IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PROSPECT CAPITAL MANAGEMENT L.P.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	C.A. No. 22-mc-89-MN-CJB
STRATERA HOLDINGS, LLC and DESTRA CAPITAL MANAGERS LLC,	)	
	)	
Respondents.	)	

RESPONDENTS AND COUNTER-PETITIONERS STRATERA HOLDINGS, LLC AND DESTRA CAPITAL MANAGERS LLC'S COUNTER-PETITION AND MOTION TO ENFORCE ARBITRATION AWARD

Respondents and Counter-Petitioners Stratera Holdings, LLC ("Stratera") and Destra Capital Managers LLC ("Destra") (collectively, "Respondents") hereby move for an order enforcing an arbitration award against Petitioner and Counter-Respondent Prospect Capital Management L.P. ("Prospect") pursuant to 9 U.S.C. § 9:

I. Preliminary Statement

1. Stratera and Destra seek to enforce the only final award issued by the arbitration panel (the "Panel") in this dispute, the one the Panel labeled as "Final Award" and the only award that disposes of the issues submitted by the parties to the Panel.

II. Parties

2. Stratera is a limited liability company, none of whose members are citizens of Florida.

3. Destra is a limited liability company, none of whose members are citizens of Florida.

4. On information and belief, Prospect is a limited partnership whose members are all citizens of Florida.

III. Jurisdiction and Venue

5. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1) because Prospect and each of Respondents are citizens of different states and the amount in controversy exceeds $75,000 exclusive of interest and costs.

6. Venue is proper in this district as specified in the Third Agreement and under 9 U.S.C. § 9. Ex. 1-A, 40-41.

IV. Facts

A. The Underlying Dispute

7. The Panel made determinations regarding what it considered the facts regarding the dispute between the parties. Ex. 1-L, Revised Interim Award, 6-9.

8. Prospect and Stratera together set up the Priority Income Fund (the "Fund"). *Id.* at 6.

9. Priority Senior Secured Income Management, LLC (the "LLC") is the advisor that manages the Fund's investments. *Id.*

10. Within the LLC, Prospect provides the advisory services, managing the investments, and Stratera put up the money to start the Fund and funded the initial expenses of the Fund. *Id.*

11. The Fund compensates the LLC through Base Management and Incentive Fees based upon an Investment Advisory Agreement between the Fund and the LLC. *Id.*

12. The Second Agreement governed the relationship between Prospect and Stratera when those were the only two members of the LLC. *Id.*

13. Under the terms of the Second Agreement, the Base Management and Incentive Fees, which represented all of the LLC's income stream, were split 50/50. *Id.*

14. The Fund also hired Provasi Capital Partners LP ("Provasi"), a Stratera subsidiary, to act as the Dealer Manager to distribute the Fund's shares, and the Fund signed a separate agreement called a Dealer Manager Agreement with Provasi. *Id.*

15. As the Dealer Manager, Provasi was responsible for marketing and selling shares of the Fund through its network of dealers. *See id.* at 6.

16. The 50/50 revenue split under the Second Agreement was not conditioned on any further action by Stratera or distribution by Provasi. *Id.*

17. In March 2018, Provasi provided the Fund notice that it would terminate the Dealer Manager Agreement. *Id.*

18. Prospect approached Provasi requesting that it continue as Dealer Manager of the Fund. *Id.* at 6-7.

19. Provasi, in turn, approached Destra about the possibility of its subsidiary Destra Capital Investments, LLC ("DCI") acting as a sub-wholesaler under Provasi. *Id.* at 7.

20. The purpose of keeping Provasi as the Dealer Manager instead of simply signing a new dealer manager agreement with Destra was so that the dealer agreements Provasi had signed with its selling group could be kept in place. *See id.*

21. Stratera and Destra told Prospect that they wanted Destra to receive a portion of the fees paid to Stratera under the Second Agreement, with the overall fee split between Prospect, on the one hand, and Stratera and Destra, on the other, remaining the same as under the Second Agreement—50/50—and confirmed this in a term sheet. *Id.* at 7-8.

22. In the parties' negotiation of the Third Amended and Restated Limited Liability Company Agreement of Priority Senior Secured Income Management, LLC (the "Third Agreement") that would replace the Second Agreement and govern the relationship between Prospect, Stratera, and Destra, Prospect inserted language that would determine the division of the fees based upon shares sold. *Id.*

23. Specifically, the Third Agreement provides categories of shares called Stratera Fee Party Shares and Destra Fee Party Shares. Stratera Fee Party Shares would include 50% of shares issued in the Offering before the Third Agreement adding Destra to the LLC and 12.5% of Fund Shares issued in the Offering after the Third Agreement for shares which DCI acted as a sub-wholesaler. Ex. 1-A, 34.

24. To confirm that the basis for distribution of fees was unchanged from the Second Agreement, Destra insisted that Prospect provide a schedule showing the methodology of dividing fees. Ex. 1-L, 8.

25. Prospect provided such a schedule, which is included in the Third Agreement as Schedule 11.18. *Id.*

26. The parties also added language to the Third Agreement itself requiring that the calculation of the fee percentages be performed in accordance with that schedule. *Id.*

27. When investors purchase shares through their broker-dealers, they have an opportunity to elect whether they prefer to receive their periodic distributions from the Fund in the form of cash or whether they would prefer that the distribution money instead be used to purchase additional shares of the Fund through the Fund's dividend reinvestment program ("DRIP"). *See id.* at 5 and 9.

28. When DCI became the sub-wholesaler to Provasi, performing the role in interacting with dealers that Provasi had performed before it, it assisted investors regarding the decision to choose DRIP instead of a cash dividend, such that the issuance of DRIP shares on shares sold during DCI's tenure as sub-wholesaler was through DCI acting as sub-wholesaler. *Id.* at 9.

29. In the same way, for shares sold before DCI became the sub-wholesaler, the issuance of such DRIP shares on such shares is through Provasi acting as Dealer Manager. *Id.* at 5.

30. Nonetheless, when Prospect calculated the first payment of fees to be made after the execution of the Third Agreement, Prospect excluded DRIP shares issued on both DCI-sold shares and Provasi-sold shares from the shares credited to Stratera and Destra in the calculation, contending that such shares were not issued "in the Offering." *Id.* at 9.

31. Thus, Prospect did not pay in accordance with Schedule 11.18 of the Third Agreement. Ex. 1-A, 41-42, § 11.18, and Schedule 11.18.

32. The Third Agreement contains a provision requiring the arbitration of the dispute in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Ex. 1-A, 38-39.

33. The Third Agreement provides that the arbitrators should establish the rules for the proceeding and "shall use the [AAA Commercial Arbitration Rules] but are encouraged to adapt the rules the arbitrators deem appropriate to accomplish the arbitration in the quickest and least expensive manner possible." *Id.* at 39.

B. The Arbitration

34. On June 5, 2019, after completing all of the prerequisites in the Third Agreement

to arbitrating the dispute, Stratera initiated an arbitration against Prospect. Ex. 1-L, 2.[1]

35. On August 31, 2020, also after completing all of the prerequisites in the Third Agreement to arbitrating the dispute, Destra joined the arbitration, now styled, *Stratera Holdings LLC and Destra Capital Managers LLC v. Prospect Capital Management L.P.*, AAA Case No. 01-19-0001-7529. Ex. 1-C, 1-6.

36. Stratera and Destra alleged, *inter alia*, that Prospect had breached the Third Agreement by failing to credit Stratera and Destra in its calculation of fees for shares issued through the DRIP program on shares originally sold by Provasi and DCI. Ex. 1-L, 3.

37. Stratera and Destra requested that the arbitration Panel award it the Management and Incentive Fees that were collected and improperly retained by Prospect and not distributed to Stratera and Destra. *Id.*

38. Stratera and Destra also requested that the Panel require that future Management and Incentive Fees be distributed in accordance with Schedule 11.18 of the Third Agreement, which included DRIP shares flowing from those sold by Provasi or DCI among those credited toward Stratera and Destra's percentages. *Id.* at 3, 13.

39. The Panel conducted an evidentiary hearing over eight days, from July 19, 2021 to July 28, 2021. *Id.* at 2.

40. At the outset of the hearing, at the parties' request, the Panel issued an order establishing what issues were being submitted to the Panel at that hearing and which would be bifurcated and addressed separately. Ex. 1-E, 1.

41. That order stated, "Proceedings with respect to attorneys' fees will be conducted after the Panel issues an Order on liability and damages, if any." *Id.*

[1] The Panel's Final Award reaffirmed and incorporated the Revised Interim Award. Ex, 1-P, 1.

42. Thus, only the issue of attorneys' fees was bifurcated, and the parties' submission to the Panel was on both liability and damages. *See id.*

43. The parties submitted their closing briefs on September 15, 2021. Ex. 1-L, 2.

C. The Interim Award

44. On October 8, 2021, the Panel issued what it labeled an "Interim Award of Arbitrators" (the "Interim Award") even though Prospect refers to it in its Petition/Motion to the Court as the "Award." *See* Ex. 1-F, 1 and D.I. 1, p. 2.

45. In the Interim Award, the Panel described its conclusion on the DRIP issue, stating, after finding that the Third Agreement is ambiguous,[2] "We find that parol evidence supports **Claimants' [i.e., Stratera and Destra's] position** that the calculation of the Applicable Fee Party Percentages must include fees on DRIP shares." Ex. 1-F, 13 (emphasis added).

46. Importantly, the defined term "Applicable Fee Party Percentages" includes not only the Destra Fee Party Percentage but also the Stratera Fee Party Percentage (and the Prospect Fee Party Percentage). Ex. 1-A, 28.

47. Further, by referring to the conclusion that it supported "**Claimants' position,**" the Interim Award also could only be referring to DRIP flowing from both DCI-sold shares and Provasi-sold ones, which was Stratera and Destra's (referred to by the Panel as "Claimants'") position. *See* Ex. 1-D, 1, ¶ 1; Ex. 1-C, 2, ¶ 1 (neither of which differentiates between DRIP flowing from DCI-sold shares and Provasi-sold shares).

[2] Prospect inaccurately states that the Panel said the award was "possibly ambiguous." D.I. 1, p. 9. The actual language from the Interim Award is, "The Third Agreement is ambiguous." Ex. 1-F, 9. Prospect's contention that the Interim Award said "neither the text of the Agreement nor Schedule 11.18 should be applied literally" is also incorrect. D.I. 1, p. 9. Instead, the Interim Award held, inter alia, that "Prospect cannot disclaim the application of the schedule… that, on its face confirmed the Claimants' understanding. . . ." Ex. 1-F, 11.

48. The Panel's finding, therefore, clearly included DRIP shares in both the Stratera Fee Party Percentages and Destra Fee Party Percentages.

49. Further, the Interim Award described the Panel's conclusion in more detail as follows, referring to "DRIP shares" without differentiating between DRIP shares flowing from Provasi-sold shares and DCI-sold shares, demonstrating the Panel's understanding that there was no distinction between them:

> The parties' negotiations demonstrate that Claimants [i.e., Stratera and Destra] expected to be paid on DRIP shares and that Prospect knew of their expectation. Because Prospect created Schedule 11.18 in such a manner as to confirm Claimants' expectation concerning the allocation of fees, which included fees on DRIP shares, Prospect is deemed to have accepted the inclusion of DRIP shares notwithstanding the provisions in the Third Agreement that might otherwise be interpreted to exclude DRIP shares because they were not "issued in the Offering".

Ex. 1-F, 13. By finding "Claimants" expected to be paid on DRIP shares, again, the Panel is referring to Stratera and Destra as opposed to Prospect's argument that somehow the Panel was only referring to Destra receiving DRIP. *See id.*

50. But when the Panel described its holding in the portion of the Interim Award explaining the Panel's holding, it did not specifically refer to Provasi-sold shares (which would result in Stratera receiving fees on DRIP shares flowing from shares sold by its subsidiary), instead stating, in relevant part, as follows:

> Based on the findings of fact and conclusions of law stated below, we hold that [Prospect] has breached the Third Agreement by not calculating the fees such that the Stratera Fee Party Shares and Destra Fee Party Shares included DRIP shares in lieu of cash dividends that would have otherwise been due on the shares for which [DCI] served as sub-wholesaler. . . .

Id., 3-4.

51. The Interim Award made clear it was not a final award and that the Panel's findings

did in fact include fees on DRIP shares flowing from Provasi-sold shares.

52. Most obviously, the label, "Interim Award," signaled the Panel's intention that it was not a final award. *Id.* at 1.

53. As noted, Prospect, in its Petition/Motion, it conspicuously omits the Panel's "Interim" label from the Interim Award, knowing that repeating over and over that the Interim Award is interim would eviscerate its argument that the award was actually a final award. D.I. 1 and D.I. 3.

54. The Interim Award describes its findings throughout the award but contains a section at the end that the Panel labels, "Interim Award," where the Panel describes the actions actually required by the Interim Award. Ex. 1-F, 17-18.

55. Those actions are limited to the provision of information necessary to allow the Panel to issue its final award. *Id.*

56. Indeed, the last paragraph of the Interim Award, contained in this section, states, "This Interim Award shall remain in full force and effect until such time as a final Award is rendered." *Id.* at 18.

57. This sentence conclusively reflected the Panel's intent that the Interim Award not be a final award and that a final award would come later—the Panel knew what a final award would look like (addressing all of the issues submitted), and this was not it. *See id.*

D. Stratera and Destra Sought Clarification of Award After Prospect Provided Information Only on DCI-Sold Shares

58. To obtain information necessary to issue a final award, the Panel ordered Prospect to provide Stratera and Destra with a calculation of their share of Management and Incentive Fees collected and improperly retained by Prospect to date on "the above-described DRIP shares" so that the parties could submit a joint submission concerning such information. Ex. 1-F, 17-18.

59. When Prospect provided that information, it was apparent to Stratera and Destra that Prospect had interpreted the Panel's Interim Award to exclude from the calculation DRIP shares flowing from Provasi-sold shares.

60. On October 27, 2021, Stratera and Destra sent the Panel a letter explaining Prospect's misreading of the order and requesting that the Panel amend the language of the Interim Award to clarify that DRIP shares flowing from Provasi-sold shares must be included in the calculation of fees due to Stratera and Destra. Ex. 1-G, 13.

61. When Prospect sent a letter response to the Panel, it included no argument that there was any rational basis for treating DRIP shares flowing from DCI-sold shares differently from those flowing from Provasi-sold shares (as no such argument exists), instead arguing only that the Panel did not have the authority to clarify its award under AAA Commercial Arbitration Rule 50. Ex. 1-H, 5-6.

62. That same day, on October 28, 2021 (within 20 days of the October 8 issuance of the Interim Award as required by Rule 50), Stratera and Destra submitted to the Panel and AAA a formal Request for Clarification, or, in the Alternative, Modification of the Interim Award. Ex. 1-I.

63. That request explained that Rule 50 was inapplicable to the Interim Award because it was not a final award, but, in the alternative, that the Panel was permitted to modify or clarify the award under the exceptions to Rule 50. *Id.* at 1-4.

64. In its response, Prospect argued that the Panel was prohibited from correcting or clarifying the Interim Award by the doctrine of *functus officio*, again failing to offer a substantive explanation for why DRIP shares flowing from DCI-sold shares should be treated differently from those flowing from Provasi-sold shares. Ex. 1-J, 1-11.

65. This position by Prospect contrasted sharply with its own later request that the Panel modify the Revised Interim Award to conclude that Prospect was actually the prevailing party in the litigation such that Prospect should recover fees instead of Stratera and Destra, as the Interim Award had provided (Prospect also argued, alternatively, that there was no prevailing party such that no fees should be awarded) . Ex. 1-N, 3 and 13.

66. By seeking to change the Revised Interim Award, Prospect took a position in the arbitration that the interim awards were not final awards and were subject to modification. *See id.*

67. Notably, the Panel would later "reject Prospect's invitation to revisit the award of attorneys' fees in the Revised Interim Award," not because of *functus officio* but because Stratera and Destra were the prevailing parties. Ex. 1-P, 2.

E. Panel Rejected Rule 50 and *Functus Officio* Arguments

68. When the Panel ruled on Stratera and Destra's motion, it offered a detailed explanation of the mistake it had made in describing its holding in the Interim Award and the inapplicability of the *functus officio* doctrine. Ex. 1-K, 1.

69. As to its mistake, the Panel explained that it failed to make clear in the Interim Award its conclusion that the DRIP shares to be included in the calculation were those flowing from both DCI-sold and Provasi-sold shares:

> The essence of the Panel's conclusion was that fees on DRIP shares should be included in the applicable Fee Party Percentage, a conclusion that necessarily applies to DRIP shares flowing from shares issued by Provasi. The Panel's holding did not make this latter point clear, but rather referred specifically only to fees on DRIP shares flowing from shares issued through DCI as sub-wholesaler.

Id. at 1-2.

70. The Panel explained the basis for its conclusion that Stratera and Provasi were entitled to be paid on DRIP shares:

> In its Interim Award, the Panel reached its conclusion based upon the ambiguity created by the inconsistency between the text of the parties' Third Agreement and Schedule 11.18 to that Agreement. Because the last sentence of Section 11.18 stated that calculation of the Fee Party Percentages *must* be performed on the basis of Schedule 11.18, and [Prospect] prepared Schedule 11.18, we concluded that Respondent is deemed to have accepted the inclusion of DRIP shares in the calculation of the Applicable Fee Party Percentages, notwithstanding provisions in the Third Agreement that might otherwise be interpreted to exclude DRIP shares.

Id. at 2 (emphasis in original).

71. Thus, the Panel explained, "The essence of the Panel's ruling on the merits is that Schedule 11.18 requires the inclusion of *all* DRIP shares, and not just those issued on shares issued through DCI acting as subwholesaler, in the calculation of Destra and Stratera Fee Party Percentages." *Id.* (emphasis in original).

72. The Panel summarized its resolution of the dispute in the Interim Award as follows:

> • [Stratera and Destra] contended that they were entitled, by virtue of the terms of Schedule 11.18, to calculation of fees based on *all* issued and outstanding shares.
>
> • [Prospect] argued that Claimants were not entitled to include *any* DRIP shares in the calculation of fees.
>
> • In its Interim Award, the Panel concluded that fees should be calculated on the basis of *all* non-Stira DRIP shares.

Id. (emphasis in original).

73. The Panel explained how it misdescribed what it intended in the Interim Award:

> In its Interim Award, however, the Panel failed to make clear that full effectuation of its intent required a clear statement to the effect that the calculation must be based not only on DRIP on shares issued through DCI, but also DRIP on shares issued through Stratera's subsidiary, Provasi.

Id.

74. The Panel stated that it would now "correct[] that oversight" and that, "**Doing so does not, however, require re-visiting the Panel's conclusion on the merits**." *Id.* (emphasis supplied).

75. The Panel explained that Rule 50 did not prohibit its clarification because it was not redetermining the merits of an issue specifically addressed in the Interim Award. *Id.*

76. Instead, the Panel explained, "**Here, the Panel is simply clarifying the effect - at most, correcting its earlier characterization of the effect — of its determination of [Stratera and Destra's] claim for inclusion of DRIP shares in the calculation of their fees**." *Id.* at 2-3 (emphasis supplied).

77. The Panel then explained that, if the authorities requiring that *functus officio* only apply to final awards—those that decide not only the issue of liability but also damages—"our analysis could stop here, as the Interim Award was labeled as such and clearly did not decide all issues including damages." *Id.* at 3.

78. The Panel also noted that the purpose of *functus officio* is to prevent reexamination of an issue by a nonjudicial officer potentially subject to outside communication and influence. *Id.*

79. The Panel found that "the underlying rationale of the *functus officio* doctrine is inapplicable here" because, "There has been no outside communication or unilateral influence in this matter, and no party is suggesting that there has been." *Id.*

80. The Panel further found that, even if the award were not an interim award and *functus officio* applied, exceptions to the *functus officio* doctrine applied. *Id.* at 4.

81. One exception allows modification of an award when "the award does not adjudicate an issue which has been submitted." *Id.* at 3 (internal quotations omitted).

82. The Panel explained that the Interim Award did not completely adjudicate the issues presented:

> That exception presumably includes cases in which the award does not *completely* adjudicate an issue that has been submitted. Here, by failing to address adequately in the Panel's holding the effect of its determination of the issue of entitlement to inclusion of the DRIP shares in the calculation of [Stratera and Destra's] fees, the Panel failed to adjudicate the issue completely.

Id. at 4 (emphasis in original).

83. Another exception allows modification of an award "[w]here the award, although seemingly complete, leaves doubt whether the submission has been fully executed" such that "an ambiguity arises which the arbitrator is entitled to clarify." *Id.* at 3 (internal quotations omitted)..

84. The Panel explained that this exception was applicable because the Interim Award required clarification:

> Although not a model of clarity, this exception appears to apply to circumstances in which a mistake is not apparent on the face of the award, but the award leaves doubt as to whether it is complete, and requires clarification. For the reasons discussed above, the Interim Award requires clarification.

Id. at 4.

85. The other exception to *functus officio* provides "an arbitrator can correct a mistake which is apparent on the face of [the] award." *Id.* at 3 (internal quotations omitted).

86. Here, the Panel admitted it had made a "mistake" and characterized that mistake as not making clear its conclusion that "fees on DRIP shares should be included in the applicable Fee Party Percentage, a conclusion that necessarily applies to DRIP shares flowing from shares issued by Provasi." *Id.* at 1-2.

87. Notably, Prospect, in a draft of its side of a joint submission to the Panel on January 25, 2022 regarding attorneys' fees, also characterized the Panel's ruling as a "mistake." Ex. 1-M, 16.

88. The Panel explained that the only possible conclusion from its analysis of DRIP shares required both Provasi-sold and DCI-sold shares to be included in the calculation of Stratera and Destra's fees:

> **[T]he logical - indeed, inevitable - conclusion of our analysis with respect to [Stratera and Destra's] entitlement to inclusion of DRIP shares in the calculation of their fees is that Schedule 11.18 *requires* that DRIP shares issued and outstanding on the shares issued through DCI and Provasi be included in the calculation of [Stratera and Destra's] fees. This was the core of the Panel's conclusion, and that conclusion has not been re-visited or changed.**

Ex. 1-K, 3 (bold supplied; italics in original).

89. Based upon all of this analysis, the Panel concluded that it retained jurisdiction and was authorized to enter a Revised Interim Award. *Id.* at 4.

F. Panel Issued Revised Award and Final Award

90. In conjunction with its order explaining its authority to clarify its Interim Award, the Panel issued a Revised Interim Award that clarified that both DRIP shares flowing from both DCI-sold shares and Provasi-sold shares would be included in the calculation of fees owed to Stratera and Destra. Ex. 1-L, 5.

91. Then, once the Panel had the information it required the parties to provide in the Revised Interim Award, the Panel issued its Final Award, which incorporated the Revised Interim Award and stated, for the first time, the substantive relief awarded to Stratera and Destra. Ex. 1-P, 1-6.

92. The Final Award awarded Stratera and Destra the following:

A. $6,103,866.00 for unpaid distributions through September 30, 2021.

. . .

B. $643,314.00 in pre-award interest, which represents interest on $6,103,866.00 through March 11, 2022.

C. $3,492,790.66 in attorneys' fees, costs and expenses. . . . [and]

D. Post-award interest at the rate of 5.25% on $9,596,656.66, which is the sum of $6,103,866.00 . . . and $3,492,790.66 in attorneys' fees, costs and expenses. . . .

Id. at 2-4.

93. In addition, the Final Award required Prospect to continue to pay fees to Stratera and Destra for the most recently completed quarter (for which fees were not yet due) and for all future quarters, in a manner described in the Revised Interim Award, within 90 days following the end of each such quarter. *Id.* at 5.

94. Unlike the Interim Award, the Final Award contained explicit instructions regarding when such payments would be due and how they would be calculated:

> Beginning with the quarter ending December 31, 2021, Prospect shall pay to Claimants the amounts due for each quarter no later than 90 days after the end of each such quarter, calculated according to the Revised Interim Award and in the same manner as Prospect's calculation of Claimants' share of all Management and Incentive Fees that were collected and improperly retained by Prospect and not distributed to Claimants, as provided in "Calculations Spreadsheet 2," attached to the February 14 Joint Submission. If any such payment is not made within such 90 days, simple interest will accrue at the legal rate then in effect under 6 Del. C. §2301.

Id.

95. By contrast, the portion of the Interim Award dealing with future fees was contained not in the award section but in the Holding section and was limited to explaining that

Stratera and Destra would be entitled to the following, demonstrating that what was in the Final Award was an award—the actual relief awarded—and what was in the Interim Award was simply a description of the Panel's conclusions:

> [Stratera and Destra's] respective share of all Management and Incentive Fees that were collected and improperly retained by Prospect and not distributed to [Stratera and Destra] to date on the above-described DRIP Shares[.]

Ex. 1-F, 5.

96. The Final Award also awards attorneys' fees, costs, and expenses to Claimants. Ex. 1-P, 2.

97. Prospect does not challenge that portion of the Final Award and does not allege that the award was procured by corruption, fraud, or undue means or that there was evident partiality or corruption in the Panel. *See, generally*, D.I. 1.

V. Legal Effect

98. Stratera and Destra are submitting concurrently with this Counter-Petition and Motion their Opening Brief in support, where they explain in detail the legal justification for the enforceability of the Final Award. That Opening Brief is incorporated by reference as though included fully herein, but Stratera and Destra summarize the basis for their relief below.

99. The Final Award is an enforceable award under 9 U.S.C. § 9 because the parties agreed in the Third Agreement that such an award may be judicially enforced in the state and federal courts of New Castle County, Delaware.

100. The Interim Award was not a final award and therefore not subject to *functus officio* or Rule 50, and this will be fully addressed, not in the Memorandum in Support of Respondents' Motion but in their response to Prospect's motion.

101. Even had the Interim Award been a final award, the clarifications made in the

Revised Interim Award were permitted because they fall within the exceptions to *functus officio*.

102. First, the Interim Award included an ambiguity as to the Panel's decision on DRIP shares flowing from Provasi-sold DRIP shares that the Panel was entitled to clarify.

103. Second, the Interim Award also did not adjudicate the issues submitted to the Panel to decide, allowing the Panel to modify the award.

104. Additionally, given the Panel made a determination that it was entitled to revise the Interim Award, that determination by the Panel of its authority cannot be overturned unless it manifestly disregarded the law.

105. Rule 50 also did not prohibit the Panel from revising the Interim Award because the Third Agreement authorized the Panel to adapt the rules to accomplish the arbitration in the quickest and most efficient manner possible.

106. Finally, while acknowledging that binding Third Circuit precedent recognizes the doctrine of *functus officio*, Stratera and Destra seek to abrogate that common law doctrine given it conflicts with the Federal Arbitration Act and the basis for its implementation is no longer relevant.

VI. Cause of Action – Confirmation of Award Under 9 U.S.C. § 9.

107. Stratera and Destra incorporate by reference the allegations and arguments in the foregoing paragraphs and the Opening Brief in Support of this Counter-Petition and Motion.

108. The Final Award is a final, binding adjudication of all liability and issues in the arbitration.

109. Accordingly, the Final Award should be confirmed under 9 U.S.C. § 9.

VII. Attorneys' Fees, Costs, and Expenses Pursuant to Third Agreement

110. The Third Agreement provides, "Any costs, fees and expenses (including attorney's

fees and expenses) incident to enforcing the arbitral award shall be included in any judgment rendered thereon (including an estimate for post-trial proceedings, appeals, collections, etc., the parties agreeing here that the loser shall pay all out-of-pocket and legal expenses of the prevailing party until paid in full following all collections)." Ex. 1-A, 40.

111. This Court is authorized to award such attorneys' fees costs and expenses as a contract claim because of Stratera and Destra's entitlement under the Third Agreement. *Mosquito Hunters, LLC v. Kelwood, Inc.*, No. CV 21-05033 (FLW), 2021 WL 2850419, at *4 (D.N.J. July 7, 2021).

112. Stratera and Destra therefore respectfully request that the Court include in its judgment an award of such costs, fees, and expenses.

113. Stratera and Destra would propose that the Court set a procedure to resolve such issues once it has resolved the dispute on the merits.

VII. Prayer

114. Stratera and Destra respectfully request that the Court enter a judgment pursuant to 9 U.S.C. § 13 enforcing the Final Award, including a judgment for the following:

A. $6,103,866.00 for unpaid distributions through September 30, 2021;

B. $643,314.00 in pre-award interest, which represents interest on $6,103,866.00 through March 11, 2022;

C. $3,492,790.66 in attorneys' fees, costs and expenses awarded by the Panel;

D. Post-award interest at the rate of 5.25% on $9,596,656.66, which is the sum of $6,103,866.00 and $3,492,790.66 in attorneys' fees, costs and expenses;

E. A requirement that, beginning with the quarter ending December 31, 2021, Prospect shall pay to Stratera and Destra the amounts due for each quarter no later than 90

days after the end of each such quarter, calculated according to the Revised Interim Award and in the same manner as Prospect's calculation of Claimants' share of all Management and Incentive Fees that were collected and improperly retained by Prospect and not distributed to Claimants, as provided in "Calculations Spreadsheet 2," attached to the February 14, 2022 Joint Submission to the Panel. If any such payment is not made within such 90 days, simple interest will accrue at the legal rate then in effect under 6 Del. C. §2301; and

F. Confirmation of the enforceability of the prospective relief contained in Section II.E of the Final Award.

115. Stratera and Destra further respectfully request that the Court include in the judgment an additional award for attorneys' fees, costs, and expenses incurred in the enforcement of the Final Award, including an estimate for post-trial proceedings, appeals, and collections, which Stratera and Destra request be determined by the Court based upon evidence submitted once the Court has ruled on the Motion to Enforce and Prospect's pending Motion regarding the arbitration award.

116. Stratera and Destra request such other and further relief to which they may be justly entitled.

POTTER ANDERSON & CORROON LLP

OF COUNSEL

Bobby G. Pryor
Dana G. Bruce
Matthew D. Hill
PRYOR & BRUCE
302 N. San Jacinto
Rockwall, Texas 75087
(972) 771-3933

By: */s/ Jonathan A. Choa*
Timothy R. Dudderar (#3890)
Jonathan A. Choa (#5319)
Aaron R. Sims (#6073)
Hercules Plaza
P.O. Box 951
Wilmington, DE 19899-0951
(302) 984-6000
tdudderar@potteranderson.com
jchoa@potteranderson.com
asims@potteranderson.com

Dated: April 19, 2022
10114051

Attorneys for Defendants Stratera Holdings, LLC and Destra Capital Managers LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PROSPECT CAPITAL MANAGEMENT L.P., Petitioner, v. STRATERA HOLDINGS, LLC and DESTRA CAPITAL MANAGERS LLC, Respondents.	)	C.A. No. 22-mc-89-MN-CJB

RESPONDENTS STRATERA HOLDINGS, LLC AND DESTRA CAPITAL MANAGERS LLC'S APPENDIX IN SUPPORT OF THEIR MOTION TO ENFORCE

OF COUNSEL

Bobby G. Pryor
Dana G. Bruce
Matthew D. Hill
PRYOR & BRUCE
302 N. San Jacinto
Rockwall, Texas 75087
(972) 771-3933

Timothy R. Dudderar (#3890)
Jonathan A. Choa (#5319)
Aaron R. Sims (#6073)
POTTER ANDERSON & CORROON LLP
Hercules Plaza
P.O. Box 951
Wilmington, DE 19899-0951
(302) 984-6000
tdudderar@potteranderson.com
jchoa@potteranderson.com
asims@potteranderson.com

Dated: April 19, 2022

Attorneys for Defendants Stratera Holdings, LLC and Destra Capital Managers LLC

Respondents Stratera Holdings, LLC ("Stratera") and Destra Capital Managers LLC ("Destra") (collectively, "Respondents") file this Appendix in Support of their Motion to Enforce.

EXHIBIT NO.	**DESCRIPTION**	**APP**
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1-O	Joint Submission Regarding Prospect's Calculations Pursuant to Revised Interim Award, Exhibits 1-4 and Calculations Spreadsheet 2 (https://www.dropbox.com/scl/fi/8ia0af1nldcskuhmdrqnw/Calculations-Spreadsheet-2.xlsx?dl=0&rlkey=gy124nfo3uiensyrwntijy7zd) (2/14/22)	271
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AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration under AAA Commercial Rules and Mediation Procedures
Amended and effective October 1, 2013

STRATERA HOLDINGS, LLC and DESTRA CAPITAL MANAGERS LLC Claimants, Represented by: Bobby Pryor, Esq.; Dana Bruce, Esq.; and Matt Hill, Esq all of Pryor & Bruce vs. PROSPECT CAPITAL MANAGEMENT L.P. Respondent. Represented by: Raymond DiCamillo, Esq.; Jeffrey Moyer, Esq.; Katharine Mowery, Esq. all of Richards, Layton & Finger P.A. and Jonathan Li, Esq. and Peter Cavallaro, Esq., all of Prospect Administration LLC	CASE NO. 01-19-0001-7529

We, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into among between the above-named parties and dated May 11, 2018, and having been duly sworn, and having duly heard the allegations and proofs of the Parties, and having previously rendered a revised interim award dated December 13, 2021, do hereby issue this FINAL AWARD, as follows:

Final Award

I. The Revised Interim Award of Arbitrators (Dec. 13, 2021) (Ex. 1 hereto) (the "Revised Interim Award") is reaffirmed and incorporated in this Final Award.

II. Upon consideration of (1) the Joint Submission Regarding Prospect's Calculations Pursuant to Revised Interim Award (February 14, 2022) (the "February 14 Joint Submission") and

(2) the parties' filings regarding Claimants' attorneys' fees, the Panel holds and awards to Claimants the amounts stated or described in paragraphs II. A, B, C, D and E, as follows:

A. $6,103,866.00 for unpaid distributions through September 30, 2021. The parties have agreed that this is the correct figure under the Revised Interim Award.[1]

B. $643,314.00 in pre-award interest, which represents interest on $6,103,866.00 through March 11, 2022.[2]

C. $3,492,790.66 in attorneys' fees, costs and expenses.

1. We reject Prospect's invitation to revisit the award of attorneys' fees in the Revised Interim Award and confirm that we find Claimants to be the prevailing parties, under the rationale of *Comrie v. Enterasys Networks, Inc*., 2004 WL 936505 at *2 (Del. Ch. Apr. 27, 2004). Claimants' main contention was that Prospect wrongfully withheld payment, and in the Revised Interim Award we held that Prospect breached the Third Agreement with respect to the non-payment of DRIP fees.

2. Claimants seek the following in attorneys' fees, costs and expenses:

Pryor & Bruce ("P&B") attys' fees to Stratera through 1/13/22	$1,719,820.50
P&B attorneys' fees to Stratera from 1/14/22 through 2/4/22	$ 42,489.95
P&B expenses to Stratera payments to P&B for expenses	$ 112,337.02
P&B attorneys' fees to Destra	$1,468,527.00
P&B attorneys' fees to Destra from 1/14/22 through 2/4/22	$ 42,650.45
P&B expenses to Destra	$ 105,184.07
AAA fees and expenses to Claimants[3]	$ 223,319.81
P&B meals at trial	$ 2,025.35
Expert Nels Pearsall fees and expenses	$ 68,937.90
Expert Marc Steinberg fees and expenses	$ 86,035.00
Other expenses paid directly by Stratera	$ 22,131.23
Other expenses paid directly by Destra	$ 38,900.00
TOTAL	$3,932,358.28

[1] See the February 14 Joint Submission.
[2] *Id*.
[3] This amount is less than Claimants' total because the Arbitrators' fees are less than estimated.

3. We find the hourly rates charged by P&B to be reasonable.

4. The award of $3,492,790.66 in attorneys' fees, costs and expenses equals Claimants' request of $3,932,358.28 reduced by $439,567.62 in deductions explained in paragraphs II.C.4.b., II.C.5., and II.C.6., *infra*. Except for the deductions discussed herein, we find that the time spent on the case by P&B was reasonable. The deductions are for the following reasons:

a. On April 3, 2020, Stratera[4] submitted an expert report of Dana G. Bruce, a name partner of P&B, on the issue of "the reasonableness and necessity of Stratera's attorneys' fees, costs and expenses incurred in the Arbitration," which states, in relevant part:

> Mr. Bruce will testify that he eliminated all time and labor specifically associated with Stratera's fraud and unilateral mistake claims and then totaled the remaining entries for each attorney and paralegal. Mr. Bruce then applied a twenty-five percent (25%) overall reduction to the amount of the bill such that any time spent on non-specific fraud/unilateral mistake matters would also be reduced. *Id.* at 5.

b. In their fee application, Claimants seek 99.93%% of the fees on the statements that Mr. Bruce discounted, as discussed in paragraph II.C.4.a., immediately *supra*. If the discounted amount of fees is reasonable, in the opinion of Claimants' expert, then the undiscounted amount of such fees presumably is *not* reasonable. We apply the same discounts to the P&B statements through April 3, 2020, attached to Mr. Bruce's report. That results in a reduction of $350,015.10. Applying the same rationale that Mr. Bruce applied, we deduct $51,311.12 for the statements dated May 2, 2020 and June 2, 2020. We reach that number by adding (1) $15,487.50 in fees related to the claims for fraud and for unilateral mistake and (2)

[4] As of that date, Destra had not joined as a Claimant.

$35,823.62, equal to a 25% discount of the remaining fees.[5] The total of the deductions in this paragraph is $401,326.22.

5. The Third Agreement states: "The losing party shall pay the costs, fees and expenses of the arbitration…." We find that this does not include fees incurred in connection with the required "executive to executive" mediations and the other required mediations. We deduct $23,668.37, equal to 75% of the fees,[6] and $1,855.03 in expenses that relate to such activities through March 31, 2020, the last date covered by Mr. Bruce's expert report, and $7,468.50 in attorneys' fees and $800.00 in expenses for the mediation required by Order #9 (Sept. 23, 2020). The total of the deductions in this paragraph is $33,791.90.

6. Claimants include in their request "Other expenses paid directly by Destra: $38,900.00. That is comprised of $6,702.75 that Destra paid to an e-discovery vendor, $4,449.50 paid to Faegre for fees, and $27,747.75 paid to Faegre for costs, almost all of which were payments to an e-discovery vendor. In contrast to the application for fees paid to P&B, there is no statement regarding the experience of Marc Leaf, the sole Faegre Drinker attorney listed on the statements. or why his hourly rate of $925 is reasonable. For those reasons, we disallow the $4,449.50 in fees paid to Faegre Drinker.

D. Post-award interest at the rate of 5.25% on $9,596,656.66, which is the sum of $6,103,866.00 (paragraph II.A, *supra*) and $3,492,790.66 in attorneys' fees, costs and expenses (paragraph II.C., *supra*).

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[5] On May 20, 2020, we issued Order #4, in which we granted Prospect summary judgment on Stratera's fraud claim. The P&B time entries from that date through May 31, 2020 all involve reviewing that Order and drafting a motion to reconsider.

[6] Since we already discounted the entire statements through May 31, 2020 by 25%, see paragraph II.C.4., *supra*, we deducted only 75% of the mediation-related fees during that time period.

E. Beginning with the quarter ending December 31, 2021, Prospect shall pay to Claimants the amounts due for each quarter no later than 90 days after the end of each such quarter, calculated according to the Revised Interim Award and in the same manner as Prospect's calculation of Claimants' share of all Management and Incentive Fees that were collected and improperly retained by Prospect and not distributed to Claimants, as provided in "Calculations Spreadsheet 2," attached to the February 14 Joint Submission. If any such payment is not made within such 90 days, simple interest will accrue at the legal rate then in effect under 6 Del. C. §2301.

F. We do not award post-award interest on pre-award interest, for the following reasons:

1. Post-judgment interest accrues at the legal rate of interest as of the time of the judgment. 6 Del. C. §2301(a); *Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc*., 2021 WL 5961628 (Del. Dec. 16, 2021). The legal rate of interest is 5% over the Federal Reserve Discount Rate. 6 Del. C. §2301(a). The Federal Reserve Discount Rate is 0.25%. https://www.frbdiscountwindow.org/pages/discount-rates/current-discount-rates (last accessed March 6, 2022). Therefore, the legal rate of interest and the rate of post-award interest is 5.25%.

2. Delaware courts view an award of post-judgment interest on an award of pre-judgment interest to be an award of compound interest, *Trans World Airlines, Inc. v. Summa Corp*., 1987 WL 5778 at *8 (Del. Ch. Jan. 21, 1981), which is generally discouraged. *Id.* In *Rehoboth Marketplace Assocs. v. State*, 625 A.2d 279 (Del. 1993), in reviewing a Superior Court holding, the Delaware Supreme Court stated: "Compound interest on awards is not permitted under Delaware Law." *Accord*, *Devex Corp. v. General Motors Corp*., 569 F. Supp. 1354, 1368 (D. Del. 1983).

The cases that Claimants cite to support their argument for awarding post-award interest on pre-award interest are all Court of Chancery cases dealing with equitable claims. We need not reach the issue of whether the claims in this case, were it not for the arbitration provisions, would have been filed in Superior Court or the Court of Chancery. The Court of Chancery in *Brandin v. Gottlieb*, 2000 WL 1005954 (Del. Ch. July 13, 2000), cited by Claimants, stated:

> Delaware courts have "traditionally disfavored the practice of compounding interest ...." In accordance with that distaste, Delaware's legal rate of interest statute, 6 *Del. C* . § 2301(a), has been interpreted as providing for simple interest only.

Id. at *28, and:

> As a general matter, it makes sense for the Court of Chancery to apply the statutory rate where the damage case before it is identical to a claim that could have been brought in Superior Court were there no need for this court to decide other equitable issues.

Id. at *29.[7]

3. We do not award pre-award interest on the award of attorneys' fees. Such an award would be illogical. There is no correlation between the dates that quarterly payments that should have been made were not made, on the one hand, and the dates that the attorneys' fees were incurred. Moreover, no right to attorneys' fees exists until this Final Award is entered.

III. All claims not addressed herein or in the Revised Interim Award of Arbitrators are denied.

[7] We acknowledge that the Court of Chancery has recently awarded compound interest on contract claims, holding that the matter is within the Court's discretion. *See, e.g.*, *Glidepath Ltd. v. Beumer Corp*., 2019 WL 855660 at *26 (Del. Ch. Feb. 21, 2019). In the event that we have such discretion to award either simple interest or compound interest, we exercise such discretion to award simple interest only.

IV. This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Judy Weintraub, Arbitrator

William H. Black, Jr., Arbitrator

Robert J. Katzenstein, Arbitrator, Chair

Dated: March 11, 2022

I, Judy Weintraub, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Award.

Date: March 11, 2022

Judy Weintraub, Arbitrator

I, William H. Black, Jr., do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Award.

Date: March 11, 2022

William H. Black, Jr., Arbitrator

I, Robert J. Katzenstein, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Award.

Date: March 11, 2022 Robert J. Katzenstein

Robert J. Katzenstein, Arbitrator, Chair

Exhibit 1

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration under AAA Commercial Rules and Mediation Procedures Amended and effective October 1, 2013

STRATERA HOLDINGS, LLC and DESTRA CAPITAL MANAGERS LLC Claimants, Represented by: Bobby Pryor, Esq.; Dana Bruce, Esq.; and Matt Hill, Esq., all of Pryor & Bruce vs. PROSPECT CAPITAL MANAGEMENT L.P. Respondent. Represented by: Raymond DiCamillo, Esq.; Jeffrey Moyer, Esq.; Katharine Mowery, Esq. all of Richards, Layton & Finger P.A. and Jonathan Li, Esq. and Peter Cavallaro, Esq. from Prospect Administration LLC	CASE NO. **01-19-0001-7529**

REVISED INTERIM AWARD OF ARBITRATORS

We, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into among between the above-named parties and dated May 11, 2018, having been duly sworn, having duly heard the allegations and proofs of the Parties, having issued an Interim Award on October 8, 2021, and having granted Claimants' Request for Clarification or, in the Alternative, Modification of Interim Award, do hereby issue this REVISED INTERIM AWARD, as follows:

Introduction

This arbitration was commenced on June 5, 2019. The evidentiary hearing was held over eight days, from July 19, 2021 to July 28, 2021. Thirteen witnesses testified at the hearing. All witnesses were cross-examined by opposing counsel, and we had ample opportunity to observe and assess their demeanor and credibility. Approximately 325 exhibits were admitted in evidence. A court reporter recorded and transcribed the testimony. Written closing briefs were submitted on September 15, 2021. The hearing was officially closed on September 15, 2021, to be reopened. *See* Order #21.

The arbitration provision in the parties' agreement stated that the award "shall briefly state the findings of fact and conclusions of law on which it is based." Third Amended and Restated Limited Liability Company Agreement of Priority Senior Secured Income Management, LLC at 39 (hereinafter, the "Third Agreement"; capitalized terms not defined herein are as defined in the Third Agreement). The parties have not requested a reasoned award, so the form of award is as stated in the Third Agreement. In light of the form of award specified in the Third Agreement, the Panel assumes that the parties and their counsel are familiar with the testimonial, documentary and demonstrative evidence comprising the evidentiary record, and with the arguments set forth in the comprehensive and well-prepared post-hearing briefing submitted by the parties' counsel after the testimonial portion of the hearings was completed. Accordingly, the analysis that follows will not cite extensively to transcript testimony, hearing exhibits or case law unless the Panel deems it necessary for clarification or emphasis.

The Panel has fully considered all arguments raised. In view of the direction in the arbitration provision of the Third Agreement concerning the nature of the award, quoted *supra*,

we do not address each such argument. The fact that we do not address some arguments in the ensuing discussion does not mean that such arguments were not fully considered by the Panel.

The Claims and Relief Sought

Each Claimant (ultimately) brought the same claims and sought the same relief. They raised the following claims:

1. Breach of contract
2. In the alternative, unilateral mistake
3. Fraudulent inducement

Claimants sought the following relief:

1. Award of all Management and Incentive Fees that were collected and allegedly improperly retained by Respondent Prospect Capital Management L.P. ("Prospect") and not distributed to Claimants to date, including, without limitation, those collected on DRIP and Stira Shares;
2. An order that all future Management and Incentive Fees, including, without limitation, those collected on DRIP and Stira Shares, be distributed in accordance with Claimants' interpretation of Schedule 11.18 of the Third Agreement;
3. In the alternative as to the fraud claims, an award declaring that the Third Agreement is rescinded, leaving Management/Incentive Fees and other monies paid by Prospect to be governed by the Priority Senior Secured Income Management, LLC's Second Amended and Restated Limited Liability Company Agreement (the "Second Agreement") between Prospect and Stratera Holdings, LLC ("Stratera") and requiring

Prospect to pay such fees, including fees through the date of judgment and those that will accrue going forward, or otherwise restore the status quo ante;

4. In the further alternative as to the fraud claims, rescissory damages;
5. As to the fraud claims, punitive damages in an amount to be determined by this Panel;
6. In the further alternative as to the fraud claims, any other damages available pursuant to those claims;
7. In the further alternative as to the unilateral mistake claim, reformation of the Third Agreement to compensate Claimants for all Management/Incentive Fees that were collected and allegedly improperly retained by Prospect and not distributed to Claimants to date, an award requiring the Prospect to pay such fees, including fees through the date of judgment and those that will accrue going forward, and any other damages pursuant to this claim;
8. As to all claims, all attorneys' fees expended by Claimants, both before and during the arbitration, in pursuit of their claims, pursuant to Section 11.15 of the Third Agreement, the Panel's authority, and any other permissible basis;
9. As to all claims, all costs, expenses, and fees expended by Claimants in their pursuit of its claims, including costs and fees related to the arbitration, pursuant to Section 11.15 of the Third Agreement, the Panel's authority, and any other permissible basis;
10. Pre- and post-judgment interest; and
11. Such other and further relief at law, in equity, or otherwise, to which Claimants may be entitled.

Holding

Based on the findings of fact and conclusions of law stated below, we hold that Respondent has breached the Third Agreement by not calculating the fees such that the Stratera Fee Party Shares and Destra Fee Party Shares included DRIP shares in lieu of cash dividends that would have otherwise been due to Claimants on the shares for which either Provasi Capital Partners LP ("Provasi") served as Dealer Manager or Destra Capital Investments, LLC ("DCI") served as sub-wholesaler, whether such DRIP shares were issued before or after November 2, 2019, as well as shares that "dripped" on DRIP shares flowing from shares for which Provasi served as wholesaler/dealer manager or DCI served as sub-wholesaler. Accordingly, Prospect is ordered to pay Claimants as follows:

a. Claimants' respective share of all Management and Incentive Fees that were collected and improperly retained by Prospect and not distributed to Claimants to date on the above-described DRIP Shares;

b. In accordance with Section 11.15 (b)B. of the Third Agreement, Claimants' costs, fees and expenses of the arbitration including, but not limited to, the fees and expenses of the American Arbitration Association and the arbitrators' and Claimants' legal fees and expenses, which shall be included in the final award;[1] and

c. Pre- award interest.

[1] Section 11.15(b)B. of the Third Agreement states: "Any costs, fees and expenses (including attorney's fees and expenses) incident to enforcing the arbitral award shall be included in any judgment rendered thereon (including an estimate for post-trial proceedings, appeals, collections, etc., the parties agreeing here that the loser shall pay all out-of-pocket and legal expenses of the prevailing party until paid in full following all collections)." These issues are not for us to decide, since our jurisdiction ends at the time of our issuance of a Final Award.

d. All future Management and Incentive Fees collected on the above-described DRIP Shares, to be distributed in accordance with Schedule 11.18 of the Third Agreement as interpreted herein;

All other claims and relief sought are dismissed.

Findings of Fact

1. Prospect and Stratera together set up the Priority Income Fund (the "Fund"). Priority Senior Secured Income Management, LLC (the "LLC") is the advisor that manages the Fund's investments. The LLC originally had two members: Stratera (formerly, Behringer Harvard) and Prospect. Within the LLC, Prospect provided the advisory services, managing the investments, and Stratera put up the money to start the Fund and funded the initial expenses of the Fund.
2. As compensation from the Fund to the LLC, fees flowed into the LLC based upon an Investment Advisory Agreement between the Fund and the LLC. Under the terms of the Second Agreement that governed the relationship between Prospect and Stratera, the Base Management Fees and Incentive Fees, which represented all of the LLC's income stream, were split 50/50.
3. Separately, the Fund hired Provasi, a Stratera subsidiary, to act as the Dealer Manager to distribute the Fund's shares, and the Fund signed a separate agreement - a Dealer Manager Agreement - with Provasi. The 50/50 revenue split under the Second Agreement was not conditioned on any further action by Stratera or distribution by Provasi.
4. In March 2018, Provasi provided notice of termination of the Dealer Manager Agreement to the Fund. Prospect's John Kneisley thereafter asked Provasi's Frank Muller if Provasi

would be willing to continue as Dealer Manager despite its notice of termination, and Muller suggested bringing in a sub-wholesaler. To that end, Muller spoke to Dominic Martellaro, CEO of Destra Capital Managers LLC ("Destra"), about the possibility of DCI, a Destra affiliate, acting as sub-wholesaler under Provasi so the dealer agreements could be kept with the broker-dealers in its selling group, and Martellaro agreed to consider the possibility.

5. Stratera, Destra, and Prospect began discussions regarding Destra's potential involvement, which led to negotiations concerning how to structure Destra's compensation. Stratera's representative, Muller, and Destra's representative, Martellaro, advised Prospect's representative, Kneisley, that they were interested in having Destra receive a portion of the fees paid to Stratera under the Second Agreement, with the overall fee split between Prospect, on the one hand, and Claimants, on the other, remaining the same as under the Second Agreement. Kneisley acknowledged these expectations.

6. In the course of these negotiations, most of which took place a matter of days before the May 11, 2018 effective date of Provasi's termination, various emails were sent from Claimants' representatives to Prospect attaching drafts of the term sheet that reflected the terms agreed to between Provasi and Destra. Those term sheets showed that Destra was to receive 75% of the fees that Stratera would have received had the Second Agreement continued. For instance, Martellaro testified that in one such email from Martellaro to Kneisley (JX40), Martellaro drew Kneisley's attention to a portion of an attached term sheet, which stated, in relevant part:

> Destra would . . . receive the 37.5% of the base management fees and incentive fees . . . (in other words, Destra would receive 75% of the fees

paid to Stratera for such asserts, including as a result of leverage on such assets).

Transcript Day 3 pages 816 – 818. Kneisley testified in his deposition that when he reviewed that term sheet, he understood that Claimants expected to receive, under the Third Agreement, fees on all assets, including DRIP shares. (JX261 at 69:11 – 72:24); see also, Kneisley deposition, id., 73:18 to 77:17. Prospect was therefore aware of what Claimants expected to receive under the Third Agreement: 37.5% of the fees received by the LLC to Destra, and 12.5% to Stratera, in the aggregate equal to what Stratera received under the Second Agreement: 50% of the fees received by the LLC.

7. During the negotiations, Prospect proposed various changes in the language concerning the calculation of the parties' fee percentages, including a conceptual change from assets under management to Fund Shares issued in the Offering for which DCI acts as sub-wholesaler. Although the Claimants did not accept certain changes that Prospect proposed, Claimants did not reject the language that Prospect included concerning the basis for calculation of the fee percentages - Fund Shares issued in the Offering for which DCI acts as a sub-wholesaler.

8. In order to confirm for Destra (and Stratera) that the basis for distribution of fees was unchanged from the approach taken in the Second Agreement, Destra's Martellaro asked Prospect's Kneisley to provide a schedule laying out the methodology. Kneisley provided that schedule, which became Schedule 11.18 of the Third Agreement. Based on that schedule and language in Section 11.18 that was added by Destra's attorney, requiring that the calculation of the fee percentages be performed in accordance with that schedule, Claimants agreed to, and did, enter into the Third Agreement on May 11, 2018.

9. In connection with the first Quarterly Certification of Fee Party Shares after execution of the Third Agreement, Claimants were advised by Prospect's representative, Lindsay Harrison, that Prospect did not consider DRIP shares as Fund Shares issued in the Offering for which DCI served as sub-wholesaler, and thus in the calculation of the fee party percentages, those shares should be excluded.
10. Claimants protested that interpretation but Prospect rejected Claimants' arguments.
11. DCI assisted investors regarding the decision to choose DRIP shares instead of a cash dividend, and thus it can reasonably be said that the issuance of DRIP shares was through DCI acting as a sub-wholesaler.
12. Destra did not act as sub-wholesaler in connection with the issuance of the Stira Shares.

Conclusions of Law

1. Breach of Contract Claim
    a. The Third Agreement is ambiguous. In particular, there is a difference between the formula for calculating the fees due to the parties pursuant to Section 4.01(a)(2) and the formula set forth in Schedule 11.18 which, per the last sentence of Section 11.18, was required to be used.
        i. Section 4.01(a)(2) required distribution of Net Distributable Cash (other than from Fund O&O Expense Repayments) to each Fee Party based on the amount of cash received by the Company (i.e., the LLC) from the Fund as payment of the Base Management Fee or the Incentive Fee, multiplied by the Applicable Fee Party Percentage for each Fee Party. The Applicable Fee Party Percentage was defined as the Destra Fee Party Percentage, the Stratera Fee Party Percentage and

the PCM Fee Party Percentage. The Destra Fee Party Percentage was defined in terms of the Destra Fee Party Shares, which in turn was defined in terms of the number of Fund Shares issued and outstanding that were issued in an Offering for which DCI acts as a sub-wholesaler. Similarly, the Stratera Fee Party Percentage was defined in terms of the Stratera Fee Party Shares, which was defined (in part) in terms of the number of Fund Shares issued and outstanding that were issued in an Offering for which DCI acts as a sub-wholesaler. In contrast, Schedule 11.18 does not require that the Fund Shares be issued in an Offering and defines Fund Shares Issued and Outstanding through DCI acting as sub-wholesaler in terms of the difference between Overall Fund Shares Issued and Outstanding and Fund Shares Issued and Outstanding prior to May 11, 2018.

ii. In calculating the fees in accordance with Schedule 11.18, because DRIP shares (whether such shares flow from shares issued by Provasi or by DCI) qualify as "Fund Shares", DRIP shares are part of the calculation of each party's Fee Party Percentage. However, in the calculation pursuant to Section 4.01(a)(2), DRIP shares may not be part of the calculation of each party's Fee Party Percentage, because it is not clear that DRIP shares are issued in the Offering.

iii. Although Schedule 11.18 may have been hastily drafted, and it provides in several places that it consists of "examples" and notes that the examples "are for discussion purposes only", Section 11.18

specifically requires that in determining the allocations and distributions of Net Distributable Cash, the Operating Member shall calculate the Destra Fee Party Percentage, Stratera Fee Party Percentage and PCM Fee Party Percentage *in accordance with Schedule 11.18*, an admonition which, like the rest of the Third Agreement, is binding on the parties. Moreover, Prospect prepared this schedule in response to Martellaro's request to make sure that the calculation of Destra's fees was consistent with his understanding of the calculation methodology. We find credible the testimony of both Martellaro and Stratera's in house counsel, Eigenbrodt, that neither Claimant would have entered into the Third Agreement had Schedule 11.18, which was drafted and provided to Claimants by Prospect, not confirmed their understanding with respect to the fee percentage calculation. We acknowledge that Claimants are sophisticated business entities, represented by experienced in-house and outside counsel. We also acknowledge that we previously suggested that Schedule 11.18 may be internally ambiguous, in that "[i]f certain of the shares included in Set A were not issued through Destra, then how could C be defined as 'Fund Shares Issued and Outstanding through Destra . . . acting as sub-wholesaler'?" (Order 19 at 7-8.) Nevertheless, we find that Prospect cannot disclaim the application of the schedule it prepared that on its face confirmed the Claimants' understanding, in favor of a calculation that, had it been proffered,

would have resulted in Claimants' refusing to enter into the Third Agreement.

iv. The Panel had decided earlier, in Order #19, that the DRIP Shares were not issued in the Offering (whether such shares were issued prior to or after November 2, 2019). In the hearing, however, there was additional evidence provided that caused us to question whether we reached the correct conclusion in that Order. Having heard the testimony from multiple witnesses, including experienced securities law counsel and two expert witnesses, on the specific phrase "in the Offering", it is not surprising to us that the parties had very different understandings of what that phrase means. In light of the ambiguity involving the calculation of the Applicable Fee Party Percentages pursuant to Section 4.01(a)(2) and Schedule 11.18, we conclude that it is not necessary for us to determine whether our conclusion in Order #19 that DRIP shares are not issued in the Offering was correct.

v. This case is distinguishable from *Cambridge N. Point LLC v. Bos. & Maine Corp.*, 2010 WL 2476424 (Del. Ch. June 17, 2010) and other cases cited by Prospect, in that those cases involved relatively clear terms and not language on which experts disagree as to the meaning. Further, those cases did not involve the creation of a schedule by one party that conflicted with the terms of the draft agreement and that confirmed the other party's understanding.

vi. Section 11.18 of the Third Agreement provides that if any information set forth in the Quarterly Certifications, is disputed, the Operating Member's revised Quarterly Certification shall be conclusive for all purposes absent fraud or manifest error, and the Operating Member shall rely thereon to calculate and pay all allocations and distributions of Net Distributable Cash pursuant to Section 4.01(a)(2). Just as Section 4.01(a)(2) conflicts with Schedule 11.18, so does this portion of Section 11.18. We do not accept Prospect's argument that the last sentence of Section 11.18, that "the Operating Member shall calculate the Destra Fee Party Percentage, Stratera Fee Party Percentage and PCM Fee Party Percentage in accordance with Schedule 11.18" does not require Prospect to calculate the Stratera Fee Party Shares and Destra Fee Party Shares in accordance with Schedule 11.18. In Schedule 11.18, one cannot calculate the Applicable Fee Party Percentages without calculating the Destra Fee Party Shares and Stratera Fee Party Shares, both of which are based on the calculation of the Fund Shares Issued and Outstanding through DCI acting as a sub-wholesaler. Per the formula contained in Schedule 11.18, DRIP shares flowing from shares issued by Provasi fall within the term "Fund Shares Issued and Outstanding through DCI acting as a sub-wholesaler."

b. Because of the ambiguity in the Third Agreement, parol evidence is admissible to determine the expectations that formed the basis of the

contractual relationship. We find that parol evidence supports Claimants' position that the calculation of the Applicable Fee Party Percentages must include fees on DRIP shares.

i. The parties' negotiations demonstrate that Claimants expected to be paid on DRIP shares and that Prospect knew of their expectation. Because Prospect created Schedule 11.18 in such a manner as to confirm Claimants' expectation concerning the allocation of fees, which included fees on DRIP shares, Prospect is deemed to have accepted the inclusion of DRIP shares notwithstanding the provisions in the Third Agreement that might otherwise be interpreted to exclude DRIP shares because they were not "issued in the Offering" and notwithstanding language in the Third Agreement and Schedule 11.18 concerning shares issued through Destra Capital Investments LLC acting as sub-wholesaler.

ii. For as long as DRIP shares are issued in lieu of a cash dividend to investors whose shares were issued either through Provasi as wholesaler/dealer manager or through DCI as a sub-wholesaler, whether the DRIP shares are issued before or after November 2, 2019, we conclude that there is no reason to exclude such DRIP shares from being included in the calculation of the Applicable Fee Party Percentages.

c. Although the Stira Shares are also included in the definition of "A" in Schedule 11.18 as Overall Fund Shares Issued and Outstanding, and thus also

in the definition of "C" - Fund Shares Issued and Outstanding through DCI acting as sub-wholesaler - and thus in the Applicable Fee Party Percentages, there is parol evidence that precludes our awarding fees to Claimants in connection with the issuance of the Stira Shares. Unlike the DRIP shares, the Stira Shares were not issued through Provasi as wholesaler/dealer manager or DCI acting as a sub-wholesaler. In his deposition, Martellaro confirmed that Destra was not entitled to receive compensation in connection with the Stira Shares because DCI didn't act as a sub-wholesaler with respect to the issuance of Stira Shares. In addition, Destra never included Stira Shares in the Quarterly Certifications and there was no issue raised about Stira Shares until well into this arbitration. Thus, no compensation is due to Claimants in connection with the Stira Shares.

2. Unilateral Mistake

This claim was raised as an alternative to the breach of contract claim, with the same relief sought as for breach of contract. Because we find that there has been a breach of contract, we do not reach a determination as to the unilateral mistake claim.

3. Fraudulent Inducement

a. In order for a claim of fraudulent inducement to prevail, Claimants must prove the five elements of a fraudulent inducement claim by clear and convincing evidence. Those five elements are:

i. False representation, usually one of fact, made by Respondent;

ii. Respondent's knowledge or belief that the representation was false or was made with reckless indifference to the truth;

iii. Intent to induce Claimants to act or refrain from acting;

iv. Claimants' action or inaction taken in justifiable reliance upon the false representation; and

v. Damage to Claimants resulting from such reliance.[2]

b. The essence of Claimants' fraudulent inducement claim is Claimants' belief that (1) Prospect's representations to Claimants regarding how fees would be paid under the Third Agreement were knowingly false; (2) Prospect never intended to calculate Claimants' fees in the manner in which Prospect promised they would be calculated, evidenced by, among other things, a statement made by Kneisley that the change from assets under management to Fund Shares issued in the Offering was made for convenience, and Kneisley's omission of any mention of the fact that the change would shift fees to Prospect, amounting to millions of dollars; and (3) concealment of that material fact supported a finding of fraud. Claimants cite *Maverick Therapeutics, Inc. v. Harpoon Therapeutics, Inc.*, 2020 WL 1655948, at *27 (Del. Ch. Apr. 3, 2020) as authority for this contention.

c. We find that Claimants have not established by clear and convincing evidence that Prospect intended, at any time prior to the signing of the Third Agreement, that the provisions that changed the calculation of fee party percentages from assets under management to Fund Shares issued in the

[2] *Maverick Therapeutics, Inc. v. Harpoon Therapeutics, Inc.*, 2020 WL 1655948 at *26.

Offering have the effect of shifting fees from Claimants to Prospect. Taken as a whole, the evidence that supports the existence of such an intent does not meet the "clear and convincing" standard, and we note in this regard:

i. Kneisley testified that he had gave no thought, at the time he proposed the shift from assets under management to Fund Shares issued in the Offering, as to whether the changed language would result in the exclusion of DRIP shares in the calculation of fee party percentages;

ii. Schedule 11.18, prepared by Kneisley to demonstrate the calculation, was inconsistent with an understanding that the DRIP shares were to be excluded;

iii. The issue of whether DRIP shares were to be considered in calculating the fee party percentages was raised by Lindsay Harrison, a Prospect accountant, after the Third Agreement was executed and resulted in a "lively discussion" within Prospect, which is inconsistent with the idea that that there was an internal understanding at Prospect in this regard prior to execution of the Third Agreement; and

iv. Prospect's engagement of outside counsel at the time of the first Quarterly Certification to advise on whether DRIP shares should be considered to be "issued in the Offering" supports Prospect's position that it did not have an internal understanding on that issue, prior to the signing of the Third Agreement.

d. Accordingly, we dismiss the fraudulent inducement claim, which results in the dismissal of Claimants' plea for rescission or, in the alternative, for rescissory damages.

Interim Award

1. Within thirty days from the date of this Revised Interim Award:
   a. Respondent shall provide Claimants with a calculation of the Claimants' share of all Management and Incentive Fees that were collected and improperly retained by Prospect and not distributed to Claimants to date on the above-described DRIP Shares, as well as a calculation of pre-judgment interest on the fees that were not distributed to Claimants. Pre-judgment interest shall be calculated from the date that each payment of such Fees was due until the date of such calculation, at the legal rate of interest as defined by 6 Del. C. §2301(a), which is 5% over the Federal Reserve Discount Rate including any surcharge as of such time;
   b. Claimants shall provide to Respondent detailed records, including time and billing records, reflecting Claimants' costs, fees and expenses of the arbitration including, but not limited to, the fees and expenses of the American Arbitration Association and the arbitrators and Claimants' legal fees and expenses;
2. Within two weeks from receiving the information provided in the immediately preceding Section 1, the parties shall jointly submit to the Panel their concurrence or objections to the information provided.
3. If the Panel has any questions on the joint submission, the Panel will either issue questions to the parties or schedule a hearing. If there are no questions, then the Panel will issue a final award.

4. All claims not addressed herein are denied.

5. This Revised Interim Award shall remain in full force and effect until such time as a final Award is rendered. The Revised Interim Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Dated: 12/15/21

Arbitrator's Signature: _____

Arbitrator's Signature: _____

Arbitrator's Signature: _____