it was important to complete the transaction quickly so that fund-raising could begin immediately, when in fact it was not going to be possible to begin fund-raising until late February or March 2016, after the Funds were officially "launched." This allegation has given rise to controversy about whether the desire for an early consummation of the deal was driven by Chung's desire to have a new source of income in the light of his departure from Khosla, CFLDs desire to get approval from SAFE to move funds off-shore or both. [RPHB2 ¶177; RPHB1 ¶¶132–40]

192. On the whole of the evidence, I am satisfied that Chung was anxious to complete the transaction as soon as possible, and that he expressed that desire to Respondents. I infer that his desire was driven largely by the fact that he was departing Khosla. I also find that active fund-raising could not start until the transaction had been concluded, allowing the creation of the Funds to be announced, so that, the sooner the transaction closed, the sooner fund-raising could begin. The evidence is less clear as to whether CFLD had its own independent motivation for concluding the transaction without undue delay. There is no doubt that CFLD needed to obtain SAFE approval for its investment.

193. In my view, however, this head of claim is ill-conceived in any event. As with the other claims based on pre-contractual representations, it is not alleged that there was a promise having contractual force, that fund-raising would begin immediately. It is not alleged and the evidence does not show that but for Chung's alleged statements about the need for haste, Respondents would not have entered into the transaction. It is not alleged, at least explicitly, that a requirement for speed was artificially contrived by Chung to deny Respondents time to fully review the contract documents, or that, if they had been allowed more time, Respondents would not have made the agreement they made.

194. In short, even if the alleged statements were made and were untrue they do not give rise to an independent defence or counterclaim in this instance, because there is no evidence and no allegation that the terms of the 26 November Agreements,

which Respondents seek to avoid, were accepted, or could reasonably have been accepted, in reliance on this particular alleged representation.

195. For the reasons I have stated, I find that Respondents' defences and counterclaim based on the alleged Fast Pace Representations fail.

(i) *Khosla Representations and Non-Disclosures*

196. Respondents allege that Chung represented that he was still a Khosla partner when that was no longer the case. They also allege that, knowing that his credibility and stature was enhanced in Respondents' eyes due to his association with Khosla, Chung concealed the fact that he was no longer employed by Khosla. They contend that Khosla terminated Chung's employment because Khosla was "not supportive" of the very strategy on which Chung based 1955 Capital. They submit that "[i]t is implausible that Respondents would have proceeded to invest in 1955 Capital had they known of this intentionally withheld information." [RPHB2 ¶177]

197. The evidence shows that in August 2015, after having been introduced to Wang and Cheng in California, Chung contacted Wang to set up a meeting in Beijing. At the time they met in California, Chung had been employed at Khosla. When setting up the August meeting, Chung identified himself in a communication to Wang's assistant describing himself as "Chung of Khosla Ventures" and noted that he had met Wang at a breakfast meeting in San Francisco several months earlier. [Ex. R-92] Cheng's evidence is that he, Wang and Chung met in August 2015 and that Chung reviewed his past successful experience. Cheng's evidence is that in the course of doing so Chung "mentioned that Khosla had four or five partners and he was the only Chinese." [WS1 ¶¶17, 18] Cheng states, however, that Chung then stated that "he planned to establish a venture capital fund and asked if CFLD was interested in being a cornerstone investor" (emphasis added). [WS1 ¶18] There is no further reference in Cheng's witness statement to any other statement by Chung concerning Khosla. When Cheng sets out what he now considers to be Chung's misrepresentations or non-disclosures, Cheng does not refer to any non-disclosure concerning Khosla, although one of his complaints is that Chung "did not disclose his limitations as first-time fund manager." [WS1 ¶41(g)] Similarly, Xu's witness statement setting out his involvement beginning in September 2015 does not describe any misunderstanding that Khosla was somehow involved in the new Funds.

198. The evidence shows that on 21 July 2015 Chung had received from Khosla a proposed form of Separation Agreement, stating that 17 July 2017 was the last date of Chung's employment with Khosla and pressing him to sign it within three weeks. The terms of the proposed agreement were then negotiated between Chung and Khosla and were still under discussion in August. His requests for a mutual release and track record were refused. When the agreement was finalized, Chung continued to serve on the boards of some portfolio companies, and for that reason he continued to call himself an "affiliate partner" of Khosla. He was no longer involved in Khosla's other activities. Chung did not tell Wang when they met in Beijing that he was no longer employed by Khosla. He says he thought this might have been harmful to Khosla. [Ex. R-194, R-195; TR. 323]

199. Chung's evidence is that when he first met Wang in California, Wang did not express interest in an investment in Khosla, but rather in one or more Khosla portfolio companies. Chung maintains that he decided to "transition" out of Khosla and that he was not fired. He explains that his vision of creating a China-focused fund was not shared by Khosla. He also maintains that when he travelled to Beijing and set up a meeting with Wang, it was not with a view to soliciting an investment by CFLD in a new Fund. He says that proposal was made by Wang. [TR. 290–92, 297–99, 323–26]

200. During these proceedings, considerable energy has been devoted to the question of whether Wang or Chung initiated the discussions about a possible investment by CFLD in what later became the Funds. Similarly, the related issue of whether Chung was on a desperate search for a new income source after being fired by Khosla has been explored at length. As in my view nothing turns directly on either issue, I will summarize my conclusions. On the whole of the evidence, I am persuaded that Chung's departure from Khosla was not at his sole instigation, but rather stemmed from a misalignment between his areas of interest and those of his employer. He either had to change his focus or leave. He did not wish to change his focus, so he was required to leave. There is no indication that his employment was terminated for cause, for incompetence or for dishonesty.

201. It is clear that Chung was looking for new opportunities and that one idea he cherished was setting up new funds that would, initially at least, be China-focused. I have no doubt that when he traveled to Beijing, he did so with the idea that he would find potential investors who would buy-in to that concept, and that his

meeting with Wang was for that purpose. I accept that Chung took advantage of the ambiguous nature of his transitional relationship with Khosla, without making it clear that he and Khosla were parting company. I also accept that the level of Wang's interest and the size of his potential commitment were both more than Chung had expected, and that he seized on the unexpected opportunity to make his dream a reality.

202. The factual issues relevant to the misrepresentation claim under discussion, however, are (a) whether Respondents were aware, when they made the 26 November Agreements, that Chung was no longer employed by Khosla (b) if so, whether they had been intentionally misled as to the reasons for Chung's departure and (c) whether they would or would not have made the 26 November Agreements if they had been aware of the true facts.

203. No evidence was tendered from Wang. Neither Cheng nor Xu state that they were not aware by 26 November 2015 that Chung was no longer associated with Khosla. On the whole of the evidence, it is clear that Respondents knew from at least September 2015 that Khosla had no involvement in the Funds and that Chung's relationship with Khosla was ending. The Claimants, not Khosla, were the intended counterparties and Respondents knew that.

204. As already noted, Respondents submit that "[i]t is implausible that Respondents would have proceeded to invest in 1955 Capital had they known" of the reasons for Chung's departure from Khosla. They do not, however, point to the evidence of any of Respondents' witnesses to support this proposition. This part of Respondent's claim is based on speculation and an incorrect characterization of the circumstances surrounding Chung's departure from Khosla. I do not agree that it is self-evident that Respondents would not have entered into the 26 November Agreements had they known the reason for and circumstances of Chung's departure from Khosla. Respondents have not proven that it is more likely than not that Respondents would have declined to proceed had they known. Chung was bound to correct, and did correct, any misimpression his earlier statements or silence might have created that he was functioning as an employee of Khosla in negotiating with Respondents. Claimants were not, however, as parties involved in an arms-length negotiation, under a duty to disclose the precise circumstances surrounding his departure from Khosla.

205. For the reasons I have stated, I find that Respondents defences and claims based on the alleged Khosla Representations and Non-Disclosures fail.

(j) *Finality of Terms Misrepresentation*

206. This misrepresentation claim is based on the allegation that Claimants represented that as of 26 November 2015 the terms of the Investment Agreements were final, and then made and failed to disclose the Post-Closing Changes. I have found, however, that the alleged representation was true. The Post-Closing Changes were not part of the 26 November Agreements.

207. For this reason, I find that Respondents defences and claims based on the alleged Finality of Terms Representation fail. I consider below the question of whether the attempt to make the Post-Closing Changes constituted a breach of fiduciary duty.

(D) Claimants' Alleged Breaches of Pre-Contractual Fiduciary Duties

208. Respondents have alleged that Claimants breached fiduciary duties through conduct both before and after the 26 November Agreements were made. [RSOC4 ¶137] Respondents argue that the Claimants' alleged breaches of fiduciary duty preclude them from enforcing "any obligations under the" Investment Agreements and that rescission and/or cancellation of a contract is an available equitable remedy. [RSOC4 ¶231] They also allege that they are entitled to damages or equitable compensation for unjust enrichment. [RSOC4 ¶213]

209. This part of my analysis deals only with allegations of pre-contractual breaches of fiduciary duty. Alleged pre-contractual non-disclosure of terms of the Investment Agreements is relied on in support of an argument that Claimants are precluded from relying on exclusionary language in the Investment Agreements. [RSOL4 ¶137(a)]. The list of alleged breaches of fiduciary duty focuses mainly on post-closing events, but includes "misrepresenting of the size and scope of Claimants' existing LP commitments and the Funds' capital raising progress" and "[m]aterial misrepresentations as to market practice." [RSOC4 ¶370(g)(h)]

210. Respondents allege that MF owed fiduciary duties to Respondents because, with Claimants' consent, MF assisted Respondents in preparing their regulatory disclosures. Respondents allege that MF breached its fiduciary duties by assisting Claimants in the preparation of the Investment Agreements which favoured the

interests of Claimants over those of Respondents and in making other pre-contractual representations and non-disclosures. Then, because they worked with MF, Claimants are alleged to have knowingly participated in MF's breaches of fiduciary duty and to be liable for such breaches, even if Claimants themselves did not owe pre-contractual fiduciary duties. [RSOC4 ¶¶144–52]

211. For several reasons, I find that Respondents' defences and claims based on pre-contractual breaches of fiduciary duty cannot succeed. First, I find that Claimants themselves owed no direct fiduciary duties to Respondents until the 26 November Agreements were concluded and Claimants assumed their responsibilities as general partners of a partnership in which Respondents were limited partners and as attorneys under the Appendix 1 POAs. Under Delaware law, sophisticated commercial entities conducting commercial negotiations do not owe each other fiduciary duties of loyalty demanding that they put the interests of the proposed counter-party ahead of their own. See *N.S.N. Int'l Indus., N.V. v. E.I. DuPont De Nemours & Co*., No. C.A. 12902, 1994 WL 148271, at *7 (Del. Ch. Mar. 31, 1994) (finding no fiduciary relationship between sophisticated parties bargaining at arms' length).

212. A sophisticated commercial negotiating party cannot unilaterally impose a fiduciary duty on the other party and avoid taking reasonable steps to protect its own interests by the simple expedient of saying, in effect, "I trust you."

213. Second, for reasons already stated, I find that MF undertook responsibilities to Respondents in only a very limited context, assisting in the preparation of the regulatory disclosures. When Respondents decided to take advantage of that assistance, they knew that MF acted only for Claimants in relation to the preparation and completion of the Investment Agreements. Until the 26 November Agreements were executed and delivered, Respondents were not limited partners. MF owed no pre-contractual duties to Respondents, save, perhaps, in relation to the work it did preparing regulatory approval documents. No breach of fiduciary duty and no actionable consequences of any possible breach have been shown to have occurred in relation to that limited engagement. As a result, assuming, without deciding, that there otherwise might be merit to Respondents attempt to taint Claimants with a breach of fiduciary duty by MF, Claimants are not answerable for any pre-contractual breach of fiduciary duty by MF.

214. Third, to the extent that I have found, above, that the alleged misrepresentations or non-disclosures relied upon as breaches of fiduciary duty did not occur or have not been proven, a breach of fiduciary duty claim founded on those allegations also must fail.

215. For the reasons I have stated, the Respondents' defence and counterclaims based on pre-contractual breaches of fiduciary duty fail.

(E) Claimants' Alleged Failures to Comply with Applicable Securities Legislation

216. Respondents contend that the relevant Investment Agreements are void or voidable at their instance by virtue of Claimants' non-compliance with: [RPHB1 ¶¶312–14; RPHB2 ¶¶182-214; RSOC1 ¶¶177–97**]**

a. Section 10(b)(5) of the U.S. *Exchange Act* and Exchange Rule 10b-*5* (**Federal Securities Fraud Claim**)

b. §§ 25110, 25401 of the *California Corporations Code*; (**California Securities Claims**)

c. §§ 114, 115, 277 and 298 of the Hong Kong Securities and Futures Ordinance (**HK SAFO Claims**); and

d. the laws of the Peoples Republic of China (**PRC Securities Laws Claims**).

(a) <u>*Federal Securities Fraud Claim*</u>

217. SEC Rule Section 10b-5, codified at 17 C.F.R. § 240.10b-5 (**SEC Rule 10b-5**), and promulgated by the SEC pursuant to its authority under Section 10(b) of the *Securities Exchange Act* of 1934 (**Exchange Act**), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange—
>
> a. To employ any device, scheme, or artifice to defraud,
> b. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> c. To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

218. Although Section 10b-5 of the *Exchange Act* does not explicitly provide a civil remedy for its violation, the United States Supreme Court has held that a private right of action is implied by the Rule. See *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 166-67 (1994) ("As we have interpreted it, 10(b) of the *Securities Exchange Act* of 1934 imposes private civil liability[.]"). Claimants do not dispute that a civil remedy is available.

219. Under Section 10b-5, a party must establish each of the following elements: "(1) a material misrepresentation or omission … (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37–38, 131 S. Ct. 1309, 1317, 179 L. Ed. 2d 398 (2011) (citations omitted).

220. Respondents submit that the same evidentiary record that supports Respondents' allegations of pre-contractual fraud and breach of fiduciary duty warrants an award for violation of *Exchange Act* Section 10b-5 and Exchange Rule 10b-5. They cite, for example, *In re Ramada Inn Securities Litig.,* 550 F. Supp. 1127, 1135 (D. Del. 1982) ("the nondisclosure of material facts underlying a breach of fiduciary duty . . . does violate Section 10(b)) (citing *Healey v. Catalyst Recovery of Penn., Inc*., 616 F.2d 641 (3d Cir. 1980); *SEC v. Platforms Wireless Int'l Corp*., 559 F. Supp. 2d 1091 (S.D. Cal. 2008) (upholding Section 10(b) claim against CEO for statement that "implementation and deployment of its infrastructures were completed," noting that the CEO's statement permitted only conclusion that company had actually developed a viable system, but the CEO knew that the company only had a description and definition of how the system would operate, but lacked the funds to make the system). [RSOC1 ¶¶180, 181]

221. Respondents allege that Claimants' misrepresentations were made with requisite "intent to manipulate, deceive, or defraud, and recklessness." In re *Nat'l Century Fin. Enterprises, Inc.,* 846 F. Supp. 2d 828, 866 (S.D. Ohio 2012), adhered to on denial of reconsideration sub nom. *Crown Cork & Seal Co. Master Ret. Tr. v. Credit Suisse First Boston Corp*., No. 12-CV-05803-JLG, 2013 WL 490717 (S.D.N.Y. Feb. 6, 2013). Respondents submit that scienter may be established by "(a) showing that the defendants had both motive and opportunity to commit the fraud, or (b)

constituting strong circumstantial evidence of conscious misbehavior or recklessness." *Local 731 I.B. of T. Excavators and Pavers Pension Trust Fund v. Swanson,* No. 09-799, 2011 WL 24444675, at *11 (D. Del. June 14, 2014); See *S.E.C. v. Woolf,* 835 F. Supp. 2d 111, 119 (E.D. Va. 2011) (allegations that offerors misrepresented "their own expertise" and "their own success in trading securities" to potential investors sufficient to satisfy scienter requirement of Section 10(b)). [RSOC1 ¶189]

222. Respondents submit that Chung's scienter is attributable to each of the Claimant GPs. See: Thomas L. Hazen, Treatise on the Law of Securities Regulation, 3 Law Sec. Reg. § 12:58 (Oct. 2017 Update) ("knowledge of a corporate officer or agent acting within the scope of authority is attributable to the corporation"). [RSOC1 ¶191]

223. Respondents contend that Claimants had both the motive and opportunity necessary to establish scienter for purposes of Section 10(b) as "motive" is satisfied by establishing that Claimants "benefited in some concrete and personal way from the purported fraud." *ECA, Local 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.,* 553 F.3d 187, 198 (2d Cir. 2009). They submit that Claimants clearly received a concrete, personal benefit from their fraudulent inducement of GIIL's investment sufficient to satisfy the scienter requirements of Section 10(b). [RSOC1 ¶¶192]

224. Respondents submit that GIIL clearly and reasonably relied on the content of Claimants' fraudulent statements by entering into the Investment Agreements. See *In re Ramada Inn Securities Litig*. (reliance established where plaintiff purchased security "upon the recommendation of an investment advisor whose advice was in turn based on management misreporting of corporate affairs" (citation omitted)); *Glosser v. Cellcor, Inc*., Civ. No. 12725, 1994 WL 593929, at * (Del. Ch. Ct. Sept. 2, 1994) (affirming negligent misrepresentation claim for misstatements in investor prospectus, noting "[t]he whole purpose of the prospectus is to invite reasonable reliance."). [RSOC1 ¶¶193–96]

225. Respondents submit that as a result of Claimants' violations of Section 10(b), they incurred substantial damages including the deposit of US$80 million in escrow accounts controlled by Claimants, significant personnel costs of monitoring and mitigating Claimants' wrongdoing, reputational harm, and the legal costs of outside counsel. [RSOC1 ¶¶197]

226. Claimants contend that in view of the overlaps between essential elements of common law fraud and liability under the *Exchange Act*, the Respondents' claims under this heading fail for the same reasons as their misrepresentation claims. I agree. [CSOC3 ¶180]

227. I agree with Claimants that while a plea of motive and opportunity may be sufficient to constitute a pleading of scienter, to establish liability Respondents must prove that it is more likely than not that Claimants acted with the "intent to deceive, manipulate, or defraud" when they made the alleged misstatements in question. *Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, at 48, 131 S. Ct. 1309, 1317, 179 L. Ed. 2d 398 (2011)*, 563 U.S. at 48.

228. I also agree with Claimants that Respondents can only establish liability under Section 10(b) based on forward looking statements if such statements were made "with actual knowledge" that the statement was false or misleading. 15 U.S.C.A. § 78u-5. A forward-looking statement is defined as a "statement containing a projection of revenues, income, earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items." 15 U.S.C. § ¶¶78u–5(i)(1)(A); *In re Cutera Sec. Litig.,* 610 F.3d 1103, 1111 (9th Cir. 2010). [CPHB1 ¶¶395, 396]

229. In these circumstances, the findings I have made earlier in this award concerning Respondents' allegations of fraud, equitable fraud and negligent misrepresentation based on the same alleged misrepresentations and non-disclosures are dispositive of the defences and claims under the *Exchange Act* and SEC Rule 10b-5.

230. For the reasons I have stated, the claims and defences based on alleged non-compliance with the *Exchange Act* and SEC Rule 10b-5 fail.

(b) *Securities Law Claims—Applicability of Delaware, California, Hong Kong and PRC Securities Laws*

231. Respondents invoke the securities laws of California, Hong Kong and China in support of their defences of unenforceability and counterclaims for rescission and damages. Claimants contend that because of the Governing law clauses in the Investment Agreements, only Delaware law is relevant. The governing law provisions state:

> Governing Law: This Agreement will be governed by and construed under the laws of the State of Delaware as applied to agreements among residents of such state made and to be performed entirely within such state.

232. The Arbitration Agreements, from which the authority of the Sole Arbitrator is derived, state (in relevant part)

> Any claim, dispute, or controversy of whatever nature arising out of or relating to this Agreement, including, without limitation, any action or claim based on tort, contract, or statute … shall be resolved by final and binding arbitration ("Arbitration") …. The arbitration shall be … held in San Francisco, California.

233. The relevant defences and counterclaims, while based on statutes, concern the enforceability and possible rescission of the 26 November Agreements. There has not been any objection that the subject matter of the statutory defences and counterclaims falls outside the scope of the Arbitration Agreements or that they do not arise out of or relate to the Investment Agreements.

234. The agreements of the parties identify only two potentially applicable laws—Delaware law, as provided in the Governing Law provision, and California law, as the parties agreed that the juridical seat of arbitration is San Francisco, California. In the light of what was expressly agreed, there is no basis for me to apply either Hong Kong or Chinese law to determine whether the agreements are enforceable or should be rescinded.

235. For two alternative reasons, however, I find that California securities laws apply. First, I find that the securities laws of California apply in accordance with Delaware law. Second, as this is an international commercial arbitration, I find that I must have regard to the mandatory laws at the juridical seat of arbitration. My analysis is set out in the following paragraphs.

236. In their First Post-Hearing Brief, Claimants contended that Respondents' claims under California securities laws can have no effect on the enforceability of the Investment Agreements because "[Respondents] waived [their] right to sue [Claimants] under California law when [they] agreed to adjudicate disputes with [Claimants] under Delaware law;" citing *OpenGate Capital Grp. LLC v. Thermo Fisher Sci. Inc.,* No. CV 13-1475-GMS, 2014 WL 3367675, at *14 (D. Del. July 8, 2014) (dismissing claim that defendant violated California Securities laws because agreement contained a Delaware choice-of-law provision and plaintiff failed to

plead an essential element). Claimants submit that Delaware courts will enforce a contract that complies with Delaware law and is governed by Delaware law, even if the contract would be invalid or illegal under the laws of another jurisdiction, citing *Change Capital Partners Fund I, LLC v. Volt Elec. Sys., LLC*, No. CV N17C-05-290 RRC, 2018 WL 1635006, at *9 (Del. Super. Ct. Apr. 3, 2018) (dismissing claims alleging violations of New York and Texas usury laws because loan agreement contained Delaware choice-of-law provision and claimant had failed to establish that New York or Texas law would have applied but for the choice of law provision). [CPHB1 ¶396]

237. The cases relied upon by Claimants show that even where there is an express choice of law provision that would on its face encompass the claim, a Delaware Court applying Delaware law may in some circumstances determine that the laws of another state should apply. In *Change Capital* the Delaware Superior Court said [at *5]: (emphasis added)

> However, where, as here, the contracting parties designate a state's laws to apply, the *Restatement (Second) of Conflicts* § 187 instructs:
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Delaware courts have recognized the exception in *Restatement (Second) of Conflicts* § 187(2)(b) stating, "the Restatement is generally supportive of choice-of law provisions, but recognizes that allowing parties to circumvent state policy-based contractual prohibitions through the promiscuous use of such provisions would eliminate the right of the default state to have control over enforceability of contracts concerning its citizens." [*Ascension Ins. Holdings, LLC v. Underwood,* 2015 WL 356002, at *2 (Del. Ch. Jan. 28, 2015). "A mere difference between the laws of two states will not necessarily render the enforcement of a cause of action arising

in one state contrary to the public policy of another." [*Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 45 (Del. Ch. 2012) (quoting *J.S. Alberici Const. Co.,* 750 A.2d at 520)]

238. As described in more detail below, the defence and counterclaim based on non-compliance with California securities laws arise out of the sale of and offering for sale of securities in California, activities that are regulated by California law in the public interest. None of the acts or omission relevant to that claim occurred in Delaware. There was no offering for sale or sale of securities in Delaware. Absent the choice of law provision clearly it would be California law, not Delaware law, that applies to regulate Claimants offering for sale and sale of the securities. A fundamental policy of California state law is that those who sell or offer for sale securities in California should not be able to avoid the application of California laws by the device of including waivers or other exculpatory clauses in the agreements giving effect to the transaction See *Hall v. Superior Court*, 150 Cal. App. 3d 411, 418 (1983) ("[T]he right of a buyer of securities in California to have California law and its concomitant nuances apply to any future dispute arising out of the transaction is a 'provision' within the meaning of Section 25701 which cannot be waived or evaded by stipulation of the parties to a securities transaction.")

239. The Claimants' submission is, in effect, that the execution of the Investment Agreements containing Delaware law provisions, amounts to a waiver of those breaches even if the execution was a direct consequence of prior breaches of California securities laws. They have not suggested, nor could they, that Delaware securities law should apply to Claimants' securities-related activities in California. Were Claimants' position to be accepted it would have the effect of avoiding entirely any state regulation of their securities-related activities. That is, in my view, the very form of perverse result that securities laws are intended to prevent.

240. While clearly Arizona law has no direct application here, I agree with the sentiment expressed by the Arizona court in *Zounds Hearing Franchising, LLC v. Bower,* No. CV-16-01462-PHX-NVW, 2017 WL 4399487, at *1 (D. Ariz. Sept. 19, 2017), when that court said:

> [S]ellers of securities cannot excuse themselves from state securities laws by saying in their offering that the buyer agrees the state's securities laws do not apply to the seller—or that the laws of some more lenient state will apply instead of the laws of the state of the offering…. If an in-state franchisor selling an in-state franchise to an

> in-state franchisee tried to escape those obligations by writing in his franchise agreement that the franchisee agrees he does not have to comply with those laws, he would be laughed out of court. That is because the very nature of such statutes is to impose obligations on people that override what they might otherwise agree to among themselves. Such statutes say what you cannot agree to.

See also, *A & R Logistics Holdings, Inc. v. FDG Logistics LLC*, 148 A.3d 1171 (Del. 2016) at 855 (A Delaware choice of law provision is not "a mechanism for the wholesale importation of every provision of Delaware statutory law into the commercial relationship of contracting parties.")

241. I find that, although the Delaware choice of law provision is sufficiently broad to encompass the counterclaims and defences seeking contractual remedies based on violations of securities laws:

    a. to apply the Delaware choice of law provision to exclude the application of California law to the defences and counterclaims relating to the sale and offering for sale of securities in California would be contrary to a fundamental California policy;

    b. California has a materially greater interest than Delaware in the determination of those issues; and

    c. California would be the state of the applicable law in the absence of the choice of law by the parties.

242. Alternatively, unlike the present situation, the authorities cited by Claimants concerned the laws to be applied by a Delaware Court, in proceedings in Delaware, where there was a Delaware choice of law clause. In *OpenGate*, there was not only a choice of law provision but also a forum selection provision specifying that all disputes were to be determined by a Delaware Court. This proceeding, however, is an international arbitration. The forum selected by the parties is arbitration in San Francisco, California. That juridical connection to a state other than the state whose laws were to govern the contract was not present in any of the cited cases.

243. I am mindful of the conceptual difference between substantive laws and the laws applicable to the conduct of the arbitration. But, the effect of the choice of a California seat and the choice of California law as the *lex arbitri* also, in my view,

carries with it a requirement that regard be had to mandatory laws in force in California.

244. For these two independent reasons, while I agree with Claimants that Hong Kong and Chinese securities laws are not to be applied in this arbitration, I do not agree with Claimants' contention that the Governing Law provisions of the relevant Investment Agreements preclude the need for Claimants to comply with California securities statutes.

(c) *California Securities Law—Sale of Unqualified Securities*

245. The California Corporate Securities Law of 1968 (**CSL**) forms part of the California Corporations Code (**CCC**). Under CCC Section 25110, it is unlawful to offer or sell in California any security unless such security has been qualified or unless such security is exempted from such qualification. In relevant part, the statute states:

> It is unlawful for any person to offer or sell in this state any security in an issuer transaction (other than in a transaction subject to Section 25120), whether or not by or through underwriters, unless such sale has been qualified under Section 25111, 25112 or 25113 . . . or unless such security or transaction is exempted or not subject to qualification under Chapter 1 (commencing with Section 25100) of this part.

246. Respondents allege that the limited partnership interests sold to Respondents are "securities" within the meaning of the CCC. They submit that Claimants offered for sale and sold the limited partnership interests to Respondents in California. The evidence shows that Claimants did not qualify the offering or sale under the CCC and also did not file a Limited Offering Exemption Notice of Transaction (**Notice of Transaction**) pursuant to 10 Cal. Code. Reg. § 260.102.14. Respondents submit that because Claimants neither qualified the sale of limited partnership interests nor filed a Notice of Transaction, the sale of the limited partnership interests in the Funds was in violation of CCC Section 25110.

247. Respondents submit that the failure to comply with applicable requirements under the CCC renders the transaction voidable at the option of the Respondents as purchaser under CCC Section 25503, citing *Malik v. Universal Res. Corp*., 425 F. Supp. 350, 360–61 (S.D. Cal. 1976) ("Violations of § 25110 give rise to rescissory or compensatory relief fixing liability personally on the seller(s) of the securities."). Respondents submit that as a result, Respondents are entitled to claim the return

of all monies paid to purchase the investment relying on CCC Sections 25110 and 25503. [RSOC1 ¶¶220–38; RSOC4 ¶¶173–81]

248. Claimants contend that Respondents' investment falls within the scope of the Limited Offering Exemption to qualification under CCC Section 25102(f) because (i) sales of limited partnership interests in the Funds were limited to not more than 35 persons (ii) Respondents are sophisticated investors who could be reasonably assumed to have the capacity to protect their own interests in connection with the transaction (iii) Respondents represented that they were purchasing for their own account "and not with a view to or for sale in connection with any distribution of the security" and (iv) Respondents' investment was not accomplished "by the publication of any advertisement." [CSOC3 ¶¶193,194]

249. Claimants submit that, because the circumstances satisfy the elements of the Limited Offering Exemption under CCC 25102(f), they were not required to qualify their sale of limited partnership interests under California law. [CSOC3 ¶195]

250. 10 Cal. Code. Reg. § 260.102.14 requires that an issuer of securities claiming a Limited Offering Exemption must file with the Commissioner a Notice of Transaction. Reg. § 260.102.14(b) states:

> (b) A notice required by this section shall be filed with the Commissioner no later than 15 calendar days after the first sale of a security in the transaction in this state. No notice is required if none of the securities offered are purchased in this state. (emphasis added)

Claimants submit that they were not required to file a Notice of Transaction, and did not do so, because none of the securities offered were "purchased" in California.

251. Respondents submit that the circumstances do not fall within the Limited Offering Exemption because Respondents are not sophisticated investors who "could be reasonably assumed to have the capacity to protect their own interests in connection with the transaction." They submit that Claimants were required to file a Notice of Transaction because the limited partnership units were offered for sale, sold and "purchased" in California. [CSOC4 ¶¶176, 177]

252. I agree with Respondents that the limited partnership interests in the Funds are securities, because the limited partnerships are "investment contracts" as the term is used in CCC Section 25019, which provides, in relevant part:

> "Security" means any . . .. investment contract . . . or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase . . . the foregoing.

253. I also agree with Respondents that there was an offer to sell and sale of securities in California. In relevant part, CCC Section 25008 provides:

> (a) An offer or sale of a security is made in this state when an offer to sell is made in this state, or an offer to buy is accepted in this state […]. An offer to buy or a purchase of a security is made in this state when an offer to buy is made in this state, or an offer to sell is accepted in this state […].
>
> (b) An offer to sell…is made in this state when the offer…originates from this state […]. An offer to buy…is accepted in this state when acceptance is communicated to the offeror in this state; and acceptance is communicated to the offeror in this state when the offeree directs it to the offeror in this state reasonably believing the offeror to be in this state and it is received at the place to which it is directed.

254. Section 25017 clarifies the circumstances that constitute an "offer" or "sale" of a security:

> (a) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value. […]
>
> (b) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

255. As stated earlier in this award, I find that the 26 November Agreements were concluded when Claimants, in California, sent an offer to Respondents, in China, and Respondents then communicated their acceptance of the offer to Claimants in California. I find that there were "offers to sell" securities (the limited partnership interests) to Respondents "in this state" (i.e. California) within the meaning of Sections 25008 and 25017. I agree with Respondents that in addition to the offer that lead directly to the completion of an agreement, it would have been enough to subject Claimants' conduct to California securities laws that Chung made phone calls, and sent emails, WeChats, and text messages to Respondents, their representatives, and Wang from California concerning the potential Funds and the terms of the Funds. Cf. *Cal. Corp. Comm'r. Ops*., Op. No. 76/13C (June 15, 1976) ("even when an offer of a security is initially made in a foreign country, the offer will be subject to the CSL if subsequent discussions are held with the investors while the offeror is in California"); *Cal. Corp. Comm'r. Ops.,* Op. No. 81/10C (June 15, 1976)

(because GP was located in California and was available to answer questions, the Commissioner was unable to conclude that offers would not be made in California); *11 Cal. Corp. Comm'n Official Op*. (Nov. 12, 1981) (calls from outside the state to GP from potential investors seeking information regarding limited partnership made it an offer "from" California).

256. There also was a "sale" of securities in California. Section 25008 (a) states (emphasis added) that "An offer or sale of a security is made in this state when an offer to sell is made in this state." There was an offer to sell made in California.

257. In addition, the proposed agreements were issued from California. Respondents directed their acceptance to Chung and his California attorneys in California, and Respondents' funds were delivered to a California bank. Chung executed the SAs and side letters in California on 23 November 2015. He executed the LPAs on his own and GIIL's behalf in California on 18 December 2015. See *Hardy v. Musicraft Records*, 93 Cal. App. 2d 698, 701, 209 P.2d 839, 841 (1949) (securities were sold in California where sales contract was executed there); See *Parvin v. Davis Oil Co*., 524 F.2d 112, 117 (9th Cir. 1975) ("it seems clear that where any statutory element of a sale takes place in California, its courts have been willing to apply injunctive relief or criminal penalties for failure to obtain a permit"). See also *Spaude v. Mysyk,* No. 1:16-CV-01836, 2017 WL 9485666, at *8 (N.D. Ohio July 14, 2017), report and recommendation adopted, No. 1:16 CV 1836, 2017 WL 4221076 (N.D. Ohio Sept. 22, 2017) ("sale occurred in California because "the offering materials in this action apparently emanated from [the Funds'] California headquarters, and the buyers' acceptances were apparently directed at a California entity" (analyzing CAL. CORP. CODE § 25008 and citing *Diamond Multimedia Sys., Inc. v. Superior Court*, 968 P.2d 539, 548 (Cal. 1999) ("An offer to sell is made 'in this state' if the offer originates from California. … Thus, a sale occurs 'in this state' even if the purchaser is in, and communicates acceptance of the offer to sell from, New York.")).

258. Because there was both an offer for sale and a sale of securities in California, the offering and sale had to be qualified, or, if there was entitlement to an Exemption from Qualification, a Notice of Transaction had to be filed, unless there was no "purchase" of securities in California.

259. The offer and sale of limited partnership interests was not qualified. Claimants bear the burden of demonstrating entitlement to the exemption from the qualification

requirement upon which they rely. *People v. Simon*, 9 Cal. 4th 493, 500–501, 886 P.2d 1271, 1276 (1995) ("In any proceeding under [California's Corporate Securities Law of 1968], the burden of proving an exemption or an exception from a definition is upon the person claiming it.").

260. I agree with Claimants that they were entitled to a Limited Offering Exemption. I do not agree with Respondents that they were not sophisticated investors who could be reasonably assumed to have the capacity to protect their own interests in connection with the transaction. As stated earlier in this award, I find that Respondents were part of a sophisticated international enterprise and had substantial capacity to protect their own interests.

261. In view of my findings, it is necessary to determine whether the limited partnership units were "purchased" in California so that, as Claimants contend, it was not necessary for Claimants to file a Notice of Transaction. Claimants submit that the limited partnership interests were "purchased" outside California, but they do not specify where the purchase allegedly did occur. For the same reasons as I find that there was a sale in California, I find that there was a purchase in California. I see no basis to conclude that the purchase took place somewhere else.

262. I find that Claimants failed to comply with 10 Cal. Code. Reg. § 260.102.14 by failing to file a Notice of Transaction with the Commissioner no later than 15 calendar days after the sale of the Limited partnership Interests to Respondents.

263. CCC Section 25503 provides remedies for a buyer of a security from a seller who is in violation of Section 25110. The statute states, in relevant part:

> Any person who violates Section 25110 . . . of this part . . .shall be liable to any person acquiring from him the security sold in violation of such section, who may sue to recover the consideration he paid for such security with interest thereon at the legal rate, less the amount of any income received therefrom, upon the tender of such security, or for damages, if he no longer owns the security, or if the consideration given for the security is not capable of being returned. Damages, if the plaintiff no longer owns the security, shall be equal to the difference between (a) his purchase price plus interest at the legal rate from the date of purchase and (b) the value of the security at the time it was disposed of by the plaintiff plus the amount of any income received therefrom by the plaintiff. (Emphasis added)

264. Respondents submit that because of Claimants' failure to file the Notice of Transaction, Respondents are entitled to the return of all monies paid to purchase the investment, relying on CCC Sections 25110 and 25503. *Malik v. Universal Res. Corp*., 425 F. Supp. 350, 360–61 (S.D. Cal. 1976) ("Violations of § 25110 give rise to rescissory or compensatory relief fixing liability personally on the seller(s) of the securities").

265. I have considered whether the failure to file a Notice of Transaction "violates" Section 25110. CCC Section 25102 begins with the phrase "The following transactions are exempted from the provisions of Section 25110." After describing the exempt transactions, CCC Section 25102(f)(4) states: (emphasis added)

> The commissioner shall by rule require the issuer to file a notice of transactions under this subdivision.
>
> The failure to file the notice or the failure to file the notice within the time specified by the rule of the commissioner shall not affect the availability of the exemption. Any issuer that fails to file the notice as provided by rule of the commissioner shall, within 15 business days after discovery of the failure to file the notice or after demand by the commissioner, whichever occurs first, file the notice and pay to the commissioner a fee equal to the fee payable had the transaction been qualified under Section 25110. Neither the filing of the notice nor the failure by the commissioner to comment thereon precludes the commissioner from taking any action that the commissioner deems necessary or appropriate under this division with respect to the offer and sale of the securities.

266. The offering for sale and sale of the limited partnership interests to Respondents meets the requirements to be exempted under Section 25102(f). It is an exempt transaction. The filing of a Notice of Transaction is not a pre-condition to entitlement to the exemption. Failure to file, even if rectified, exposes the Issuer to sanctions by the Commissioner. I find that a failure to file a Notice of Transaction in accordance with 10 Cal. Code. Reg. § 260.102.14 in respect of the offering for sale or sale of unqualified securities in circumstances that are exempt from the qualification requirements does not "violate" Section 25110 within the meaning Section 25503. It is not unlawful under Section 25110 to offer to sell or sell a security or engage in a transaction that "is exempted."

267. For the reasons I have stated, I find that the Respondents' defence and counterclaims based on violation of Section 25110 fail.

(d) California Securities Laws—False and Misleading Statements

268. Respondents contend that Claimants violated Section 25401 of the CSL by making untrue or misleading statements to Respondents in connection with the sale or offering for sale of the limited partnership interests to Respondents, as a result of which Respondents are entitled to claim the return of all monies paid to purchase the investment. [RSOC1 ¶¶239–49] The alleged false or misleading statements are substantially the same as those which form the basis of the common law fraud and securities fraud claims. [RSOC1 ¶242]

269. As set forth above, the limited partnership interests are "securities" as defined in CCC Section 25109, and they were offered for sale and sold in California. It is unlawful to offer or sell securities by means of misleading or untrue statements. CCC Section 25401 provides:

> It is unlawful for any person to offer or sell a security in this state, or to buy or offer to buy a security in this state, by means of any written or oral communication that includes an untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in the light of the circumstances under which the statements were made, not misleading.

270. Section 25401 "applies to all sales of securities, regardless of whether they are exempt from the registration requirements" (*Stewart v. Ragland*, 934 F.2d 1033, 1047 (9th Cir. 1991)).

271. No element of intent is needed to establish a violation of Section 25401. See *Altitude Entertainment Films, Inc. v. Marchand*, 2016 WL 6037881, at *7 (Cal. Dept. Corp. July 28, 2016) citing *People v. Simon*, 9 Cal. 4th 493, 515, 886 P.2d 1271, 1286 (1995)).

272. "To determine whether a statement is misleading, even when literally true, courts in the Ninth Circuit and in California apply an objective reasonable investor test: 'a statement is misleading if it would give a reasonable investor the impression of a state of affairs that differs in a material way from the one that actually exists.'" *Russian Hill Capital, LP v. Energy Corp. of Am.*, No. 15-CV-02554-HSG, 2016 WL 1029541, at *5 (N.D. Cal. Mar. 15, 2016) (quoting *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985 (9th Cir. 2008)).

273. Statements of opinion or forward-looking statements are not deemed to be "facts" under Section 25401, unless it is shown that the speaker did not actually hold the opinion or believe the prediction reasonable. See *Yu-Sze Yen v. Landwin Grp., LLC*, No. CV1002398CJCMLGX, 2010 WL 11549679, at *9–10 (C.D. Cal. Dec. 8, 2010) (holding that opinions or predictions as to future events "are not actionable under [Section 25401] because... [they are] not an 'untrue statement of fact"').

274. A misrepresentation is material if "there is a substantial likelihood that, under all the circumstances, a reasonable investor would consider it important in reaching an investment decision." *Ins. Underwriters Clearing House, Inc. v. Natomas Co.,* 184 Cal. App. 3d 1520, 1526, 228 Cal. Rptr. 449, 453 (Ct. App. 1986) (noting that the test for materiality is the same under both California and Federal Securities laws). A representation is not a statement of "material" fact if the "statement at issue is too vague to be actionable." *In re Aetna, Inc. Sec. Litig*., 617 F.3d 272, 283 (3d Cir. 2010) (holding that a description of a pricing policy as "disciplined" was not material).

275. A failure to state a material fact is not actionable unless it is required to clarify a prior misleading statement of fact. *See Freiberg v. Pac. Sci. Co.*, No. G027641, 2002 WL 31045495, at *3 (Cal. Ct. App. Sept. 13, 2002) (explaining that "[t]he duty to disclose imposed by Corporations Code sections 25400 and 25401 . . . only arises when a prior statement is misleading" and noting that federal securities laws impose the same duty and looking to federal securities cases for guidance).

276. Respondents submit that in order to induce Respondents' investment, Chung made numerous promises and representations that could not realistically be fulfilled. [RSOC4 ¶187]

277. Respondents refer, first, to various statements made by Chung concerning his plans to raise up to US$150 million in capital from other limited partners within one year and his goal of closing 3–5 investments per year. [RSOC4 ¶¶187(a) and (b)] I find, and Chung admitted, that he did describe the objectives and plans for the Funds in the terms alleged. He acknowledged that at an early stage in the discussions he had thought it might even be feasible to close 5–7 deals a year, but that he revised that estimate downward in later discussions. [TR. 394-397] Respondents submit that Chung had either no intention or no ability to fulfil any of these objectives.

278. Because they were forward-looking statements of opinion these statements are not deemed to be "facts" under Section 25401, unless it is shown that Chung did not actually hold the opinions or believe the prediction reasonable. See *Yu-Sze Yen v. Landwin Grp., LLC, supra*. I find that when he made these statements Chung believed them to be reasonable estimates of what could be achieved and that he intended to work hard toward achieving them.

279. Respondents submit, however, that Chung negligently or willfully failed to disclose material facts within his knowledge which, if disclosed, would have alerted Claimants to the fact that Claimants did not have the ability to achieve the stated objectives, including: [RSOC4 ¶¶189–90]

    a. that Chung had been terminated from Khosla;
    b. that Respondents' capital commitment was historically large for a first time VC Fund;
    c. that the Funds' investment approach was contrarian and inordinately speculative—even by VC standards;
    d. that the investments entailed many risks and that Respondents' commitment to anchor a first-time fund manager was uniquely risky;
    e. that 2016 would be a difficult year for raising first-time financing for startups; and
    f. that material terms of the proposed investment were not included in the SAs, but rather were set out in Appendix 1 and the LPAs.

280. Claimants contend that as the forward-looking statements of Chung were not statements of fact, there was no duty under Section 25401 to disclose any of the allegedly undisclosed facts on which Respondents rely. Respondents, however, submit that the present situation is akin to that in *People v. Butler* 212 Cal. App. 4th 404, 423–24, 151 Cal. Rptr. 3d 352, 369 (2012), in which the California Court of Appeals said (at 423-24):

> The theory of the prosecution's case was defendant's promises to pay his investors were misleading in light of material omissions by defendant pertaining to the likelihood of repayment. Defendant's subjective belief about whether he could repay his investors was irrelevant under the prosecution's theory. Defendant's violation of section 25401 was providing outrageously unrealistic promises to unsophisticated investors without providing the investors with the material facts necessary for them to understand defendant's promises could not realistically be fulfilled. We agree with the [prosecution's] interpretation of section 25401.

281. *People v Butler* was a criminal case in which the defendant sought to overturn, *inter alia,* a conviction for breach of Section 25401. In simple terms, the defendant had made a specific promise to pay investors a 12% return. The Court found that the promised returns were not achievable. The structure that was to yield this return was similar to a Ponzi scheme. Defendant argued, however, that he genuinely believed that the promised return could and would be paid. The Court therefore considered whether the conviction could be sustained if that were true. The Defendants position was similar to that taken by Claimants in this case. He said that he had made no material statement of fact by promising a 12% return and that he had been convicted for failing to disclose additional facts that he had no duty to disclose. The Attorney General submitted that the Defendant's failure to disclose material facts about his history and the financial precariousness of the businesses in which he was offering investments, was sufficient to satisfy Section 25401. The Court said: (at [12] emphasis added)

> But the question the parties dance around in their briefs is whether a *false promise* to repay an investor in the future can be "*an untrue statement of a material fact*" (or a "misleading" statement of fact) under section 25401. (Italics added.) It is implicit in the Attorney General's view that a schemer should not be able to avoid criminal liability under section 25401 by providing no information other than a promise to provide fantastic returns. By making his promises of 12 percent interest and return of principal, was defendant making either false statements or, under the circumstances, misleading statements? Conversely, is a "Ponzi schemer" innocent of violating section 25401 if he does not make any representations of past or existing fact in extracting "investments"?

282. After the passage in the decision upon which Respondents rely, the Court said: (at [13]) (emphasis added)

> We agree with the Attorney General's interpretation of section 25401. In cases involving pyramid schemes or Ponzi schemes in which unsophisticated investors' money is being used to pay off interest owed to other investors and money is being siphoned off to enrich principals before the underlying business is profitable, promises to investors to pay interest and return principal are inherently either false or misleading. Here, defendant's promises to repay principal and interest on promissory notes were misleading in the absence of disclosures about the nature of his business enterprises and his prior history of fleecing elderly investors.

283. *People v Butler* determined that a promise to achieve a financial result is inherently a representation of fact that the promised result is capable of being achieved. When the facts are that it was inevitable that the promised financial result could not be achieved, the inherent statement of fact is false or, at best, misleading unless

accompanied by disclosure of all material facts. In the present case, Chung made no promise that his stated objectives would be achieved. His statements remain statements of opinion. While there were risks that the stated objectives could not be achieved, and while the evidence shows that Claimants did not actually achieve the goal of raising US$150 million from other limited partners or the goal of closing 3–5 investments per year, on the whole of the evidence, I do not find that the failure was inevitable in the same sense that payment default is inevitable in a Ponzi scheme.

284. For the reasons I have stated, I do not find that Claimants were under a statutory duty to disclose by virtue of Chung's statements concerning his plans to raise up to US$150 million in capital from other limited partners within one year and his goal of closing 3–5 investments per year.

285. Respondents also refer to Chung's alleged encouragement in Respondents of the belief that it was realistic for them to assume that their objective—of having Fund 1 focus on investments in technologies that would be deployed in CFLD's industrial parks—could be achieved. They submit that Claimants had a duty to disclose that it would be unworkable to exclusively focus on companies that could re-locate to CFLD's industrial parks. [RSOC4 ¶187(c)]

286. The evidence shows that Chung did tell Respondents of his belief that limiting investments to companies that could re-locate to a CFLD industrial park was unworkable, because it would deny the funds the ability to close on the best investments. For that reason, even though Respondents' objective had been agreed to be desirable at an early stage, no requirement was included in the Investment Agreements. [CWS1 ¶¶50–62; CWS6 ¶¶45–48; TR. 327–28] There was no material non-disclosure.

287. For the reasons I have stated, Respondents' defence and counterclaims based on Section 25401 fail.

(F) Post-Closing Changes: Claimants' Alleged Breach of Fiduciary Duty and Unauthorized Alterations

288. I have found, above, that Claimants' purported Post-Closing Changes and the execution of revised documents relying on the Appendix 1 POAs were not authorized with the result that the Post-Closing Changes were never agreed.

289. As described above, the Post-Closing Changes included: the addition of new default provisions in both LPAs; the addition of a new "fee waiver" provision in the Fund 1 LPA allowing the GP to satisfy its 1% capital contribution obligation by waiving payment of a portion of its management fee; the deletion of restrictions in the China Fund LPA on the GP's ability to borrow money on behalf of the fund, including the deletion of a requirement for LP consent; and, modifications to the risk disclosures in the Appendix 1. I find that the changes to the default provisions and the deletion of the requirement for LP consent to borrowings were material changes, in that they fundamentally changed the risks associated with the investment from the perspective of GIIL. The fee waiver provision, while of benefit to the GPs was not material in that the net financial result from the perspective of GIIL was not impacted. [Loy Rebuttal Report ¶76, n. 111]

290. Respondents contend that the actions of Claimants in purporting to make the Post-Closing Changes, failing to disclose the fact they had been made [RSOC4 ¶¶2–7], invoking the purported changes against Respondents [RSOC4 13(c)] and wrongly asserting privilege over documents revealing the purpose and intent of the Post-Closing Changes [RSOC4 ¶¶8,9, 59–64] have legal consequences.

291. Respondents contend, first, that these actions constitute a breach of fiduciary duty as a result of which the LPAs are voidable by Respondents. [RSOC4 ¶¶133–50; RPHB1 ¶¶11(b), 154–203, 247–49, 288–94, 326–29, 395; RPHB2 ¶¶165–68, 249] Respondents contend, second, that as matter of Delaware contract law, an unauthorized attempt to make a material alteration to a written contract makes the entire agreement voidable, and that this principle applies to the facts of the present case. [RPHB1 ¶¶326–29]

292. Respondents contend that as the LPAs are void, or voidable at their instance, the entire transaction must be rescinded because the SAs and EAs are not valid stand-alone contracts that can be enforced without valid LPAs. [RPHB1 ¶¶295, 296, 330–31; RPHB2 ¶¶229–31]

(a) *Post-Closing Changes as Breaches of Fiduciary Duty*

293. Respondents argue that Claimants' breaches of fiduciary duty preclude them from enforcing any obligations under the relevant Investment Agreements and that rescission or cancellation of a contract is an available equitable remedy. [RSOC4

¶231] They allege that they are entitled to damages or equitable compensation for unjust enrichment. [RSOC4 ¶213]

294. Under Delaware law, "[a] claim for breach of fiduciary duty requires proof of two elements: (1) that a fiduciary duty existed and (2) that the [claimants] breached that duty." *Beard Research, Inc. v. Kates*, 8 A.3d 574, 601 (Del. Ch. 2010) (management company owed fiduciary duties to managed company), aff'd 11 A.3d 749 (Del. 2010). These duties include "a duty of loyalty, good faith, and fair dealing. . . [and] encompass corollary duties of an agent to disclose information that is relevant to the affairs of the agency entrusted to him and to refrain from placing himself in a position antagonistic to his principal concerning the subject matter of his agency." See John Glenn, J.D., *et. al.*, Duties and Liabilities of Agent to Principal, Loyalty and Good Faith, Generally, 2A C.J.S. AGENCY 268 (June 2017) (citing *Kates,* 8 A.3d at 601). "Peculiar customs or usages to the contrary of this rule, of which the principal had no notice, constructive or actual, do not affect its application." John Glenn, J.D., et al., Violation or Breach of Duty of Loyalty, 2A C.J.S. AGENCY § 275 (June 2017 Update).

295. In accordance with Delaware law, Claimants owed fiduciary duties to Respondents in relation to the use of the Appendix 1 POAs relied upon to execute the Executed LPAs on GIIL's behalf. See DEL. CODE ANN. tit. 6, § 15-404(b)(1), (c); *Schock v. Nash*, 732 A.2d 217, 224–25 (Del. 1999) ("[t[he creation of a power of attorney imposes a fiduciary duty of loyalty on the attorney-in-fact").

296. Claimants also owed fiduciary duties to Respondents as GPs of the Funds. "Since general partners in a limited partnership typically have the exclusive power and authority to control and manage the partnership, they owe the limited partners an even greater fiduciary duty than is imposed on general partners in the typical general partnership." See J. William Callison, General Partner Fiduciary Duties, P'SHIP L. & PRAC. § 22:7 (Oct. 2017 update) (collecting cases).

297. Under Delaware law, it is a breach of the fiduciary duty of loyalty for a fiduciary to engage in self-interested transactions to the detriment of the party to whom the duty is owed, without that party's knowledge and consent. See Restatement (Second) of Trusts § 170, ("The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which

the trustee knows or should know."); *McGovern v. Gen. Holding, Inc.,* C.A. No. 1296, 2006 WL 4782341, at *17 (Del. Ch. Ct. June 2, 2006) (by engaging in self-interested transactions, defendant-partner breached both partnership agreement and fiduciary duties).

298. The evidence shows that the import of the Post-Closing Changes was to make the terms of the LPAs more favourable to the GPs (e.g. the fee-waiver) and more onerous for the Respondents (e.g. the default remedies). For the reasons stated earlier, I do not accept Chung's uncorroborated evidence that there was a specific discussion with Respondents about Claimants' intention to make the Post-Closing Changes to the LPAs.

299. Claimants submit that the revisions to the default provisions were "consistent with" the SAs (which specifically provided that forfeiture was a potential consequence of default). [CSOC3 ¶228] The brief paragraph in the SAs themselves, however, does not mention forfeiture of an LP interest. It refers only to sale at a "price substantially discounted from fair market value." [Ex. C-28] The 13 November Appendix 1, § 1(c) states "if the Investor defaults on its obligation to make capital contributions to the Fund or to deposit amounts in the LP Escrow Account, as applicable, its interest in the Fund may be subject to forfeiture and other consequences as specified in (*sic*) paragraph of the Partnership Agreement." (emphasis added). [Ex. C-28] The "Partnership Agreement" referred to in the 13 November Appendix was the 13 November LPAs, the only version that had been provided to the Respondents. The Respondents agreed to the remedies set out in those LPAs. They did not agree to accept any and all default or forfeiture provisions that the GPs might choose to add at a later date that were "consistent with" the disclosures in the SAs and Appendix 1.

300. Chung states that the failure to promptly deliver the Executed LPAs and revised Appendix 1 to Respondents as Park urged was a mistake, not a conscious decision made with a view to concealing the changes. Chung's evidence is that he thought Park was to attend to this, but it "dropped through the cracks." Claimants emphasize Chung's May 2016 question to Park "Don't they already have the LPA?" as evidence of his honest belief at that time.

301. In December 2015, Claimants' counsel prepared redlined versions comparing the revised text to "the last version viewed by CFLD." [Ex. R-240] At the time they were

purportedly made, Chung and Claimants recognized that at least some of the Post-Closing Changes were "aggressive." [Ex. R-239]. Park recommended to Chung, also in mid-December 2015, as part of a priority list, that once the full "hammer" modifications to the LPAs had been made they should be sent to CFLD "asap." [Ex. R-239] Park followed up with Chung in February 2016, asking in a list of "open" items "Signed LPAs given to GIIL?" [Ex. R-242] In a message to Park in May 2016, Chung noted that CFLD was asking for a copy of the LPAs and asked "Don't they already have the LPA?" [Ex. R-294] Claimants did not, however, send the Executed LPAs or revised Appendix 1 to Respondents until 16 October 2016, shortly before this dispute arose, and only then at CFLD's specific request. Respondents discovered the Post-Closing Changes on their own, when they compared their 13 November 2015 versions against the executed versions sent to them in October 2016. [TR. 175-76, 264–65; Ex. C-68, R-330]

302. There was a conflict between the interests of the GPs and the interests of the Respondents in relation to the Post-Closing Changes. In the circumstances, I find that Claimants acted in their own interests, and with reckless disregard for the interests of the Respondents as grantor's of the Appendix 1 POAs and as LPs, in purporting to make the Post-Closing Changes on the basis that general discussions at an early stage of negotiations, coupled with the Appendix 1 POAs, were enough to authorize the Post-Closing Changes without seeking and obtaining Respondent's specific consent. I find that it was a breach of the fiduciary duties owed by the GPs both in their capacity as holders of the Appendix 1 POAs and as general partners to attempt unilaterally to implement the Post-Closing Changes. I find that the failure to disclose, promptly and fully, the purported Post-Closing Changes after they were made was also a breach of Claimants' fiduciary duties under the Appendix 1 POAs and as general partners.

303. Under Delaware law, parties to a limited partnership may amend or limit common law fiduciary duties through contractual terms. "Delaware's limited partnership jurisprudence begins with the basic premise that, unless limited by the partnership agreement, the general partner has the fiduciary duty to manage the partnership in its interest and in the interests of the limited partners. . . Thus, . . . principles of contract preempt fiduciary principles where the parties to a limited partnership have made their intentions to do so plain." *Sonet v. Timber Co., L.*P., 722 A.2d 319, 322 (Del. Ch. 1998). See also Self-Dealing of Trustee in Making Investments—Consent of Beneficiaries, 76 AM. JUR. 2D TRUSTS § 464 (Aug. 2018 update).

("Consent to self-dealing must be clearly proven and made with a full knowledge of all the material particulars and circumstances, including the full extent of the beneficiary's legal rights.")

304. Claimants contend that there can be no finding of breach of fiduciary duty because such a finding is precluded by the terms of the LPAs. Although Claimants refer to the text of the Executed LPAs, the text of the 13 November LPAs is the same: [Ex. C-22; Ex. C-29 §14.3; Ex. C-30 §15.3]

> None of the General Partner, the Managing Principal, other members of the General Partner, . . . shall be liable to any Limited Partner or the Partnership for mistakes of judgment, or for action taken or inaction, or for losses due to such mistakes, action or inaction, . . . Notwithstanding any of the foregoing to the contrary, the provisions of this paragraph shall not be construed so as to relieve (or attempt to relieve) any person of any liability (i) for conduct which is grossly negligent, reckless, or intentionally wrongful or criminally unlawful, provided that such person had reasonable cause to believe that his or its conduct was unlawful.

305. Because of my finding that the Claimants acted recklessly in the circumstances, I find that the exculpation provisions in the 13 November 2015 LPAs do not preclude a finding of breach of fiduciary duty.

306. Claimants contend, however, that the Post-Closing Changes ultimately were inconsequential because they were never actually asserted against Respondents by Claimants and Respondents suffered no harm or detriment as a result of the (I have found, ineffective) attempt to make them. Claimants submit that they did not use the added default provisions, that the GPs never used the expanded borrowing powers, and that the offsetting of management fees against capital contributions had no financial impact on the Respondents. [CSOC3 ¶233]

307. Respondents contend: [RSOC4 ¶143]

> Claimants also cannot avoid liability for breach of fiduciary duty by claiming that none of their breaches "caused Respondents any harm." The harm to Respondents is obvious: they were ensnared in an onerous, costly and unbeneficial investment relationship with a faithless fiduciary with whom they would never have agreed to business if they had been apprised of all the material facts. In any event, damages is not an element of a breach of fiduciary duty claim." In *re Riverbed Tech., Inc. Stockholders Litig.*, No. CV 10484-VCG, 2015 WL 5458041, at *6 (Del. Ch. Sept. 17, 2015), judgment entered sub nom. In re Riverbed Tech., Inc. (Del. Ch. 2015) (emphasis added).

308. I agree that under Delaware law proof of common law damages is not an essential element of a claim for breach of fiduciary duty. See *QC Commc'ns Inc. v. Quartarone*, No. CIV.A. 8218-VCG, 2013 WL 1970069, at *1 (Del. Ch. May 14, 2013) (calling claim for breach of fiduciary duty "perhaps the quintessential equitable claim"). But the absence of loss or some other form of detriment is an important question when considering the appropriate equitable remedy.

309. The harm Respondents have identified (being ensnared in an undesirable investment) does not flow from the ineffective attempt to amend the 26 November Agreements. By the time the ineffective Post-Closing Changes were made, the Respondents were already bound to the terms of the 26 November Agreements. The ill-conceived, unauthorized and uncommunicated effort to unilaterally change its terms did not alter the situation. The Respondents contractual rights and obligations were not changed.

310. Respondents contend, however, that they are in any event entitled to the remedy of rescission for breach of fiduciary duty because the unauthorized Post-Closing Changes, even though ineffective as matter of law, were asserted against them by Claimants. That allegation is tied to the larger question of what legal consequences flow from the positions taken by the parties after 1 December 2016 concerning their respective rights and obligations. These questions are discussed below.

(b) <u>*Post-Closing Changes: Implications Under Contract Law*</u>

311. Respondents characterize the making of unauthorized Post-Closing Changes as akin to the unauthorized physical alteration of a signed written agreement. They contend that as matter of Delaware contract law, an unauthorized material alteration to a written contract makes the entire agreement voidable. [RPHB1 ¶¶326–29] *Smith v. United States*, 69 U.S. 219 (1864), and *Hall & Co. v. Cont'l Cas. Co.*, 34 A.D.2d 1028, 1029 (1970), aff'd, 30 N.Y.2d 517 (1972), both cited by Respondents, concerned sureties, who were found to have been discharged because the obligations they had guaranteed were altered without their authority. They were cases where a claim was made to enforce an obligation that was different from the obligation that had been undertaken. *In re Kurak,* 409 B.R. 259 (Bankr. D. Mass. 2009) concerned the addition of a person's name as one of the "Borrowers" under a mortgage after it had been signed by that person and by a co-owner of the land to be charged. The court found that the mortgage was invalid *as to the interest in land of the signatory whose name had been added as "Borrower."* These cases do

not establish that an agreement containing an alteration is entirely *void* or *voidable.* They also involved attempts to enforce altered obligations.

312. Claimants analogize the present situation to that of an invalid amendment to a pre-existing contract. They submit that Courts regularly treat invalid amendments as void without invalidating the remainder of the agreement, citing *R.S.M. Inc. v. All. Capital Mgmt. Holdings L.P.,* 790 A.2d 478, 496 (Del. Ch. 2001) (invalidating single provision of omnibus amendment, rather than whole Restated Agreement, and noting that plaintiffs' attempt to use improper provision "as a basis to invalidate the entire Restated Agreement [was] contrary to the clear intention of the relevant instruments . . . and would result in an inequitable and impractical result"); *Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co*., 769 F. Supp. 599, 629 (D. Del. 1991) aff'd in part, rev'd in part on other grounds, 988 F.2d 386 (3d Cir. 1993) (finding that amendment was invalid and that unamended agreement governed). [CPHB2 ¶172]

313. Whether the Claimants' or Respondents' characterization is more apposite to the present case, it is clear that the legal consequences depend on whether Claimants have sought to enforce the Post-Closing Changes as Respondents allege. The situation is, therefore, the same as with the claims based on breach of fiduciary duty. Respondents' allegations are tied to the larger question of what legal consequences flow from the positions taken by the parties concerning their respective rights and obligations after the Post-Closing Changes were purportedly made, and before and after their existence was discovered by Claimants.

(G) Claimants' Other Alleged Post-Contractual Breaches of Fiduciary Duty

314. In Respondents' Fourth Statement of Case, Respondents state claims for other post-contractual breaches of fiduciary duty in addition to the breach associated with the ineffective and undisclosed Post-Closing Changes. The other allegations of post-contractual breaches of fiduciary duty (**Other Breaches of Fiduciary Duty)** are as follows: [RSOC4 ¶¶141–43]

    a. Misappropriating the Funds' assets and personnel in pursuit of Chung's independent business opportunities;

    b. "Outright subjectivity" in the allocation of investment funds between the two Funds and vis-a-vis GPs' managing member's other Funds;

c. Willful nondisclosure of the GPs' contemporaneous, preferential treatment of Funds' "token" LPs and "preferential rights" offered to "non-CFLD" investors;

d. Employment of the GPs' Managing Member's wife, Coral Chung, as a salaried, "part-time" consultant for unspecified services at a base annual salary of [redacted]—an employment package [redacted] "Venture Partner" Ryan Gilliam [redacted] the Managing Member's CFO, Sean Park [redacted] or high profile" candidates, such as [redacted]

e. Invocation of the attorney-client privilege to shield incriminating, non-privileged communications and conceal the GPs' self-dealing;

f. Misrepresenting Claimants' confidentiality obligations regarding existing and potential LPs and portfolio investees, in an effort to conceal Claimants' failure to perform;

g. Misrepresenting the size and scope of Claimants' existing LP commitments and the Funds' capital raising progress;

h. Material misrepresentations as to market practice; and

i. Gross negligence in securing the Funds' compliance with applicable SEC regulations.

315. Respondents' First Post-Hearing Brief argued, for the first time, that the alleged post-contractual breaches of fiduciary duty also constitute breaches of contract. [RPHB1 ¶316]. The effect of this allegation is to open the door to asserting contractual as well as equitable remedies for the same misconduct. The only specific allegation of breach of contract was the allegation that Claimants failed to establish escrow accounts as agreed. [RPHB1 ¶¶317–19]

316. I have reviewed the evidence cited by Respondents in support of the alleged Other Breaches of Fiduciary Duty (i.e. in addition to those associated with the Post-Closing Changes). The evidence simply does not support Respondents' first three

allegations of self-dealing. As to the fourth allegation, the evidence shows that Coral Chung was employed as a consultant at a significant salary. The evidence shows that she was well-qualified and her salary was benchmarked against potentially more lucrative board and consulting opportunities that she declined in order to work for Claimants. [TR. 98–102] The evidence does not establish that her employment by Claimants was a breach of fiduciary duty.

317. Respondents contend that Claimants' invocation of the attorney-client privilege to allegedly "shield incriminating, non-privileged communications and conceal the GPs' self-dealing" is an instance of breach of fiduciary duty. In Procedural Order No. 4, I determined that the GPs, as such, could not assert attorney-client privilege as against LPs over certain communications between them and counsel for the Funds. I said:

> Even if one were to apply the more exacting standard applicable under Delaware law, I find that the GPs generally are bound to share with GIIL attorney-client communications that provide advice to the partnership concerning matters affecting the conduct of the partnerships' affairs, but not such communications as relate to matters concerning which the GPs and GIIL were, at the time, adverse in interest.

318. Procedural Order No. 4 found an obligation on the GPs to disclose to subsequent limited partners "pre-formation advice concerning matters that impact the limited partners as such" including "advice about the terms of the LPAs, EAs and SAs (including Appendix 1) and any amendments to them." The Order led to the production of documents on which Respondents have relied in this proceeding to prove that the Post-Closing Changes were material, were recognized as such, and ought to have been timely disclosed. The corollary of my finding in Procedural Order No. 4, which I adopt for the purposes of this award, is that—there being a fiduciary duty to disclose such documents—a failure to disclose is a breach of fiduciary duty.

319. I have considered whether in the circumstances it is appropriate to infer that the documents were intentionally withheld by Claimants, knowing that they were required to be disclosed or with reckless disregard for Respondents' rights, as part of a continuing course of conduct not to candidly disclose to Respondents the circumstances surrounding, and the nature and purpose of the Post-Closing Changes. I am not prepared to draw such an inference, even taking into account the tenuous basis for the privilege claims over communications involving Park. The circumstances of this case are unique and the legal issues surrounding the claims of privilege were complicated, as reflected by the analysis that was required to reach

a conclusion in Procedural Order No. 4. That being the case, Respondents are entitled to the protection of the exculpatory provision in the LPAs. The assertion of attorney-client privilege in the course of this proceeding is not an instance of "mistakes, action or inaction … which is grossly negligent, reckless, or intentionally wrongful or criminally unlawful." As a result, any liability for this particular breach of fiduciary duty is excluded.

320. Several of the alleged instances of breach of fiduciary duty reflect CFLD's dissatisfaction with the level of reporting they were receiving from Claimants about fund-raising and investment activities. Their own internal memoranda reporting on telephone discussions with Chung, on which Respondents rely in support of this contention, reflect that Chung had provided a summary, high-level progress report but felt constrained by confidentiality expectations of others from disclosing some details. Respondents allege, in effect, that Chung was inventing confidentiality obligations to justify the lack of information. [Ex. R-63, R-65, R-69] Chung's evidence is that this is not correct. [TR. 380–81; 982–84] The evidence also includes a number of detailed written update reports that were provided to Respondents. [Ex. C-61, C-62, C-65] I find that the evidence does not establish a failure to report that rises to the level of a breach of fiduciary duty.

321. More troublesome is Respondents' allegation that Chung misrepresented the size and scope of Claimants' existing LP commitments, particularly the commitment made by prominent businessman [redacted] The evidence shows that CFLD was preparing an internal report, which referred to [redacted] commitment. The draft suggested that the minimum commitment threshold was $10 million. Chung suggested that it be reduced to $5 million. [Ex. R-48] A later document, also intended as a CFLD internal progress report stated that [redacted] had contributed "millions of dollars." [Ex. R-154, R-70(b)] The fact is that [redacted] commitment was for $1 million. On cross-examination it was suggested to Chung that he did not correct the over-statement of the size of [redacted] commitment because he wanted to leave CFLD with the mistaken impression that he had committed more. Chung's evidence is that he had agreed with [redacted] that he would not reveal the amount of his commitment, and correcting the mis-statement would have breached that undertaking. [TR. 423–25]

322. Chung says that it was a "mistake" not to correct the draft communication that over-stated [redacted] contribution. [TR. 425] It was obviously a convenient mistake

from his perspective, given the pressure he was under from Respondents to show progress. The question is whether the evidence is sufficient to show that his failure to correct the misimpression he had created amounted to a breach of fiduciary duty by Claimants in their capacity as general partners. After careful consideration, I have concluded that this, too, is not an instance of "mistakes, action or inaction … which is grossly negligent, reckless, or intentionally wrongful or criminally unlawful" and that as a result any liability for this particular alleged breach of fiduciary would be excluded.

323. Finally, Respondents allege that Claimants were "grossly negligent" in securing the Funds' compliance with applicable SEC regulations. The alleged act of gross negligence was a delay in filing a Form ADV. It has not been demonstrated that there was an element of "self-dealing" or disloyalty in this delay. I do not consider the failure to timely achieve this filing requirement to be breach of fiduciary duty.

324. I recognize that Respondents rely on the collective impact of these various instances of post contractual conduct. The ultimate question is whether Respondents have shown that, taken together, these incidents establish a pattern of gross negligence, recklessness or intentional wrongdoing by which the GPs placed their own interests ahead of those of Respondents. That is the standard of conduct to which Respondents agreed when they accepted Claimants' offer based on the 13 November LPAs. I find on the evidence before me that this test has not been met, whether viewing the instances relied upon by Respondents individually or collectively.

325. For the reasons I have stated, I find that, apart from the breaches of duty associated with the Post-Closing Changes, the Respondents have failed to establish their defences and counterclaims based on allegations of post-contractual breaches of fiduciary duty.

(H) Claimants' Alleged Breach of Contract by Failing to Establish Escrow Accounts

326. Respondents allege that Claimants breached the 26 November Agreements by failing to establish escrow accounts to hold GIIL's deposits. Each EA states that "[a]n LP Escrow Account shall be established by the General Partner for the Investor in accordance with" the LPA. [Ex. C-31,32] Section 4.2 of each of the 13 November LPAs states: (emphasis added)

> As a condition to its admission to the partnership, a Limited partner may be required by the General partner to deposit all or a portion of its Capital Commitment, in cash, into an account (each, an "***LP Escrow Account***"). The LP Escrow Account shall be invested in high quality Securities on a short-term basis and any income therefrom shall be used to cover expenses associated with the LP Escrow Account with any remaining income for the benefit of the Limited Partner. The terms of such LP Escrow Account shall provide that the General Partner, in its discretion, may draw upon amounts held in the LP Escrow Account of a Limited Partner in order to satisfy capital contributions required of such Limited Partner pursuant to this Agreement, provided the General Partner provides the Limited Partner with 10 business days' written notice thereof. Amounts in an LP Escrow Account shall not be deemed capital contributions for the purposes of this Agreement during such time as held therein. Any amounts in the LP Escrow Account drawn upon by the General partner in respect of capital contributions pursuant to this paragraph 4.2(f) shall be deemed capital contributions when drawn upon. The remaining terms of escrow account shall be established by the General Partner in its reasonable discretion.

327. Respondents submit that funds in the escrow accounts were to remain the property of Respondents and would not be treated as assets of the partnerships. They refer to the GPs' assurance to CFLD that "all of the cash transferred by CFLD remains in a bank escrow account (technically a CFLD account) and is not on 1955 Capital's books." [Ex. R-145] They submit that these assurances were consistent with the accepted definition of an "escrow account." However, the evidence shows that Respondents' funds were deposited into "Analysis Checking" accounts in the names of the GPs. [Ex. R-72] Respondents contend that Claimants' defaults in establishing the required "escrow account" deprived them of title to their un-called capital and presented additional risks to any funds directed to those accounts.

328. I do not agree that the escrow accounts established by Claimants did not comply with the requirements of the EAs and 13 November LPAs. Section 4.2(f) of the LPAs makes clear that the "LP Escrow Accounts" were to be under the custody and control of the GPs who could draw down funds at their discretion to satisfy Capital Contributions. The business purpose of the Escrow Accounts was to provide Claimants with the assurance that the promised contributions would be available as funds were needed, subject only to a notice requirement. That purpose would have been frustrated if the deposits remained within the LPs control. I accept the evidence of Ahmedani that in the venture capital industry the term "escrow account" refers to accounts such as these, and not to accounts wherein funds are held by an independent third-party for the benefit of both parties, as is the case, for example, when funds are placed in escrow for a real estate transaction. [TR. 118–20]

329. For these reasons, I reject Respondents' defence and counterclaim based on the contention that Claimants breached the 26 November Agreements by failing to establish the required escrow accounts.

(I) Claimants' Alleged Breach of Implied Covenant of Good Faith and Fair Dealing

330. Respondents' defences and counterclaims based on post-contractual events have evolved. Respondents' First Statement of Case recited a list of alleged failures by Claimants "To Satisfy Their Performance Obligations" after Respondents had deposited their funds. [RSOC1 ¶¶119–36] The list included the failure to secure additional LPs, the failure to close investments for the Funds, the failure to target portfolio companies to re-locate into CFLD's industrial parks, the failure to build a competent investment team and the failure to register or qualify the offering with any regulatory agency.

331. The alleged instances of "non-performance," however, were not relied on as the basis for claims for breaches of contract. The instances of non-performance described were failures to act consistently with expectations created by alleged pre-contractual misrepresentations. The First Statement of Case did allege, however, that "Claimants' fraudulent inducement of GIIL to the limited partnership in breach of their fiduciary duties and federal and state securities laws, violated the duty of good faith and fair dealing implied in every contract under Delaware law." [RSOC1 ¶250]

332. Respondents' Second Post-Hearing Brief re-cast the earlier allegations of breach of an implied covenant of good faith and fair dealing. Respondents now argue that Claimants "repudiated" the "agreed" investment objective of making investments in companies that were suitable for landing in CFLD's industrial parks and Chung's promise to use his "best endeavours" to achieve that objective. [RPHB2 ¶¶254–59]

333. Under Delaware law, every contract has an implied covenant of good faith and fair dealing 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 …. [P]arties are liable for breaching the implied covenant when their conduct frustrates the overarching purpose of the contract…." *Dunlap v. State Farm Fire & Cas. Co*., 878 A.2d 434, 440–42 (Del. 2005) (internal quotations and citations omitted). See also: *Dieckman v. Regency GP LP*,

155 A.3d 358, 368 (Del. 2017); *Breakaway Solutions, Inc. v. Morgan Stanley & Co. Inc.,* No. 19522, 2004 WL 1949300, (Del. Ch. Ct. Aug. 27, 2004); ("when it is clear from the writing that the contracting parties would have agreed to proscribe the act later complained of had they thought to negotiate with respect to that matter' [] a party [may] invoke the covenant's protections") *Dunlap v. State Farm* at 442, quoting *Katz v. Oak Indus., Inc*., 508 A.2d 873, 880 (Del. Ch. 1986); a "court can only imply an obligation when the express terms of the contract indicate that the parties would have agreed to the obligation had they negotiated the issue, the plaintiff must advance provisions of the agreement that support this finding in order to allege sufficiently a specific implied contractual obligation." See *Metro. Life*, 2012 WL 6632681, at *16) (citing *Fitzgerald v. Cantor,* No. C.A. 16297-NC, 1998 WL 842315, at *1 (Del. Ch. Nov. 6, 1998)).

334. The implied covenant "protects the spirit of the agreement and may, therefore, be offended even when a party has not violated an express term of the agreement." *Amirsaleh v. Bd. of Trade of City of New York, Inc.,* No. 2822, 2008 WL 4182998, at *9 (Del. Ch. Ct. Sept. 11, 2008) (upholding claim for breach of the implied covenant alleging frustration of the contract's purpose—even though, as a matter of law, defendants had not breached any express provision of the agreement).

335. Under Delaware law, the term "good faith" contemplates "faithfulness to the scope, purpose, and terms of the parties' contract." *Gerber v. Enter. Prod. Holdings, LLC,* 67 A.3d 400, 419 (Del. 2013), overruled on other grounds by *Winshall v. Viacom Int'l, Inc*., 76 A.3d 808 (Del. 2013) (emphasis omitted); accord Restatement (Second) of Contracts § 205 cmt. a (1981) ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party...."). The concept of "fair dealing" similarly refers to "a commitment to deal 'fairly' in the sense of consistently with the terms of the parties' agreement and its purpose." *Gerber,* 67 A.3d at 419. See also: *Reiver v. Murdoch & Walsh, P.A.*, 625 F. Supp. 998, 1014 n.20 (D. Del. 1985) ("A threat may be a breach of the duty of good faith and fair dealing under the contract even though the threatened act is not itself a breach of the contract.") (quoting Restatement (Second) of Contracts § 176 cmt (1981)).

336. Respondents contend that the overarching purpose of the Investment Agreements was to facilitate investments in start-up high-tech companies that were strong candidates to establish business in CFLD's industrial parks. They allege that

Claimants breached the implied covenant by repudiating that objective. [RSOC1 ¶¶250–55]

337. CFLD's objective was made clear to Chung in early discussions with Wang and Cheng. The concept that was discussed was that there would be a single-investor fund in which CFLD would make a substantial investment, which would invest exclusively in companies suitable for CFLD's parks. CFLD would have a role in managing the single investor fund with Chung. A multi-investor fund in which CFLD would make a smaller investment, and for which Chung would find other investors, would not be so restricted. Fund 1 was, however, to target earlier stage companies with potential to later locate in the parks, acting as a "feeder" of investment opportunities for the single purpose fund. [RWS1 ¶¶17–24] Cheng's description of the discussions on this topic in August and September 2015 is consistent with the contemporaneous memorandum (earlier defined as "**Minutes**" although characterized by Respondents as an "**MOU**") that Xu prepared and sent to Chung. [Ex. R-9b, R-10b] The Minutes state that the investment strategy for the single-investor fund "will focus on commercializing innovative technologies, realizing significant production capacity, and launching in CFLD's industrial cities or parks, so as to promote regional economic development." It states that the investment strategy of the multi-investor fund "will focus on prospective and innovative hi-tech companies (teams) in the Bay Area/Silicon Valley in the U.S. that have the potential to develop revolutionary products and may realize significant production capacity in the future." [RWS1 ¶¶30–39; Ex. R-9b, R-10b]

338. Chung's evidence is that the Minutes do not reflect an agreement, even an agreement in principle, resulting from the discussions to that date. He states that they represent the terms that Wang was proposing at that time. His evidence is that, through discussions and communications that took place both before after the Minutes were prepared, he made it clear to Wang and others at CFLD that he would not agree to the restrictions and objectives that CFLD proposed. [CWS1 ¶53]

339. Chung states: [CWS1 ¶51]

> I would never have agreed to go forward with the transaction if it included a requirement that companies in which the funds invested locate in CFLD's industrial parks. Among other things, including such a requirement would have constrained our ability to negotiate terms with potential investment targets, would have made 1955 Capital a far less attractive and flexible investment partner for potential portfolio

> companies, and would have significantly constrained our attempts to raise additional funds from other potential limited partners. The requirement would also have created a perception that 1955 Capital was captive to CFLD, rather than being an independent fund, which would have made it difficult to attract and hire talent.

340. The Investment Agreements that, collectively, I have called the "26 November Agreements," do not include or refer to the objectives or restrictions that were discussed among Chung, Wang and Cheng in August and early September. For example, the "Investment Objectives" stated in the signed SAs are (emphasis added): [Ex. C-27, C-28]

> The Fund's primary purposes are (directly or indirectly through one or more subsidiary entities, joint ventures and/or other co-investment arrangements) to (i) purchase, acquire, hold and manage a diversified portfolio of venture capital, growth equity and other types of investments in high-tech companies or teams and (ii) enter into, make, and perform, all contracts and other undertakings; and to engage in all activities and transactions as may be necessary, advisable, or desirable to carry out the foregoing. The fund shall also be entitled to invest idle cash in high-quality securities on a short-term basis.

341. XU's evidence is that he prepared the Minutes reflecting the discussions to date and that not having received any comment from Chung he understood that the parties were in agreement. He says that from that point forward he relied on and trusted Chung to make sure that the "formal" documents recorded the "agreement" set out in the Minutes. [RWS2 ¶7] He states that a PowerPoint Presentation prepared by Chung in October 2015 reinforced his belief that the Funds were to be China-focused. The "Mission Statement" of 1955 Capital set out in the PowerPoint is to "Invest in **advanced technology** from the developed world to solve the most **challenging problems** in the developing world—starting with **China"** (emphasis in original). Other slides refer to the Funds' "China-focused mindset." [RWS2 ¶13; Ex. R-17] Chung, on the other hand, emphasizes that there is no reference to CFLD's industrial parks in the PowerPoint.

342. The parties have very different explanations for why the final executed and agreed documents did not expressly carry forward the objectives CFLD had stated when the negotiations began. Xu states that Chung rushed the transaction, knowing that CFLD was inexperienced in venture capital investments and documentation and that English language documents had to be interpreted if they were to be understood. In effect, Respondents imply that they were duped by various means into signing SAs that, unknown to them, did not identify the agreed objectives.

343. Chung contends that over the course of the negotiation he persuaded CFLD that it would be counter-productive to restrict Fund activities as CFLD wished, that the final documents accurately reflected the parties' mutual intentions and that Respondents reviewed them with care or could have and should have reviewed them with care, before signing. In his oral testimony, he referred to a 14 September voice-mail message from Xu as marking a change in CFLD's position from it being a requirement that investees land in CFLD's parks to looking for investees who someday had the potential to locate in the parks. [TR. 405, 406]

344. The evidence shows that Wang and Chung discussed this question in October 2015. I accept Chung's evidence that during those discussions Wang did not pursue a requirement that investees of the China Fund locate in CFLD's parks, but instead emphasized the importance of the solo Fund making investments in companies that were prepared to locate in China, stating that it would then be CFLD's responsibility to persuade them to locate in its industrial parks. Chung's evidence is that it was agreed that the Fund would get a verbal expression of willingness to locate in China at some stage and that Claimants would use their "best efforts" to encourage them to locate in CFLD's parks. Chung agrees that he knew that CFLD was relying on his "promise to use best endeavours" to bring companies to CFLD's industrial parks. [TR. 443-447]

345. I find that the overarching business purpose of the Investment Agreements relating to the China Fund was to invest in high-technology companies that expressed a willingness to locate in China at some stage, and which had the potential to locate in CFLDs industrial parks. It was also a common understanding that Claimants would use best efforts to encourage investees to locate in CFLDs industrial parks, but that it was CFLD's responsibility to successfully achieve that goal.

346. The evidence also shows that in 2016 Claimants did introduce CFLD to several companies who were prospective investees with potential to locate in CFLD's industrial parks. Chung's evidence is that some of these prospects were lost when Respondents refused to provide additional funds in late 2016. [CWS1 ¶¶215, 216; Ex. C-66]

347. While Respondents make generalized allegations that Claimants repudiated or failed or refused to pursue the common goals of the parties in relation to the China

Fund, the evidence simply does not establish conduct by Claimants in that regard that could conceivably amount to a breach of the implied covenant of good faith and fair dealing. The refusal of Claimants to accept the Respondents' originally desired contractual requirements and restrictions in the course of pre-contractual negotiation does not amount to a breach of the duty.

348. For the reasons, I have stated, I reject Respondents' defences and counterclaims based on breach of the implied covenant of good faith and fair dealing.

(J) Respondents' Alleged Breaches of Contract and Claimants' Alleged Assertions of Post-Closing Changes

349. By 26 November 2015, there was agreement between the parties—the 26 November Agreements—comprised of the China Fund and Fund 1 SAs, the EAs, the 13 November Appendix 1 and the 13 November LPAs. The Post-Closing Changes purported to be made by Claimants in December 2015 were not part of the agreements and the attempt to make them had not been communicated to Respondents. For the reasons stated earlier in this award, I find the purported making of the Post-Closing Changes and the failures to disclose were breaches of fiduciary duty. Alternatively, I have found that revisions purportedly made to the LPAs before signing involved material, unauthorized alterations to what had been agreed, with potential consequences under Delaware contract law. As of the end of 2015, however, the breaches of fiduciary duty and the unauthorized alterations had not yet had any practical consequences for either party.

350. Respondents contend that the Post-Closing Changes have been asserted against them and that as result the 26 November Agreements should be rescinded or they should be awarded damages. Resolving these issues requires a more detailed examination of post-closing events. Claimants contend that the Post-Closing Changes were never asserted against Respondents, so that there are no legal consequences.

351. Claimants contend (and Respondents deny) that Respondents committed an anticipatory repudiation of the 26 November Agreements in October 2016, and then committed actual material defaults under those agreements on 1 December 2016. Alternatively, Claimants allege that Respondents breached a duty of good faith and fair dealing by the demands made and positions taken at the 28 October 2016 meeting, and thereafter. Claimants allege that Respondents breached the

implied covenant by creating this dispute without legal justification, demanding that Chung step down as the Funds' general partner, demanding the return of the portion of the capital commitment previously transferred, accusing Chung of fraudulent conduct based on assertions that CFLD knew to be false, and by other conduct. [CSOC1 ¶199] They allege: [CSOC1 ¶222]

> CFLD's actions, including the October 2016 ambush conducted through outside counsel posing as CFLD employees, its ongoing leveling of false accusations of fraud, demands that Mr. Chung resign and the Funds be disbanded, and threats to sue Mr. Chung if he did not comply with its demands, also go far beyond mere breaches of the terms of the Investment Agreements – and did far more than frustrate the purpose of the contracts or prevent Claimants from receiving the fruits of the bargain. They paralyzed the Funds and inflicted an all-encompassing array of injuries on Claimants.

352. Claimants allege that Respondents' breaches of the implied covenant hamstrung and frustrated the ability of Claimants to find new investors and new investments. [CSOC4 ¶¶131–34]

353. Before analyzing these allegations, in this section of the award, I describe my findings with respect to the key post-contractual events.

(a) *27 and 28 October 2016 Meetings*

354. At the 27 and 28 October meetings, Respondents accused Chung of fraud, demanded that he resign, demanded the return of the money in escrow, and threatened to force a shutdown of the Funds. They stated that they did not intend to honour the obligation to transfer additional funds. [CWS1 ¶245; CWS3 ¶¶19–21, 23; CWS2 ¶¶34, 35] Claimants contend that this was a wrongful anticipatory repudiation. [CPHB1 ¶¶58, 59]

355. Under Delaware law, a party commits an anticipatory repudiation of a contract by unequivocally stating that it does not intend to perform its future contractual obligations. Anticipatory repudiation requires a clear statement repudiating the contract or making clear that a party will not perform. See *Tenneco Auto., Inc. v. El Paso Corp.,* No. CIV.A. 18810-NC, 2007 WL 92621, at *6 (Del. Ch. Jan. 8, 2007); *BioVeris Corp. v. Meso Scale Diagnostics, LLC*, No. CV 8692-VCMR, 2017 WL 5035530, at *9 (Del. Ch. Nov. 2, 2017) ("If it is clear that the promisor intends not to perform his promise, there seems little reason to force the parties to wait to have their rights and obligations determined. . . . To find that there has been an anticipatory

repudiation, a promisor must give an unequivocal statement that is positive and unconditional." (internal quotes omitted.))

356. Under Delaware law, a party confronted by an anticipatory repudiation can elect to treat the agreement as being at an end by communicating to the repudiating party its intention to do so or by acting in reliance on the repudiation. If the innocent party elects to treat the contract as being terminated, it may immediately sue for damages without having to await an actual default. If the innocent party does not elect to treat the contract as terminated, the contract continues in force for both parties and the repudiating party can retract the repudiation and continue performance, in which case the repudiation will have had no consequences. "The renunciation of a contractual duty before the time fixed in the contract for performance is an anticipatory repudiation which ripens into a breach prior to the time for performance only if the injured party elects to treat it as such" *Franconia Assoc. v. United States,* 536 U.S. 129, 143 (2002) (citing RESTATEMENT (SECOND) OF CONTRACTS § (1979)); *In re Broadstripe, LLC,* 435 B.R. 245, 261 (Bankr. D. Del. 2010); See also: *McCormick v. Fidelity & Cas. Co. of New York*, 307 Pa. 434, 438–39 (Pa. 1932) (holding that if there is an anticipatory breach, the injured party may unequivocally and affirmatively accept such a breach and sue at once or the injured party can reject the anticipatory breach and the contract remains in force.).

357. I find that Respondents' declaration at the 28 October meeting that they did not intend to perform their future obligations and their demand for return of the funds already paid was a clear and unequivocal anticipatory repudiation of the 26 November Agreements. Claimants did not, however, state or evince by their conduct that they intended to treat the contracts as terminated. Instead, Claimants affirmed that the contract was continuing and made clear that they expected Respondents to continue to perform. That they considered the contract to be ongoing after 28 October 2016 is evidenced, for example, by their subsequent notices of default based on the failure to pay the 1 December 2016 deposits.

(b) *11 November 2016—Respondents' Letter Concerning Breaches by Claimants*

358. By a letter of 11 November 2016, GIIL asserted that Claimants had committed "breaches of the contracts governing our relationships and your duties at law." [Ex. C-70] The alleged breaches foreshadowed the many allegations made by Respondents in this proceeding, including making unauthorized Post-Closing Changes to the LPAs, pre-contractual misrepresentations, breaches of fiduciary duty

and a duty of good faith and fair dealing by managing the Funds in the interests of the GPs rather than the GIIL, mismanagement by making only a single investment and the failure to timely provide material information requested by Respondents. The letter states that they were providing "formal notice of your defaults" and demanding resignations and the provision of "a proposal for termination of the partnership's affairs." The letter states that absent satisfactory compliance GIIL would pursue "all available legal and equitable remedies."

359. This letter does not clearly state an intention not to perform future obligations under the 26 November Agreements, but rather demands that Claimants provide a proposal for winding-up the partnership. Similarly, however, it does not state that despite what was said at the 28 October 2016 meeting, GIIL intended to resume performance pending an agreed termination of the partnership. It does not represent a withdrawal of the earlier anticipatory repudiation.

(c) *14 November 2016—Respondents' Letter Demanding that Claimants not Draw Down further Escrow Funds*

360. By letter dated 14 November 2016, GIIL demanded that until further written notice from GIIL and "despite the status of any settlement negotiations between the parties, the Escrow Accounts should not be accessed without GIIL's consent." [Ex. C-71] This demand is inconsistent with the terms of the 26 November Agreements, which gives Claimants the right to access the funds as needed, subject to giving notice. It is further evidence of repudiation of future obligations.

(d) *1 December 2016—Non-payment of Second Escrow Instalments*

361. Under the EAs, on 1 December 2016, GIIL was to make further deposits of funds into the escrow accounts in the amounts of US$50 million for the China Fund and US$10 million for Fund 1. Those deposits were not made. The EAs provided that any such failure to deposit funds "shall be deemed a default with respect to which the provisions of paragraph 4.4 of the [LPAs] shall apply." [Ex. C-31 and C-32]

362. Because Claimants had not elected to treat the contract as terminated following Respondents' earlier repudiation, the 26 November Agreement remained in force as of 1 December 2016. The failure to pay the additional deposits on 1 December 2016 was a breach of the 26 November Agreements, and a default within the

meaning of the LPAs. The anticipatory repudiation had been overtaken by actual defaults.

363. Claimants contend that the 1 December 2016 failure to pay is a material breach which, especially when coupled with GIIL's earlier repudiation, entitles Claimants to claim "total breach" resulting in the loss of the entire benefit of the 26 November Agreements. [CPHB1, Appendix A] Despite claiming total breach damages, however, Claimants assert that the relevant Investment Agreements have not been terminated and remain in force. [CSPHB1]

364. Paragraph 4.4(a) of all versions of the LPAs states that "t]he Partnership shall be entitled to enforce the obligations of each Limited Partner to make the contributions of capital set forth in paragraph 4.2(a), and the Partnership shall have all remedies available at law or in equity in the event any such contribution is not so made" (emphasis added). [Ex. C-22, C-29, C-30]

365. Paragraph 4.4(b) of each version of the LPAs states: (in part)

> … should any Limited Partner fail to make any of the capital contributions required under this Agreement, such Limited Partner shall be in default, and the General Partner may, in its sole discretion, elect to enforce one or more of the provisions of this paragraph 4.4(b), to which each Limited Partner hereby expressly consents, by providing notice of such election to such defaulting Limited Partner….

366. Sub-paragraphs (i) through (vii) of paragraph 4.4(b) set out various non-exclusive default remedies. That list of remedies was altered by the Post-Closing Changes so that the Executed LPAs include, among other changes, a new subparagraph (vii) allowing the General Partner to "cancel the defaulting Limited Partner's Interest." [Ex. C-29, C-30] I have found, however, that the purported addition of that remedy is ineffective.

367. As described below, Claimants at one time alleged that the failures to pay on 1 December 2016 entitled them not only to claim damages at common law for material breach of contract, but also to "contractual remedies."

(e) 13 December 2016—Claimants' Letters Giving Notice of Default

368. By letters dated 13 December 2016, Claimants gave GIIL a notice of default under Section 4.4(a) of the LPAs and advised that pursuant to Section 4.4(a), "if GIIL

remains in default for 10 calendar days following the date hereof, the General Partner of the partnership may consider exercising the various remedies available to it under Section 4.4 on behalf of the Partnership." [Ex. C-72] No particular potential remedy under paragraph 4.4(b) was specified. The 13 December 2016 notices of default did not constitute notice of election of a remedy as contemplated by paragraph 4.4(b).

369. The 1 December 2016, payment default was not cured. Despite the defaults and notices of default, Chung's evidence is that he continued to work in good faith and to try to de-escalate the dispute, without success. [CWS1 ¶250]

(f) 8 May 2017—Draw Down Notices

351. On 8 May 2017, Claimants sent Respondents two draw down notices for $6,000,000 and $2,000,000. [RWS2 ¶80] The notices also state that Claimants considered that their contractual remedies under the LPAs still remained available. The notices said, in part, (emphasis added): [Ex. R-91, R-92]

> Please make payments by wire transfer in accordance with the instructions below. When wiring funds, please ensure your bank identifies the name of the General Partner for whom the payment is being made as the "originator" or in the additional notes section of the wire.
>
> Please note that per the notice sent to you on December 13, 2016, Global Industrial Investment Limited remains in default of its obligations. The General Partner hereby reserves all of its rights under the Agreement, including but not limited to those set forth in Section 4.4 of the Agreement.

(g) 28 July 2017—Demand for Arbitration

370. The Demand was dated 28 July 2017. It alleged that Respondents had repudiated and breached the Investment Agreements and that Respondents were in default under the LPAs. The awards sought were as follows (emphasis added):

> 1. Awarding declaratory relief as appropriate, including a declaration that Respondents are required to make the payments specified in the LPAs, Subscription Agreements and Escrow Agreements.
>
> 2. Awarding injunctive relief as appropriate, including an order directing Respondents to make the payments specified in the LP As, Subscription Agreements and Escrow Agreements.

3. Awarding damages according to proof.

4. Entitling Claimants to contractual remedies.

5. Awarding attorneys' fees and costs pursuant to Section 14.5(b) [14.4(b)] of the LPAs

6. Awarding such further relief as the arbitrator deems just and proper.

351. It is clear from the Demand that Claimants did not consider that they had elected to treat the Investment Agreements as terminated. They were, in effect, seeking specific performance of the Investment Agreements. Claimants did not directly seek enforcement of contractual remedies. They sought a declaration of entitlement to enforce those remedies. The Demand paraphrased the remedies provided for under paragraph 4.4(b) of the Executed LPAs (but not the 13 November LPAs), including "Canceling the defaulting LP's interest." It made no election among the contractual remedies.

(h) 5 September 2017—Answer and Counterclaim

371. Respondents delivered the Answer and Counterclaim dated 5 September 2017. The primary assertion in that pleading was that "Claimants' dishonest, fraudulent and bad-faith conduct in violation of applicable securities laws, their fiduciary duties, and state common law, renders GIIL's obligations under the its purported contracts with the GPs void and voidable." Alternatively, it was alleged that "the GPs, not GIIL, have breached and repudiated their contractual obligations." The pleading states that "GIIL seeks an award declaring its purported investment contracts with the GPs void and unenforceable or, alternatively, terminable by virtue of the GPs' material breach, and ordering the GPs to refund the entirety of its US$80 million paid to Claimants to date, together with other relief described herein." [Answer and Counterclaim, ¶15]

372. By asserting that the Investment Agreements were void or voidable and claiming the return of monies paid thereunder, unless their assertion was true Respondents were clearly and unequivocally committing a further, or renewed, anticipatory repudiation of any future obligations under the Investment Agreements. They were clearly evincing their intention not to perform any future contractual obligations.

(i) *12 December 2017—Draw-Down Notices*

373. On 12 December 2017, Claimants delivered two further draw down notices for US$7.5 million and US$2.5 million, containing the same text as the May notices demonstrating that Claimants still had not elected to treat the Investment Agreements as being terminated. [RWS2 ¶81; Ex. R-97, R-98]

(j) *Claimants' Statements of Case*

374. In their First Statement of Case, Claimants dropped the claims for declarations that Respondents are required to make future payments under the Investment Agreements and for injunctive relief directing payment. Instead, they sought a declaration that the Respondents had breached, a declaration that Claimants are entitled to exercise their contractual remedies, and damages.

375. Claimants did not in any of the Statements of Case articulate any form of election to exercise or seek relief in respect of any particular default remedy under paragraph 4.4(b) of the LPAs. At the same time, they tendered quantum evidence in support of a claim for damages based on the additional profits they contend they would have earned through the life of the Investment Agreements, but for Respondents' alleged breaches.

(k) *Evidentiary Hearing and Proposed Form of Award*

376. At the commencement of the Evidentiary Hearing, I asked Claimants to clarify whether they were still seeking declarations of obligations to continue performance or whether the claim was limited to damages. I also asked for a clear indication of whether Claimants contended that the Investment Agreements are still in effect or whether they say they are at an end. [TR. 30, 31]

377. Claimants delivered a document called "Proposed Award in favour of Claimants." (**Claimants' Proposed Award**). It stated:

> During the first day of the Final Hearing, the Arbitrator asked Claimants to clarify: "the specific awards that your client is seeking as a result of this evidentiary hearing." In particular, the Arbitrator asked whether Claimants were still seeking an award granting the first two requests set forth in the Prayer for Relief in Claimants' Demand for Arbitration, dated July 28, 2017, which states:

> 1. Awarding declaratory relief as appropriate, including a declaration that Respondents are required to make the payments specified in the LPAs, Subscription Agreements and Escrow Agreements.
>
> 2. Awarding injunctive relief as appropriate, including an order directing Respondents to make the payments specified in the LPAs, Subscription Agreements and Escrow Agreements.
>
> Claimants vacate their request for Items 1 and 2 in their initial Prayer for Relief as set forth above.
>
> Claimants continue to seek: (a) an award of damages according to proof; (b) an award of attorney's fees and costs; and (c) such further relief as the arbitrator deems just and proper. Specifically, Claimants seek a reasoned award that includes the relief set forth in the attached "Proposed Award."

378. The attached "Proposed Award" described a monetary award only of "damages under Claimants' Second, Fourth, Fifth (as to GIIL only,) and Sixth Claims for Relief;" i.e. (2) damages for Breach of Contract, (4) damages for the breach of the implied covenant of good faith and fair dealing, (5) damages for interference with Contract (alternatively, as against CFLD only) and (6) damages for interference with prospective advantage.

379. At this stage, it was clear that Claimants were no longer seeking an award to enforce the LPAs and their contractual remedies, but rather sought to enforce their remedies at common law.

(l) *Post Hearing Briefs*

380. I asked the parties to state concisely their position concerning the present status of the various Investment Agreements in their Post-Hearing Briefs.

381. Claimants' First Post Hearing Brief, Appendix A, states as follows with respect to the status of the Investment Agreements (emphasis added):

> Claimants commenced this arbitration to resolve their claim for damages arising from Respondents' repudiation and material breach of the Investment Agreements. Restatement (Second) of Contracts § 243 (1981) ("[A] breach by non-performance accompanied or followed by a repudiation gives rise to a claim for damages for total breach."). Pending the Arbitrator's award of damages in lieu of performance, the Investment Agreements remain in force. Following a final ruling, the contractual relationship between the parties will come to an end. The termination of Respondents' obligations under the Investment Agreements may have implications

for the underlying Partnerships (the legal entities that comprise the Funds), but the disposition of those entities is not at issue in this proceeding.

Claimants have continued to treat the Investment Agreements as governing their duties with respect to the operation of the Funds until this matter is finally resolved. For example, Claimants have provided periodic financial reports to Respondents pursuant to Section 11.3 of the LPAs and have maintained Respondents' Capital Accounts pursuant to Sections 13.4 and 14.6 of the China Fund LPA and Fund I LPA, respectively.

Claimants also continue to have rights under the Investment Agreements, including the right to indemnification under the SAs and LPAs, which provide: The Partnership agrees to indemnify the General Partner … to the fullest extent permitted by law and to save and hold them harmless from and in respect of all (i) fees, costs, and expenses, including legal fees, paid in connection with or resulting from any claim, action, or demand against any Indemnified Party that is in connection with, arises out of or in any way relates to the Partnership, its properties, business, or affairs … and (ii) such claims, actions, and demands and any losses liabilities, expenses or damages resulting from such claims, actions, and demands, including amounts paid in settlement or compromise of any such claim, action or demand[.]

Claimants have not exercised their right to indemnification (or to advancement of defense costs), pending the final disposition of this matter. Claimants' right to indemnification should be taken into account as part of the final disposition of the parties' rights and obligations.

***

Respondents have a partnership interest in each Fund, including in the investments made by the Funds, which is governed by and shall be calculated pursuant to the terms of the Investment Agreements. The Respondents' rights to the escrow funds are governed by the terms of the Escrow Agreements and the LPAs.

***

Respondents are entitled to any amounts remaining in escrow upon termination of the Investment Agreements. Such amounts, however, should be made available for the following purposes: (1) satisfaction of any damage award; (2) satisfaction of Claimants' right of indemnification; and (3) satisfaction of any costs awarded under the LPAs or Article 34 of the ICDR Rules.35 Because Claimants can call capital against the funds held in the escrow accounts pursuant to the Investment Agreements, they should be entitled to do so following a final award in respect to indemnification, costs, and any damages awarded.

382. In their First Post-Hearing Brief, Respondents stated that their position is that the Investment Agreements are invalid or terminated. They also set out their understanding that the abandonment by Claimants of claims to specifically enforce

the Investment Agreements meant that all parties agreed that the agreements are invalid or terminated. [RPHB1 ¶¶286, 287]

(m) *Post-Hearing Draw Downs and Application to Re-Open*

383. On 29 March 2019, Claimants issued capital call and draw-down notices to GIIL in the aggregate amount of US$1,339,060.49. The notices were not received by GIIL until 11 May 2019. In the meantime, the escrow funds had been drawn down by Claimants on 29 April 2019. [Ex. A, B, C to Respondents Letter, 23 May 2019 (**Application to Re-Open**)] Claimants' conduct once again affirmed the continuing existence of the EAs, the 13 November LPAs and the SAs.

384. On 23 May 2019, Respondents delivered the Application to Re-Open, seeking an interim measure requiring that the withdrawn funds be redeposited and the re-opening of the Evidentiary Hearing to permit evidence of the recent withdrawals to be admitted into the record. In the Application to Re-Open, consistent with the positions taken in their Post-Hearing Briefs, Respondents contended that by abandoning the claims for specific performance and maintaining their claim for total breach Claimants had made a "Final Election To Treat The Fund Documents As Terminated And Seek Solely Monetary Damages For Breach." They submitted that having made an election to seek total breach damages Claimants had irrevocably elected to treat the relevant Investment Agreements as terminated, and thus had no right to make further draws under the EAs and LPAs. While stating that Claimants had wrongly delayed making the election to recover damages rather than seeking specific performance, Respondents did not contend that the election was ineffective. The entire thrust of their submissions was that the agreements were at an end, despite the Claimants' delay in electing their remedy.

385. By letter date 24 May 2019 (**Application Answer**), Claimants answered the Application to Re-Open. The Application Answer asserted that Claimants had made it clear in their Post-Hearing Briefs that while they were seeking "damages in lieu of specific performance" they were still continuing to operate the Funds and maintained that the relevant Investment Agreements remained in effect and would remain in effect until after this award is issued.

(n) *Post-Hearing Procedural Order No. 1 and Supplemental Submissions*

386. By Post-Hearing Procedural Order No.1, the Evidentiary Hearing was re-opened to admit to the record the Re-Opening Application and the Application Answer and the parties were directed to make supplemental submissions on specific issues relating to the issues of election of remedies and the manner in which this award should address the status of the Investment Agreements.

387. In CSPHB1, Claimants submit that they are entitled to and must continue to operate the Funds pending the issuance of this award, that for that reason the relevant Investment Agreements remain in effect and can and must be enforced by Claimants and that there is no legal impediment to maintaining the agreements in effect while at the same time seeking total breach damages. Specifically, Claimants contend:

a. The Funds are limited partnerships and as such are separate legal entities;
b. The Claimants are the general partners of the Funds and owe fiduciary duties to the Funds to maintain their operations, including those relating to the Funds' three portfolio investments;
c. Claimants have clearly "elected" to continue operating the Funds pursuant to the Investment Agreements;
d. The election does not preclude a claim for damages for breach of contract, citing, *inter alia*, *Northern Helex Co. v United States*, 197 Ct. Cl. 118 (1972), *Old Stone Corp. v United States*, 450 F.3d 1360 (Fed. Cir. 2006), *Times Mirror magazines, Inc. v Field & Stream Licenses Co.,* 103 F.Supp. 2d 711 (S.D.N.Y. 2000);
e. The remedies sought are not inconsistent;
f. The arbitration parties all have stated a common objective of severing their relationships and it is in the best interests of all parties that this be achieved;
g. Because it "is both complex and challenging to unwind the parties' relationship in a fair and just manner that does not cause further harm to the Funds, the portfolio companies, or Mr. Chung … Claimants respectfully request the continued assistance of the Arbitrator" by retaining jurisdiction after the issuance of this award.

388. In RSPHB1, Respondents contend:

a. Until the Evidentiary Hearing, Claimants continued to exploit the Investment Agreements, including by making the 8 May and 11 December 2017 drawdowns totaling US$18 million;
b. Claimants also had paid themselves US$10,972,125.00 in post (alleged) breach management fees up to 31 December 2018;
c. Claimants also collected US$997,570.00 in post (alleged) breach reimbursement for expenses up to the end of Q3 2017, and likely have also collected other amounts thereafter;
d. Claimants also made two additional post (alleged) breach portfolio investments to Gridtential (US$2,999,999 and Sustainable BioProducts US$4,999,999;
e. Claimants, therefore, elected to maintain the Investment Agreements in effect and continue performance;
f. Claimants purported to reverse that election at the Evidentiary Hearing by abandoning the claim for specific performance and claiming damages for total breach;
g. The requirement for an election between inconsistent remedies applied in cases of repudiation, material breach and breach of implied covenant;
h. Under the doctrine of election, Claimants are precluded from now claiming damages for total breach, as the election is required to be made immediately and, once made, is conclusive, citing, *inter alia*, *Princeton Digital Image Corp v Office Depot Inc*., No. CV 13-239-LPS, 2017 WL 10765194 (D.Del. Aug. 1, 2017), *ESPN, Inc., v Office of Com'r of Baseball,* 76 F.Supp.2d 383 (S.D.N.Y. 1999) and *Levin v Grecian*, 12 C 767, 2016 WL 1270427 (N.D.Ill. Mar. 31, 2016);
i. Claimants should not be permitted to belatedly change their election of remedies as in the meantime they have taken the benefit of the Investment Agreements at Respondents expense;
j. Claimants cannot recover lost future profits as part of a total damages claim because the relevant Investment Agreements remain in force; and
k. While Claimants are entitled to recover damages for breach of contract, to date they have suffered no damages because:
    i. they have been paid in full for their management fees accrued to date;
    ii. and they have not shown that there has been any loss in carried interest revenue (a substantial part of the monies deposited into escrow has not yet been invested).

389. The position taken by Respondents in RSPHB1 is different than the position they took in earlier Post-Hearing submissions. While earlier they maintained that Claimants had elected to terminate the agreements and claim total breach damages, they now contend the opposite; they say that Claimants elected to maintain the agreements in force and thus are precluded from claiming total breach damages. Claimants agree that they have not elected to terminate the agreements, but submit that they should nonetheless be awarded total breach damages.

(o) *Conclusions Concerning Claimants' Attempts to Assert Post-Closing Changes and Breaches of Fiduciary Duty*

390. With one exception, the evidence shows that Claimants have not attempted to enforce against Respondents any of the purported Post-Closing Changes. The sole exception is that Respondents have claimed the right to set-off contributions owed against management fees receivable since January 2016. The right to do this was not expressed in the 13 November LPAs. Claimants did, however, disclose to Respondents their intention to exercise, and their actual exercise, of a claimed fee-waiver right in the 1 January 2016 fee-waiver notice. [Ex. R-57] Respondents then had in their possession all of the documents comprising the 26 November Agreements, including the 13 November LPAs. The information provided was, in my view, sufficient to disclose to Respondents that Claimants took the position that under the agreed terms they were entitled to exercise a fee-waiver. Respondents did not challenge Claimants' right to exercise a fee-waiver.

391. As described earlier, I have found that the attempt to make the Post-Closing Changes without authority was a breach of fiduciary duty. What equitable remedy, if any, is appropriate in the circumstances? The remedies claimed are rescission and damages. The only Post-Closing Change that has been enforced is the fee-waiver, to which Respondents acquiesced. The evidence does not establish that any losses were suffered by Respondents as a result of the Claimants' assertion of the fee-waiver. Claimants have not enjoyed a benefit at Respondents' expense. In these circumstances, it would be inequitable to rescind the relevant Investment Agreements in their entirety as claimed.

392. As described earlier in this award, Respondents also rely on principles of Delaware law concerning unauthorized alterations to documents. For the reasons stated earlier, I do not accept Respondents' contention that as a matter of contract law all original, unaltered terms of an altered agreement are void as a result of an

unauthorized change. It is only the altered term that is unenforceable. Again, the only altered term sought to be enforced is the fee-waiver. The exercise of the fee waiver caused no loss. There is no entitlement to damages for this breach.

393. For the reasons I have stated, I find that the appropriate remedy for breach of fiduciary duty in relation to the Post-Closing Changes is an award of nominal damages. I find that Claimants, jointly and severally, must pay to Respondents, jointly, the sum of $100 as nominal damages for breach of fiduciary duty.

(p) *Conclusions Concerning Anticipatory Repudiation, Material Breach and Breach of Implied Covenant*

394. For the reasons I have stated, I find that CFLD clearly and unequivocally repudiated the relevant Investment Agreements by their statements at the 27 and 28 October 2016 meetings. Because Claimants have not "accepted" the anticipatory repudiation by stating that they considered the agreements terminated (indeed, even now Claimants contend that the Investment Agreements are ongoing) the anticipatory repudiation in itself does not provide a basis for recovery of the damages claimed. See *In re Broadstripe, LLC,* 435 B.R. 245, 261 (Bankr. D. Del. 2010). *McCormick v. Fidelity & Cas. Co. of New York*, 307 Pa. 434, 438–39. [RPHB1 ¶¶333–36] It is only if the non-repudiating party elects to treat the agreement as terminated that an immediate cause of action for total breach damages arises. "The renunciation of a contractual duty before the time fixed in the contract for performance is an anticipatory repudiation which ripens into a breach prior to the time for performance only if the injured party elects to treat it as such." *Franconia Assoc. v. United States,* 536 U.S. 129, 143 (2002) (citing Restatement (Second) of Law of Contracts (1979)).

395. Particularly because the breach was accompanied by an earlier unwithdrawn repudiation of all future obligations, I find that Respondents committed the breach of the Investment Agreements on 1 December 2016, when they failed to make the required additional escrow deposits, was a material breach. Under Delaware law, when a party commits a material breach of contract the injured party may be discharged from any future performance obligations and may claim damages for total breach. In *BioLife Solutions, Inc. v. Endocare, Inc.,* 838 A.2d 268 (2003) the Court of Chancery of Delaware said (at *278, internal citations omitted), citing

Eastern Electric and Heating, Inc. v. Pike Creek Professional Center, 1987 WL 9610, at *4 (Del.Super. Apr. 7, 1987):

> A party is excused from performance under a contract if the other party is in material breach thereof. "The converse of this principal is that a slight breach by one party, while giving rise to an action for damages, will not necessarily terminate the obligations of the injured party to perform under the contract." Non-performance by an injured party under such a circumstance operates as a breach of contract. "The question whether the breach is of sufficient importance to justify non-performance by the non-breaching party is one of degree and is determined by 'weighing the consequences in the light of the actual custom of men in the performance of contracts similar to the one that is involved in the specific case.'"
>
> Section 241 of the Restatement (Second) of Contracts sets forth several factors to consider when determining whether "a failure to render ... performance is material" (thus justifying repudiation of a contract).
>
> > These factors include: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

396. I also find that CFLD breached the implied covenant of good faith and fair dealing by its conduct during and after the 27 and 28 October 2016 meetings. The evidence shows that as early as 26 September 2016 Respondents were actively planning ways to withdraw from their commitments and recover the money advanced to date, because of concerns about lack of performance by Claimants. Initially it appears they intended to pursue this objective through negotiation. [Ex. C-101] Respondents were, of course, entitled to seek to extract themselves from what they now considered to be an undesirable commitment by any lawful means.

397. In my view, however, CFLD's conduct at the late October meetings was a bad faith tactic designed to put Chung and Claimants on the defensive because CFLD did not wish to live with the consequences of the bargains GIIL had made on its behalf. Normally mere threats and accusations of wrongdoing, even if unsubstantiated, do not give rise to a breach. In the unique circumstances of this case, however, the fact that the anchor investor in the Funds was making allegations of fraud and had

stated its intention to unwind its investment was something that Claimants would have to disclose to potential Fund 1 investors and attempt to explain away before crystallizing any potential commitment from other investors. The threats could have immediate consequences. They had the potential to de-rail efforts to obtain additional investor commitments for Fund 1 and thereby undermine the overarching purpose of the Fund 1 Investment Agreements.

398. For the reasons I have stated, I find that the conduct of CFLD on 28 October 2016 was an immediate breach of CFLD's implied covenant of good faith and fair dealing. Below I consider the consequences of and remedies for this breach.

(K) Respective Liabilities of CFLD and GIIL

399. Claimants assert that GIIL, as a signatory party to the relevant Investment Agreements is directly liable to pay any damages for breach of those contracts. Based on the findings in the First Award, Claimants contend that just as GIIL was found to be CFLD's agent in making the Arbitration Agreements CFLD was GIIL's principle in making the relevant Investment Agreements. [CPHB2 ¶¶206–12] They allege that under Delaware law GIIL and CFLD are jointly and severally liable for damages for breach of contract. [CPHB1 ¶¶210, FN 313]

400. Alternatively, Claimants contend that if CFLD is not directly liable for breach of contract CFLD is jointly and severally liable with GIIL for any damages because CFLD tortiously interfered with the relevant Investment Agreements. [CSOC1 ¶¶223–28; CPHB2 ¶¶213–17]

401. In any event, Claimants contend that they have established that CFLD and GIIL are both liable for tortious interference with Claimants' future business opportunities and are jointly and severally liable for that reason. [CPHB2 ¶¶218–21]

402. Respondents submit that the findings in the First Award were limited to the question of whether the Arbitration Agreements were enforceable against CFLD. They submit that the question of whether CFLD is liable for GIIL's breaches of contract is a separate, undecided issue. They submit that under Delaware law a principle is not vicariously liable for its agents breaches of contract, citing *Wenske v. Blue Bell Creameries, Inc.*, No. CV 2017-0699-JRS, 2018 WL 5994971 (Del. Ch. Nov. 13, 2018). They submit that CFLD is excluded as a party to the relevant Investment Agreements. [RPHB1 ¶¶402, 403]

403. Respondents contend that Claimants' alternative tort claims are barred by Delaware law's prohibition on the use of tort law to recover for breach of contract, citing *Nemec v. Shrader*, 991 A.2d 1120 (Del. 2010) and *Preferred Investment Servs., Inc. v. Fast Bail Bonds LLC,* No. CV N13C-03-039 ALR, 2014 WL 5761123 (Del. Super. Ct. Oct. 27, 2014). [RSOC3 ¶90; RPHB1 ¶¶409–11]

404. Alternatively, Respondents contend that liability of CFLD for tortious interference is precluded by the "stranger doctrine" under Delaware law, citing *Tenneco Automotive, Inc. v. El Paso Corp*., 2007 WO 92621 (Del. Ch. Ct. Jan. 8, 2007). [RSOC3 93; RPHB1 412–14; RPHB2 ¶¶261–72]

(a) *GIIL's Liability as Agent and CFLD's Liability as Principal for Material Breach*

405. The First Award found jurisdiction over CFLD even though CFLD was not a signatory to the Investment Agreements containing the Arbitration Agreements. The First Award made clear that the sole issue decided was whether the Arbitration Agreements could be enforced against CFLD. The law relied on by both parties, cited in the First Award, established that a non-signatory may be bound by an arbitration agreement on the basis that the signatory acted as the non-signatory's agent for the purposes of making the arbitration agreement. [First Award ¶¶104, 105] The First Award determined that GIIL acted as CFLD's agent in entering into the agreements containing the Arbitration Agreements. [First Award ¶¶155, 156] The First Award did not decide, however, whether CFLD as principle, having authorized the execution of the relevant Investment Agreements by GIIL as its agent, is directly liable to Claimants for any breaches of contract by GIIL. Nor did it decide whether both CFLD and GIIL can be found liable for such breaches.

406. I agree with Claimants that their contract claim against CFLD is not based on vicarious liability as Respondents suggest. The allegation is that CFLD is directly liable, because CFLD directed GIIL to enter into the relevant Investment Agreements on its behalf. In *Wenske*, upon which Respondents rely, the court [at *4] distinguished between claims based on vicarious liability as opposed to "direct agency."

407. Respondents submit that each of the relevant Investment Agreements did not include CFLD as a party and expressly disclaimed any third party benefit or liability. [RPHB1 ¶402] They rely on the finding in the First Award that the contract language precludes a finding that CFLD is a third party beneficiary of the Investment

Agreement in the sense recognized by Delaware law. [First Award ¶140] The First Award stated, however, that the contract language relied on by CFLD was not relevant to the question of whether the Investment Agreements could be enforced *against* CFLD. [First Award ¶141] The First Award concluded that "the language of the Investment Agreements designed to limit claims by third party beneficiaries does not preclude a finding based on other doctrines that … CFLD is bound by the Arbitration Agreements." [First Award ¶201(d)] Similarly, the language relied upon is not sufficient to preclude a finding that the substantive obligations under the Investment Agreements are enforceable against CFLD on the basis of direct agency.

408. Claimants note that in *Wenske* the court endorsed a passage from the Restatement (Third) of Agency, indicating that in some circumstances both principal and agent may be regarded as parties to an agreement made by an agent acting with actual authority. *Wenske,* 2018 WL 5994971, at *4. The passage cited, however, concerned circumstances where an agent with actual authority acted for an undisclosed principal. I agree with the submission of Respondents in their Fourth Statement of Case [RSOC4 ¶217] and with the submission of Claimants in their First Post-Hearing Brief [CPHB1 ¶305] that the present case concerns a disclosed principal.

409. Respondents submit that "under Delaware law, an agent who contracts on behalf of a disclosed principal is not personally liable to the other contracting party," citing *Pennsylvania House, Inc. v. Kauffman's Of Del., Inc.,* No. 97J-10-039, 1998 WL 442701, at *2 (Del. Super. Ct. May 20, 1998) ("viewed in its entirety clearly demonstrates that [the agent] was acting as an agent of [the principal] when he signed the Agreement. This Court finds that [the agent] is not personally liable on the Agreement.")] [RSOC4 ¶217] Claimants do not disagree with the general rule as set out by Respondents.

410. Under Delaware law, however, the general rule that only the disclosed principal is liable is subject to an exception where the contract does not expressly state that it is made as agent only and "other circumstances show [] that [the agent] has expressly or impliedly incurred or intended to incur personal responsibility." *Pennsylvania House, Inc. v. Kauffman's Of Del., Inc.,* No. 97J-10-039, 1998 WL 442701, at *2 (Del. Super. Ct. May 20, 1998).

411. The circumstances of this case are unique in several respects. In their First Statement of Case, Respondents identified facts they submitted supported the

conclusion that GIIL was intended to be s*olely* liable under the Investment Agreements. [RSOC1 ¶¶12–18] While I did not accept Respondents' contention during the jurisdiction phase that *only* GIIL, and not CFLD, was a party to the arbitration agreements, that finding does not preclude a finding that it was intended that *both* CFLD and GIIL had substantive performance obligations. On the whole of the evidence, it is clear that both parties considered that GIIL was to have performance obligations, despite acting as CFLD's agent.

412. For these reasons, I find that CFLD and GIIL are jointly and severally liable for any damages for breach of contract.

(b) *Liability of CFLD for Breach of Implied Covenant*

413. In Appendix A to their First Post Hearing Brief, Claimants state:

> CFLD is solely liable on Claimants' claim for breach of the covenant of good faith and fair dealing. It was CFLD's egregious conduct that went beyond a mere breach of the express contractual provisions. CFLD breached the "specific implied contractual obligation" that the Funds' anchor investor not knowingly take actions that would directly undermine the GPs' ability to fulfill the Funds' purpose.

414. For this reason, I find that only CFLD is liable to pay any damages for breach of the implied covenant.

(c) *Liability of CFLD and GIIL for Tortious Interference*

415. Because I find that CFLD and GIIL are jointly and severally liable to pay damages for breach of contract, and CFLD is severally liable to pay damages for breach of the implied covenant, it is not necessary for me to decide the alternative claims based on tortious interference.

(L) Causation and Damages

(a) *General Principles of Delaware Law Concerning Damages*

416. In assessing damages under Delaware law, the aim is to put the injured party in the position it would have been "but-for" the defendant's wrongful conduct. See *Genencor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 11 (Del. 2000) (courts in breach of contract actions "seek to give the nonbreaching [] party the benefit of its bargain by putting that party in the position it would have been but for the breach"). The

injured party may be entitled to lost profits as part of this compensation. See *Siga Techs., Inc. v. PharmAthene, Inc.,* 132 A.3d 1108 (Del. 2015), at 1130.

417. Under Delaware law, lost future profits are recoverable for breach of contract so long as they were reasonably foreseeable at the time of contracting. *Bougourd v. Vill. Gardens Homes, Inc.,* No. Civ.A. 00- 06-136, 2002 WL 32072790, at *4 (Del. Com. Pl. Dec. 31, 2002), aff'd, No. CIV.A. 03A-05- 003THG, 2004 WL 98714 (Del. Super. Ct. Jan. 16, 2004). To meet this requirement, a plaintiff must show "merely that the injury actually suffered [was] of a kind that the defendant had reason to foresee and of an amount that is not beyond the bounds of reasonable prediction." Joseph M. Perillo, 11 Corbin on Contracts § 56.7 at 108 (2005 rev. ed) (citing *Sabraw v. Kaplan,* 211 Cal. App. 2d 224, 27 Cal. Rptr. 81 (1962)).

418. Under Delaware law, once an injured party has established the fact of injury, less certainty is required to establish the amount of damages to be awarded to compensate the victim for that injury. See *Siga Techs., Inc*. 132 A.3d 1108, 1130 (Del. 2015), as corrected (Dec. 28, 2015); see also *Storey Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 562, 51 S. Ct. 248, 75 L.Ed. 544 (1931) ("there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount").

419. While "the projection of future damages is inherently a task fraught with the risk of speculation, [a]ll that [courts] require[] [is] 'some reasonable basis upon which a [factfinder] may estimate with a fair degree of certainty the probable loss which plaintiff will sustain in order to make an intelligent determination of the extent of the loss.'" *Lisowski v. Bayhealth Med. Ctr., Inc*., No. N15C-04-228 ALR, 2016 WL 4923053, at *1 (Del. Super. Ct. Sept. 7, 2016).

420. Under Delaware law, Claimants bear the burden of providing a "reasonable basis for inference" in support of their claimed damages. *True N. Composites, LLC v. Trinity Indus., Inc.,* 65 F. App'x 266, 273–74 (Fed. Cir. 2003) (internal citations omitted). Because the defendant's wrongdoing created the uncertainty, "fundamental justice requires that, as between [the plaintiff] and [the defendant], the perils of such uncertainty should be laid at defendant's door." *Am. Gen. Corp. v. Cont'l Airlines Corp.,* 622 A.2d 1, 10 (Del.Ch. 1992) (citations omitted).

(b) Election of Remedies and Measure of Damages

421. For the reasons stated above, I find that CFLD breached the implied covenant on 28 October 2016 and that Respondents breached the Investment Agreements on 1 December 2016 by failing to make the second deposit of escrow funds. I have found that Claimants do not have a claim for damages based on anticipatory repudiation because they did not "accept" the repudiation.

422. I find that when faced with Respondents' breaches, if they were material, Claimants had to promptly elect whether to treat the 26 November Agreements as terminated and claim damages for total breach or to treat the agreements as continuing, and claim damages for the losses caused by the breach. I agree with both parties (Respondents now having changed their position as set out above) that Claimants did not elect to treat the agreements as terminated, but rather elected to treat them as continuing. As a result, the agreements remain in effect and are binding on both parties.

423. Claimants have submitted that to fulfill their fiduciary and contractual duties as GPs of the Funds, they had no alternative but to continue to operate the Funds and thus could not elect to terminate the relevant Investment Agreements. It is not clear whether this submission is made simply to explain why the election to terminate was not made, or whether it is made to suggest that Claimants should be entitled to total breach damages despite the fact that no election to terminate was made. If the latter is the case, I find the submission unpersuasive for several reasons.

424. The circumstances in this case are not like the special circumstances that existed in cases such as *Northern Helex Co. v United States*, 197 Ct. Cl. 118 (1972) and which have been held to permit a total breach damages claim despite continued post-breach performance. Claimants did not, as occurred in that case, immediately tell Respondents that they intended to claim total breach and were continuing to perform under protest. To the contrary, Claimants actually sought to compel Respondents to continue performance. They actively pursued the benefit of the Investment Agreements, rather than reluctantly performing them out of necessity.

425. I am not convinced that it was not feasible for Claimants to elect to terminate the EAs and SAs and to take the position that Claimants considered that all obligations to Respondents and rights of Respondents under the LPAs were at an end. There is

a distinction between winding up a limited partnership and bringing to an end the future contractual rights and obligations of a limited partner. If further steps of the kind Claimants suggest might have been required (e.g. applications to the Delaware Courts) to regularize the affairs of the limited partnerships, and if there was a risk that taking such steps might be construed as continuing performance inconsistent with an election to terminate, then the *Northern Helex* approach could have been invoked. The evidence clearly shows, however, that Claimants made a conscious decision to try to get matters back on track and to continue with the Funds as though Respondents were still limited partners whose escrow funds could be called upon to satisfy capital calls and pay management fees. The evidence shows that the financial benefits to Claimants of the path they chose have been substantial.

426. I also do not agree with Claimants' contention [CSPHB1] that it would have been a breach of fiduciary duty for them to have elected to terminate the relationship and proceed in the manner I have described. I accept that Claimants owe duties to limited partners to manage the partnership in the interests of the limited partners. *Sonet v. Timber Co., L.P.*, 722 A.2d 319, 322 (Del. Ch. 1988); see also *Boxer v. Husky Oil Co.*, 429 A.2d 995, 997 (Del. Ch. 1981) (absent contractual modification, general partners owe fiduciary duties of good faith, fairness, and loyalty to the partnership and its limited partners). I do not accept that any duty owed to the limited partners (or the partnerships, assuming that independent duties were owed to the partnerships) could preclude the GPs, acting in good faith, from lawfully terminating the rights of another limited partner.

427. Claimants submit [CSPHB1 pp. 3,4] that "[c]easing operations would squander the entirety of these investments, further threaten the operations of the portfolio companies dependent on the Funds' support, and risk greater reputational harm to the Funds and Mr. Chung." That is a cogent argument as to why the better choice was not to elect termination, but it is not an argument as to why termination, taking the approach described in *Northern Helex*, was not possible.

428. The damages analysis originally presented by Claimants through their expert witness, Trevor Loy, is (leaving aside the quantum claimed) conceptually consistent with the correct approach to assessing damages in this case. Loy calculates the estimated present value of total net revenues that would have been received but for the breach (in the "**But-For World**") and deducts from that amount the

estimated present value of total net revenues that actually will be received (in the "**Actual World**"). Loy attempts to quantify lost *incremental* future profits.

429. In their First Post-Hearing Brief, however, Claimants state: [CPHB1 ¶¶244, 245]

> 244. Claimants, however, now only seek damages—not specific performance—on the basis that the Investment Agreements will no longer continue in force following the Arbitrator's award and the conclusion of this proceeding. This means that Claimants will not earn the expected actual-world profits Mr. Loy contemplates in his damages model—which he subtracts from the estimated lost "but-for world" profits to arrive at an overall damages amount.
>
> 245. For this reason, as the parties' contractual relationship will come to an end following the Arbitrator's award, a complete damages award must include the ***entire amount*** of lost profits (*i.e.*, the amount reflected in Mr. Loy's overall damages table, as well as the present value of expected profits in the actual world).

430. I do not agree with Claimants' proposed measure of damages. It is tantamount to claiming damages for the total loss of the agreements without having elected to terminate. I agree with Respondents that, in the light of the irrevocable election made, Claimants should not be awarded total breach damages. The fact that the agreements have remained in force and continue in force must be taken into account. I do not, however, agree with Respondents that the election made by Claimants necessarily means that they cannot recover an award for lost future profits. If the breaches impaired the Claimants' ability to earn greater profits than they will in fact earn, that loss is compensable by an award of damages, even if the agreements remain in effect.

431. For the reasons I have stated, I find that Claimants have irrevocably elected to treat the relevant Investment Agreements as continuing. I find that Claimants are not entitled to an award of total breach damages as if the agreements had been terminated for material breach. I find that Claimants are entitled to an award of damages for any profits lost as a result of Respondents' breaches, but the damages amount must take into account the fact that the Investment Agreements comprising the 26 November Agreements remain in effect and that Claimants have benefited and will continue to benefit from them.

(c) Claimants' Damages Claims

432. Claimants submit that Fund 1's fund-raising activities were proceeding well until CFLD's bad-faith rejection of its obligations at the 28 October meeting. They contend that they were actively considering promising investment opportunities and significant additions to their team. They submit that but for Respondents breach of implied covenant and material breach of contract, additional LPs would have joined Fund 1 and both Fund 1 and the China Fund would have achieved their investment objectives. They submit that as a result of Respondents' breaches Claimants have suffered damages in the form of lost future profits that would have been earned through management fees and the carried interest they were entitled to hold in the two Funds. [CPHB1 ¶¶222–55]

433. Claimants rely on the evidence of Loy to quantify their losses. [CES1, CES7, CES10]

434. As a first step in his analysis, Loy estimates what the ultimate Fund sizes would have been but for Respondents' breaches. Fund size is relevant to both the calculation of lost management fees (which are based either on committed capital itself or on "net" invested capital, which is a derivative of committed capital) and the calculation of lost carried interest revenue (which depends in part on the amount of investable capital). In the case of the single investor China Fund, the assumed size is US$150 million, as that is the amount committed by Respondents. In the case of Fund 1, it is necessary to estimate the amount of capital in addition to Respondents' US$50 million commitment that could have been raised, but for Respondents' breaches.

435. In estimating the capital that would have been committed by other new investors in Fund 1, Loy relies heavily on a "probability adjusted commit" estimate prepared by Fund 1 GP in October setting out additional LP investments they hoped to close. [Ex. C-42] A key assumption underlying this analysis is that either additional investors would have committed to Fund 1 before the agreed 1 December 2016 second closing date or Respondents would have consented to admit new LPs after that date. [CES1 ¶¶142–52]

436. Loy's second step is to estimate the investments that LPs would have made in potential "follow-on" funds (**Follow-On Funds**). A key assumption justifying this

analysis is that it would have been the two Claimant GPs, not other legal entities, that served as GPs of potential Follow-On Funds. [CES1 ¶¶142–52]

437. Loy's third step is to estimate the investment performance of the Funds and any Follow-On Funds, as the basis for an estimate of the returns Claimants would have received on their carried interests. [CES1 ¶¶142–52]

438. Having estimated the future revenues from management fees (making assumptions about future management costs) and carried interest, Loy's next step is to discount the estimated future cash-flows to a present value. In the case of management fee revenue he uses a risk-free discount rate. In the case of carried-interest returns he proposes several alternative approaches. This provides a range of present value estimates of the estimated lost future profits. [CES1 ¶¶142–52]

439. In his final step, Loy then deducts from the estimated present value (as of 28 October 2015) of the lost profits the estimated present value (as of the same date) of the profits and revenues that Claimants actually will derive from the Funds, with the difference representing the amount of the damages claimed for lost profits. While referred to as the "Actual World" scenario for purposes of comparison to the "But-For World" scenario, the "Actual World" scenario also requires estimating future events, based on different assumptions. For the purposes of his "Actual World" scenario, Loy assumed that the Funds would continue to operate and generate management fees and carried interests returns, but at a lower level than they would have but-for Respondents' breaches. [CES1 ¶¶142-152]

440. Respondents, relying in part on the evidence of their own expert, David Larsen, have many criticisms of Claimants' damages claims and Loy's calculations. [RES8] They allege that:

    a. Loy lacks qualifications to provide reliable damages estimates and his estimates are too unreliable to form the basis of an award; [RPHB1 ¶¶250-71]

    b. Claimants have failed to establish any "reasonably certain" damages; [RPHB1 ¶¶338-41]

c. The assumption that new investors would be admitted to Fund 1 *after* 1 December 2016 is incorrect because Respondents' consent is required to add new LPs and Respondents more likely than not would have withheld consent;

d. Respondents' breaches caused no loss to Fund 1 GP because the evidence does not show on balance that:

   i. there were new investors who would have committed to Fund 1 *before* 1 December 2016 but for Respondents breaches; [RSOC4¶¶ 115-22]
   ii. Respondents' conduct had an impact on Claimants' ability to make investments; [RSOC4 ¶¶123] or
   iii. Respondents' conduct had an impact on Claimants' ability to recruit a strong team; [RSOC4 ¶¶124-27]

e. Claimant GP's cannot claim damages for revenues that might have been derived from Follow-On Funds, because: [RPHB1 ¶¶380-84]

   i. it is much more likely than not that any Follow-On Funds would have had different GPs; and
   ii. It is unlikely in any event that investors would have been interested in a Follow-On Funds due to the lack of success of the Funds;

f. The evidence does not show that there has been a loss of net management fee income; [RPHB1 ¶¶341-63]

g. Loy's estimates of both management fee and carried interest income losses wrongly suppose that the Fund size would be greater than Respondents' US$150 million and US$50 million commitments; [RPHB1 ¶¶351–53, 369]

h. The discount rate applied by Loy to determine the present value of lost net management fee income is unduly low; [RPHB1 ¶¶364-66]

i. Loy's assumptions about future Fund performance in the but-for world are unduly optimistic and not supported by the evidence; [RPHB1 ¶¶370-72]

j. Loy's assumption about future Fund performance in the actual world are unduly pessimistic and not supported by the evidence [RPHB1 ¶¶373-78] and

k. The discount rate applied by Loy to determine the present value of lost future carried-interest revenue is unduly low. [RPHB1 ¶379]

(d) *Loy's Qualifications*

441. Loy is by education an engineer. While he has relevant venture capital fund experience, it does not include experience with some of the specific features of the Funds, including a Chinese anchor investor, a Chinese focus for investments and an emphasis on clean-tech industry investments. I agree with Respondents that Loy's lack of specifically analogous experience must be taken into account when weighing some of his evidence, including any opinions he expresses as to the reliability of Claimants' internal estimates of the amounts additional investors were likely to commit before 1 December 2016.

(e) *Implications of the Requirement for Respondents' Consent to New Fund 1 LPs*

442. Section 3.2 of the 13 November Fund 1 LPA states that after 1 December 2016 no new person may be admitted as a limited partner, except with the consent of the General Partner and a Majority in Interest of the Limited Partners. This means that the consent of Respondents would have been required to admit new LPs to Fund 1 after 1 December 2016. Respondents submit that Claimants cannot recover damages for attempts to secure Follow-On LPs that they had the contractual right to reject. [RSOC 3 ¶70(c); RSOC4 ¶115; RES8 ¶55; RPHB2 ¶278]

443. Respondents submit that, as the evidence shows their dissatisfaction with Fund 1's performance and their views concerning Chung's integrity, it is more likely than not that Respondents' consent would have been refused. They submit that they cannot be held liable for damages resulting from the exercise of a lawful right to withhold consent, citing *Thorpe by Castleman v. CERBCO, Inc.,* 676 A.2d 436, 444 (Del. 1996) (distinguishing between damages caused by the breach and damages resulting from the controllers' "lawful exercise of statutory rights" in vetoing potential transaction, and holding that any damages stemming from "the nonconsummation of the transaction" resulted from the controllers' lawful exercise of their statutory rights, and thus statutory damages could not be awarded).

444. The expert evidence shows that in the industry, extensions are common and investors are often eager to have more investors join the fund. [TR. 1435] Claimants

submit that for the Respondents to have refused to consent would have been "flatly against their own economic interests." [CPHB1 ¶180]

445. After careful consideration, I agree with Respondents. The consent requirement must be taken into account. The damages analysis presented by Claimants involves a comparison of the profits that would have been earned if Respondents had not breached their obligations with the profits actually to be earned despite their breach. In the "But-For World" one should assume that the discretion afforded Respondents by the consent requirement would be exercised consistently with Respondents' continuing implied covenant obligations. Even so, in the circumstances of this case, I find it more likely than not that Respondents, acting in what they perceived to be their own best interests as they were entitled to do when deciding whether to grant or withhold consent, would have withheld their consent after 1 December 2016. As a result, damages should not be calculated on an assumption that new LPs would have been admitted to Fund 1 after 1 December 2016.

446. Despite this finding, it is still necessary to consider whether, but for CFLD's breach of implied covenant, Fund 1 GP would have been able to obtain commitments from new LPs to invest in Fund 1 *before* 1 December 2016.

(f) *The Assumption that New Investors Would Have Committed to Fund 1 Before it Closed, But for CFLD's Breach of Implied Covenant*

447. In his calculations, Loy uses two alternative estimates for the size of Fund 1 but for CFLD's breach. In "But-For Scenario 1," Loy assumes Fund 1 GP would have raised US$191 million for Fund I, representing Respondents' US$50 million commitment plus $141 million in additional investment. [CES1 ¶143] This US$141 million in additional investment is based on Claimants' internal "probability-adjusted commit" estimate from 20 October 2016, of the additional investments Claimants believed they would close by 1 December 2016. [CES1 ¶144; Ex. C-42] In "But-For Scenario 2," Loy assumes that [redacted] would have committed US$250 million to Fund 1 by 1 December 2016, but for CFLDs breach, resulting in a Fund 1 size of US$424.5 million. [CES1 ¶144]

448. I agree with Respondents that the basis on which Loy arrived at the estimate of US$141 million in additional investment is concerning. [RPHB1 ¶352(d)] The US$141 million estimate is based on Claimants' internal estimate, calculated by multiplying

the perceived (by Claimants) likelihood in percentage terms of any particular investor committing, by the perceived (by Claimants) likely investment amount. It, therefore, includes amounts attributable to hypothetical investments perceived at the time as having very low chances of being achieved: e.g. [redacted] is assessed as having a 10% chance of committing to invest US$100 million, and, therefore, adds US$10 million to the US$141 million.

449. Under Delaware law, when considering a claim for lost profits, the first step is to determine, on a balance of probabilities, whether anything was lost. Once the fact of a loss has been established, the requirement for certainty is relaxed when it comes to the assessment of the quantum of the loss, especially when the uncertainty is attributable to the breaching party's wrongful conduct. See *Siga Techs., Inc. v. PharmAthene, Inc*., 132 A.3d 1108 (Del. 2015) at 1111: (emphasis added)

> When a party breaches a contract, that party often creates a course of events that is different from those that would have transpired absent the breach. The breaching party cannot avoid responsibility for making the other party whole simply by arguing that expectation damages based on lost profits are speculative because they come from an uncertain world created by the wrongdoer. Rather, when a contract is breached, expectation damages can be established as long as the plaintiff can prove the fact of damages with reasonable certainty. The amount of damages can be an estimate.

450. In the present case, each alleged opportunity to secure an additional LP investment should, as far as possible, be considered on its own. If the evidence shows that it is more likely than not that the outcome of discussions with a prospective investor would have resulted in some amount of investment being made before 1 December 2016 then the opportunity is established. It must then be shown that it is more likely than not that CFLD's breach of implied covenant caused the opportunity to be lost. Once the fact of a lost opportunity has been proven, more latitude can be allowed in quantifying the loss. As the amount of profit lost is tied to the amount that would have been invested, I find that the investment amount need not be proved with certainty, but may be estimated so long as there is some evidence on which a reasonable estimate can be based.

451. I have reviewed the evidence concerning the prospective LP investors that Fund 1 was pursuing at the time of CFLD's breach of implied covenant. [CWS1 ¶¶175–96; CWS8 ¶¶58–59; CWS4 ¶¶12, 13] Chung acknowledges that "[b]ecause the decision

to invest is based on many factors, including factors well outside our control, it is difficult to say with certainty which of the investors would have made a commitment, or how much they would have invested." [CWS1 ¶162] As I have said, however, certainty is not required.

452. In the following paragraphs, I consider whether it has been sufficiently proven that there was an opportunity to obtain Fund 1 commitments from investors before 1 December 2016 and, if so, whether the evidence shows that the failure to obtain a commitment by 1 December 2016 was caused by CFLD's breach of implied covenant.

453. The evidence shows that before the end of October 2016 Claimants were in discussions with [redacted] about a possible investment of US$100 million in Fund 1. [redacted] is a major Chinese [redacted] provider specializing in [redacted]. Chung met [redacted] (one of the wealthiest industrialists in China) when Chung was at Khosla. Chung, [redacted] and members of [redacted] board met throughout September and October of 2016 regarding a potential investment. Chung's evidence is that "[a]t the conclusion of those discussions, [redacted] with his entire senior team present, made the declaration that they wanted to invest in the funds, they wanted to work with me." [TR. 231–32; CWS4 ¶13]

454. At [redacted] request, and on instructions from Chung, a draft of a preliminary proposed term sheet was prepared by MF to be delivered to [redacted] could consider its terms. Chung told MF that [redacted] had "the ability to do as much as US$50–100M if we can agree on the right collaboration model." [Ex. C-45, C-120, C-121] The draft term sheet used a figure of US$100 million as the Fund 1 investment amount. At that stage, Chung revised upward earlier probability assessments for [redacted] from 25% to 33% probability to invest US$50 million. He says this was "conservative." [TR. 562, 563]

455. The October 27/28 meetings with CFLD intervened before the draft term sheet was sent to [redacted] Chung's evidence is that "until I resolved the dispute, I could not accept additional capital into the Funds, and [] disclosing an ongoing dispute with the Funds' anchor investor to [redacted] would have ended efforts to close the investment." Although Claimants considered presenting it to [redacted] in several meetings in November they "held off", hoping the dispute with CFLD might be resolved. [CWS1 ¶¶190, 191]

456. Discussions with [redacted] resumed in January 2017, and focused on a potential US$250 million investment by [redacted] A non-binding Cooperation Framework Agreement was signed (**Framework Agreement**). [CWS1 ¶¶192, 193] Neither Claimant was a party to the Framework Agreement. Chung admits that the agreement contemplated the creation of two new funds. [CWS1 ¶194] The agreement states: [Ex. C-45]

> 1. Parties A and B agree to engage in deeper cooperation in the field of energy investment, to jointly participate in or initiate the establishment of a fund together. [redacted] plans to organize an investment of approximately US$ 250 million, of which 25% would be invested in 1955 Capital's "Priority Fund" (mainly investing in early to mid-stage projects) and 75% would be invested in the newly established and specialized "Energy Fund" (mainly investing in mid- to late-stage projects) (collectively referred to with the Priority Fund as "the Funds").

457. The evidence shows that, despite never being told of the dispute between Claimants and CFLD, [redacted] eventually decided not to proceed with the investments contemplated by the Framework Agreement.

458. I find that there was no reasonable expectation that [redacted] would have committed to an investment in Fund 1 before 1 December 2016, and that the evidence does not show that an opportunity to obtain a Fund 1 commitment from [redacted] was lost as a result of CFLD's breach of implied covenant. The evidence shows that from an early stage obtaining a commitment from [redacted] was contingent on finding agreement on "the right collaboration model." The potential collaboration model ultimately developed and recorded in the Framework Agreement called for the establishment of two new funds, not an investment in Fund 1, to attempt to meet the expectations and requirements of [redacted]. [redacted] was never told of the dispute concerning Fund 1, and that fact played no part in its decision ultimately not to proceed. I do not accept Chung's evidence that Claimants' contemporaneous assessment of the probability of obtaining a commitment from [redacted] (a 33% chance of an investment of US$50 million) was "conservative." It was very optimistic.

459. For the reasons I have stated, I find that Claimants have failed to prove that they lost an opportunity to obtain a Fund 1 commitment from [redacted] before 1 December 2016 as result of CFLD's breach of implied covenant.

460. Similarly, I find that Claimants have failed to prove that but for CFLD's breach, there was a reasonable expectation that [redacted] would have committed to invest in Fund 1 before 1 December 2016. The evidence shows no more than that, after initial

discussions, [redacted] expressed interest in a potential investment and invited Claimants to submit an application but the Claimants did not do so. Even accepting Claimants' evidence that the reason they did not submit an application was that they would have had to disclose the dispute with CFLD, it is pure speculation that [redacted] might otherwise have made a timely commitment. Claimants' internal estimate that there was a 10% probability of obtaining a commitment is speculative. It certainly does not support a conclusion that there was a reasonable expectation that [redacted] would make a timely Fund 1 commitment. [Ex. C-42; CWS 4¶13]

461. I also find that Claimants have failed to prove that there was a reasonable expectation that [redacted] would have made a commitment to invest in Fund 1 before 1 December 2016, but for CFLD's actions. Again, the evidence of what had occurred before 28 October 2016 goes no further than to show that there were discussions, expression of possible interest, and a request for information, this time in the form of a Due Diligence Questionnaire (**DDQ**). The request was received weeks before the October meetings, and yet the DDQ had not been completed and returned. I infer from the evidence that the most likely reason for this is that [redacted] was particularly demanding in its due diligence expectations and Respondents did not yet have in place some of the infrastructure that [redacted] expected to see. [Ex. C-126; TR. 1010] There is no documentary evidence to support the "confidence" expressed by both Chung and Tseng in their evidence about a forthcoming commitment from [redacted]. [TR. 59, 60, 243–46] Moreover, Claimants have submitted that the potential [redacted] commitment would not have been made until *after* 1 December 2016, saying (emphasis added) "Claimants were <u>on track to complete the DDQ before December 1</u>" and "[redacted] indicated that they <u>could complete their due diligence and make a commitment by the end of the year,</u> even if the investment itself took place in 2017." [CPHB1 ¶162]

462. With respect to [redacted] three other potential investors with whom Claimants had discussions concerning possible investments in Fund 1, Chung, sometimes supported by Tseng, expresses confidence that a commitment could have been secured before 1 December 2016, but for CFLD's breach. In each case, however, there is little if any objective evidence to show whether this confident belief was a reasonable expectation. [CPHB1 166–73; RPHB2 144–48] By way of evidence concerning likelihood, there is only the Claimants' estimates of amount and probability for these three prospects set out in their "probability

adjusted commit" estimate; [redacted] (US$20 million at 25%); [redacted] (US$15 million at 50%); and [redacted] (US$1 million at 90%). [Ex. C-42]

463. The evidence shows that Claimants also were in discussions with a number of other prospects. Those that are specifically identified by Claimants are as follows (the amounts and probability estimates set out in Ex. C-42 for each are also indicated, along with the cited documentary support):

a. [redacted] (US$10 million at 33%); [Ex. C-133, C-134]
b. [redacted] (US$20 million at 50%); [Ex. C-136]
c. [redacted] (US$15 million at 50%); [Ex. C-137]
d. [redacted] (US$50 million at 25%); Ex. C-48, C-139, C-140]
e. [redacted] (US$10 million at 33%); [C-141]
f. [redacted] (US$3 million at 90%); [C-142]
g. [redacted] (US$5 million at 75%); [Ex. C-112]
h. [redacted] (US$30 million at 10%); [Ex. C-143, C-144]
i. [redacted] (US$3 million at 90%). [Ex. C-48]

464. I have reviewed the witness and documentary evidence cited with respect to each of these investors. That evidence establishes that discussions and/or correspondence had occurred about a possible investment. There are no communications from any prospect from which a conclusion can be drawn about the level of their interest, if any, or the degree of likelihood that they would commit to invest in Fund 1 before 1 December 2016.

465. Claimants emphasize that they do not contend that all of these prospects actually would have committed. They submit, however, that they have proven that it is more likely than not that *some* of them would have committed. I do not agree, for several reasons. First, in each individual case the objective evidence presented to prove the existence of an opportunity to obtain a pre-1 December 2016 commitment is unconvincing. That being the case, it is pure speculation to assume that, despite this, probably some of the investors actually would have committed. Second, this is not a case of lack of evidence of quantum resulting from CFLD's wrongful conduct. The lack of convincing evidence pertains to the existence of an opportunity that was lost due to CFLD's conduct. Third, the evidence shows that none of the potential investors were ever advised of the dispute with CFLD. There is no evidence of CFLD's actions directly causing a potential investor to change its mind. Fourth, in the

circumstances, and particularly in the light of evidence of Claimants' consistent speculative optimism, I find that little weight can be given to the internal "probability adjusted commit" estimates as proof of the existence of an opportunity. That document is a summary of subjective opinions of Claimants at a point in time. It is also a contemporaneous record made in the ordinary course of business. As such, it is some evidence that the stated estimates represent the actual opinions of Claimants at the time they were created, but it is not reliable evidence that those opinions and expectations were reasonable.

466. For the reasons I have stated, I find that Claimants have not established that they lost an opportunity to earn additional profits as a result of CFLD's breach of the implied covenant. In the circumstances, I find that the appropriate award is one of nominal damages. Respondents, jointly and severally, will pay to Claimants, jointly, the sum of US$100 as nominal damages.

(g) *The Claim for Profits Lost as a Result of Respondents' 1 December 2016 Breach*

467. The damages claimed by Claimants assume that in the "But-For World," Fund 1 would have been larger than it is, in terms of committed capital. Building on this incorrect assumption, the damages claimed also assume that, in the "But-For World" the Funds would have made more portfolio investments than they actually have made, and there would have been Follow-On Funds.

468. In the light of my conclusions, Loy's evidence concerning the quantum of lost profits is not reliable. There is not a sufficient evidentiary basis for his assumptions and conclusions that fund size, investment portfolio or performance in the "But-For World" would have been materially different from what it has been and will be in the "Actual World."

469. The narrow question is whether Respondents' failure to deposit additional funds into escrow on 1 December 2016 has resulted or will result in reduced net management fee or carried interest revenue for Claimants.

470. To the extent that revenues are dependent on committed capital, revenues have not been impaired, as the committed capital under the relevant Investment Agreements has not changed as a consequence of Respondents' breaches. To the extent, that revenues are dependent on contributed capital, the revenues have not

been impaired as Respondents have met their capital contribution obligations. There are no unsatisfied capital calls. To the extent that revenues are dependent on investable capital, the evidence does not show that the failure to increase the escrow deposits limited investable or invested capital. There is substantial committed but uninvested capital remaining in the escrow accounts. The evidence does not show any particular investment opportunity that was lost because of Respondents' failures to pay funds into escrow. Similarly, such management fees as have become payable have been paid. It remains to be seen whether there will or will not be Follow-On Funds, but the evidence does not show that Follow-On Funds have been made less likely by Respondents' breach. For present purposes, in the light of my findings, the "Actual World" and the "But-For World" are substantially the same.

471. What Claimants have lost by virtue of the 1 December 2016 breaches is the security of knowing, with certainty, that the additional funds that ought to have been deposited are available in escrow if and when they may be needed. They also, of course, have every reason to believe that, even though a reversal of position is still theoretically possible so long as the agreements remain in force, Respondents will not, if and when the time comes for them to do so, honour their continuing contractual obligations. I am mindful of the evidence that in the light of these uncertainties, both GPs have revised their over-all investment strategy, focusing on smaller investment opportunities. Chung described the present state of affairs in his oral evidence: [TR. 704–705]

> I don't know. I don't know what it's going to be like in a world where I have to tell LPs that I litigated against my LPs—or my anchor LP; and yes, I won, but have to explain to every future LP that I did that, why I did that, what risks were associated with that, what don't they know. With future team members, . . . even if we win, will—will it be public, will other team members find out about this, and will portfolio companies find out about this. So your question of, will I be able to get 1955 back on track, I think that serious damage has been done here, and I'm going to have to find a way to—to move forward. But I don't know the answer.

472. My responsibility as arbitrator is to have regard to the applicable principles of the parties' chosen law. Because Claimants have elected not to terminate the agreements, I must segregate the consequences of Respondents' declared intention not to honour future obligations from the consequences of the single breach of contract that occurred on 1 December 2016. Only losses shown to have been suffered as result of the latter breach are recoverable as damages in this proceeding.

473. For the reasons I have stated, I find that Claimants have not established that they have suffered damages as a result of Respondents' 1 December 2016 breaches of contract. In the circumstances, I find that the appropriate award is one of nominal damages for breach of contract. Respondents, jointly and severally, will pay to Claimants, jointly, the sum of US$100 as nominal damages.

(h) *Status of Investment Agreements, Escrow Funds and LP Interests*

474. In response to my request for clarification of the specific awards sought, in their Supplemental Post-Hearing Submissions each of the parties made submissions concerning forms of award that might be made concerning the status of the Investment Agreements. Of course, they did so without knowing the content of this award.

475. Claimants do not seek any specific awards with respect to the disposition of the Investment Agreements, escrow funds or Respondents' interests as LPs. They submit, however, that it is in the interests of both parties that their relationship be brought to an end. To achieve that, Claimants ask that I "retain jurisdiction to assist the parties in winding down their relationship." [CSPHB1 p. 11]

476. Respondents primarily seek rescission. To achieve that result, they submit that the appropriate award would (in addition to directing the return to them the remaining escrow amounts and awarding damages for the balance of their invested monies): [RSPHB1 pp. 12, 13]

    a. Require Respondents to take such steps as are reasonably necessary to transfer GIIL's rights, title and interest in the Funds to Claimants or their designate;

    b. Provide that if Claimants wish to maintain the Funds as viable, ongoing partnerships, they may appoint one or more new LPs in GIIL's stead, and rescission will be accomplished by GIIL's withdrawal from the Partnerships rather than declaring the LPAs void.

477. If Claimants had been awarded damages for total breach as claimed, Respondents proposed a declaration that the relevant Investment Agreements were terminated

and of no further force and effect, subject to the same provisos as stated in the event rescission was awarded.

478. As I have found that the 26 November Agreements remain in force, the awards suggested by Respondents are not appropriate. They do, however, demonstrate a commendable willingness to cooperate with Claimants to facilitate an orderly withdrawal from the partnerships. Perhaps with the benefit of the findings in this award the parties will be able to negotiate mutually acceptable terms of disengagement. I do not have jurisdiction as arbitrator, however, to assist the parties in such efforts as requested. If neutral assistance is required, it will likely have to be provided by a mediator.

(i) Costs

479. Articles 4.4(a) and 5.4(a) of the 13 November China Fund and Fund 1 LPAs state (in relevant part, emphasis added): [Ex. C-22]

> The Partnership shall be entitled to enforce the obligations of each Limited Partner to make the contributions of capital set forth in paragraph 4.2, and the Partnership shall have all remedies available at law or in equity in the event any such contribution is not so made. If any legal proceedings relating to the failure of a Limited Partner to make such contribution are commenced, the prevailing party shall be entitled to reimbursement from the opposing party of all costs and expenses incurred, including attorneys' fees and expenses, in connection with such proceedings.

480. The Arbitration Agreements in the China Fund LPA and Fund 1 LPA state (in relevant part, emphasis added):

> Each party shall bear its own attorney's fees, costs, and disbursements arising out of the arbitration, and shall pay an equal share of the fees and costs of the Administrator and the Arbitrator; provided, however, the Arbitrator shall be authorized to determine whether a party is the prevailing party, and if so, to award to that prevailing party reimbursement for its reasonable attorneys' fees, costs and disbursements (including, for example, expert witness fees and expenses, photocopy charges, travel expenses, etc.), and/or the fees and costs of the Administrator and the Arbitrator.

481. Article 34 of the applicable ICDR Rules states (in relevant part):

> The arbitral tribunal shall fix the costs of arbitration in its award(s). The tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case.

482. Claimants and Respondents each submitted costs claims. They each rely on the foregoing costs provisions of the Arbitration Agreements and Rules. Claimants submit that the LPA costs provision also applies and is paramount. Respondents submit that it is not applicable as this arbitration does not concern a failure to make a "contribution of capital." The evidence shows that all capital contributions required to be made by Respondents have been made by Claimants giving notice and then drawing down on escrow funds. Respondents submit that a failure to deposit funds into escrow is not a failure to contribute capital under the LPAs.

483. The EAs deem non-payment of amounts due thereunder to be a default for the purposes of the relevant provisions of the LPAs. [Ex. C-31, C-32] Reading the EAs and Section 4.2(e) of the LPAs together, it is clear that while the payment of escrow funds is not a capital contribution, and the failure to deposit escrow funds is not a failure to contribute capital, the contractual remedies for failure to make an escrow deposit are the same as those for failure to contribute capital. I find on that basis that if any legal proceedings relating to the failure of a Limited Partner to make an escrow payment under the EAs are commenced, the prevailing party shall be entitled to reimbursement from the opposing party of all costs and expenses incurred, including attorneys' fees and expenses, in connection with such proceedings.

484. The Arbitration Agreements empower the Sole Arbitrator to determine the prevailing party and to make an award of costs. Although the ICDR Rules provide for an allocation of costs, it may be exercised only where "reasonable." I find that an award allocating costs according to degrees of success is not reasonable where the parties expressly have agreed that the prevailing party has a right to recover its reasonable costs.

485. The Arbitration Agreements state that the authority conferred on the Sole Arbitrator is to make a costs award in favour of the prevailing party for "reimbursement for its *reasonable* attorneys' fees, costs and disbursements (including, for example, expert witness fees and expenses, photocopy charges, travel expenses, etc.), and/or the fees and costs of the Administrator and the Arbitrator." In the context of making an award of costs as between the parties, rather than assessing the amounts that ought to be paid by a party to its own attorneys and experts, "reasonableness" should be assessed as between the parties,

taking into account the nature and purpose of the expenditure as well as the amount claimed.

486. As a result, I must determine, first, which were the prevailing parties and, second, the amount of the prevailing parties' reasonable attorneys' fees, costs and expenses.

487. I find that Claimants are the prevailing parties. Success in the jurisdiction phase was evenly divided, and tilts the balance in neither direction. The fundamental disagreement between the parties in Phase 2 concerned the question of whether the Investment Agreements were valid and enforceable against Respondents. Claimants overcame the myriad defenses raised by Respondents and established that the Investment Agreements were, and remain, valid and subsisting agreements binding in accordance with their terms. Respondents' counterclaims for rescission or damages failed. For these reasons, in relation to the central controversy Claimants prevailed. I do not consider that the award of nominal damages for breach of fiduciary duty in favour of Respondents or the fact that Claimants recovered only nominal damages for breach of contract and breach of covenant justifies concluding that Respondents prevailed or that neither party prevailed.

488. I have considered the reasonableness of the quantum claimed by Claimants as costs. Claimants' total costs claimed, excluding amounts paid for ICDR administration fees and arbitrator remuneration, is US$9,954,084.07. This amount includes approximately US$7.25 million for legal fees, disbursements and taxes and approximately US$2.6 million for expert witness fees, expenses and taxes. A substantial part of the expert witness fee payments—it appears about US$1.8 million—was for non-testifying experts. Of that amount, US$1,263,508.28 was paid or is payable to Cornerstone Research for service in support of Loy who charged directly the sum of US$537,403.20. Respondents' total costs claim (US$6,523,357.97, excluding amounts paid for ICDR administration fees and Arbitrator remuneration) was significantly less than Claimants' claim. Respondents' claimed costs included US$5,555,277.25 for legal fees, disbursements and taxes and US$935,131.20 for expert witness fees. All of the experts were testifying witnesses.

489. All counsel in this case were extremely capable and represented their clients with commendable vigour, thoroughness and professionalism. This was a complex, multi-faceted case, involving significant sums of money and strongly held convictions. With one exception, I see no basis to question the reasonableness of

Claimants' attorneys' fees, disbursements and expenses. The exception is that as between the parties the combined claim for over US$1.8 million for the services of Loy and Cornerstone is not reasonable. Loy's evidence ultimately proved to be unhelpful. This evidence was not tendered in answer to Respondents' defences or counterclaims, but rather in support of Claimants' damages claims. Claimants recovered only nominal damages. In the circumstances I find that the costs claimed should be reduced by approximately one-half—US$900,000.00—of the amount claimed in respect of the Loy/Cornerstone services.

490. For the reasons I have stated, I find that Claimants, jointly, are entitled to recover from Respondents, jointly and severally, the amount of (9,954,084.07 – 900,000.00 =) US$9,054,084.07.

491. The administrative fees and expenses of the International Centre for Dispute Resolution totaling US$135,170.00 and the compensation and expenses of the Arbitrator totaling US$357,302.89 are to be fully borne by the Respondents. Therefore, Respondents China Fortune Land Development and Global Industrial Investment Limited shall, jointly and severally, pay Claimants China Fund GP, LLC and 1955 Capital Fund I GP LLC the amount of US$274,571.46, representing that portion of fees and expenses in excess of the apportioned costs previously incurred by Claimants.

VIII. AWARD

492. For the reasons stated above my Final Award is as follows:

a. I declare that each of the following agreements (collectively, the **26 November Agreements**) is a valid and subsisting agreement, enforceable in accordance with its terms:
   i. The China Fund Subscription Agreement executed by Global Industrial Investment Limited and China Fund GP, LLC dated 23 November 2015, including the 13 November Appendix 1;
   ii. The Fund 1 Subscription Agreement executed by Global Industrial Investment Limited and Fund 1 GP dated 23 November 2015, including the 13 November Appendix 1;
   iii. The China Fund Escrow Agreement executed by Global Industrial Investment Limited and China Fund GP dated 23 November 2015;

iv. The Fund 1 Escrow Agreement executed by Global Industrial Investment Limited and Fund 1 GP dated 23 November 2015;
v. The 13 November China Fund LPA; and
vi. The 13 November Fund 1 LPA;

b. I declare that Respondents China Fortune Land Development and Global Industrial Investment Limited are jointly and severally liable to perform the obligations of Global Industrial Investment Limited under the 26 November Agreements;

c. Claimants China Fund GP, LLC and 1955 Capital Fund I GP LLC, jointly, are awarded damages for breach of contract and breach of implied covenant against the Respondents China Fortune Land Development and Global Industrial Investment Limited, jointly and severally, in the sum of US$200.00;

d. Respondents China Fortune Land Development and Global Industrial Investment Limited, jointly, are awarded damages for breach of fiduciary duty against the Claimants China Fund GP, LLC and 1955 Capital Fund I GP LLC, jointly and severally, in the sum of US$100.00;

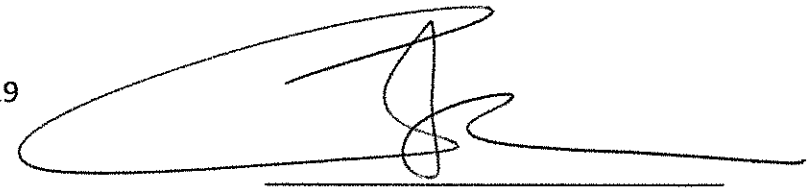
e. Claimants China Fund GP, LLC and 1955 Capital Fund I GP LLC, jointly, area awarded costs against the Respondents China Fortune Land Development and Global Industrial Investment Limited, jointly and severally, in the sums of:
i. US$9,054,084.07, representing Claimants' reasonable attorneys' fees, costs and disbursements relating to this arbitration;
ii. US$274,571.46 to reimburse Claimants for amounts paid to ICDR for administrative services and in respect of the remuneration and expanses of the Sole Arbitrator;

f. All other claims and counterclaims are dismissed; and

g. Absent the filing of an application to correct or vacate the arbitration award under applicable law, and unless the parties agree otherwise, in accordance with the Arbitration Agreements each party shall fully perform and satisfy this award within 15 days of the service of the award.

I hereby certify that, for the purposes of Article I of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made in San Francisco, California, United States of America.

Dated this 26TH day of June 2019



Gerald Ghikas, Q.C., Sole Arbitrator

State of NEW YORK)
) SS:
County of NEW YORK)

I, Gerald Ghikas, do hereby affirm upon my oath as Arbitrator that I am the individual described in and ho executed this instrument, which is my Final Award.

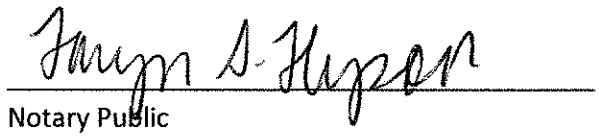
26 June 2019

Date

Gerald Ghikas, Q.C., Arbitrator

State of NEW YORK)
) SS:
County of NEW YORK)

On this 26th day of June, 2019, before me personally came and appeared Gerald Ghikas, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.



Notary Public

TARYN S. HYSON
Notary Public - State of New York
No. 01HY6376914
Qualified in Queens County
My Commission Expires June 18, 2022