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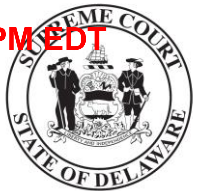

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEAF INVENERGY COMPANY, a Cayman Islands exempt limited liability company, Plaintiff Below-Appellant, v. INVENERGY RENEWABLES LLC, a Delaware limited liability company, Defendant Below-Appellee.	No. 308, 2018 Court Below: Court of Chancery of the State of Delaware, C.A. No. 11830-VCL **PUBLIC VERSION FILED ON SEPTEMBER 4, 2018**

OPENING BRIEF OF APPELLANT
LEAF INVENERGY COMPANY

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NATURE OF PROCEEDINGS

The task facing this Court is a straightforward one—to perform the contract analysis required under Delaware law when parties to an LLC Agreement advance competing interpretations. A court must determine whether the language is susceptible to more than one reasonable interpretation and, if it is, resort to extrinsic evidence to interpret it consistent with the parties' shared intent.

Here, there is no question Plaintiff-Appellant Leaf Invenergy Company ("Leaf") advanced a reasonable interpretation of Section 8.04(b) of the parties' LLC Agreement. Under Leaf's interpretation, if Defendant-Appellee Invenergy Wind LLC (now Invenergy Renewables LLC ("Invenergy")) engaged in a Material Partial Sale (defined in the LLC Agreement) without Leaf's consent, then Invenergy was obligated to redeem Leaf's interests at a defined rate of return, the "Target Multiple."

Not only is that reading consistent with the ordinary meaning of the words used in Section 8.04(b)—that Invenergy "shall not" engage in a Material Partial Sale without Leaf's consent "unless" it redeems Leaf's interest—Invenergy shared the *very same* interpretation until part-way through this litigation when it engaged new counsel and adopted a different reading. Even the trial court acknowledged prior to trial Leaf's interpretation was a "reasonable reading" and noted Invenergy's new counsel had changed positions mid-litigation. Assuming

Invenergy's later interpretation is also reasonable (because if not, the contract is unambiguous in Leaf's favor), the court should have interpreted the LLC Agreement consistently with the extrinsic evidence of the parties' intent, which the trial court found favored Leaf's interpretation.

That did not happen. In its April 19, 2018 post-trial Memorandum Opinion, the trial court recognized the language of Section 8.04(b) explicitly gave Invenergy only two options—get Leaf's consent or buy Leaf out—and it also found the extrinsic evidence showed there were no "ifs, ands, or buts" (the trial court's words) about the parties' intent—that when Invenergy engaged in a Material Partial Sale without Leaf's consent, Leaf would "always" receive its Target Multiple. Yet the court concluded it could not enforce the parties' "subjective belief" about how the LLC Agreement worked because it was constrained by two Court of Chancery appraisal decisions involving "unless clauses" in corporate charters. Respectfully, that was error. Those two cases do not hold that parties' to an LLC agreement cannot agree to a bargained-for exit right like the one at issue here, and interpreting those cases that way is fundamentally inconsistent with this Court's jurisprudence emphasizing freedom of contract in LLC agreements to the "maximum extent."

This Court reviews issues of contract interpretation *de novo.* In conducting that review, the Court need not find Leaf's interpretation was the only reasonable interpretation to rule in Leaf's favor. The Court need only find Leaf proffered *a*

reasonable interpretation and then apply the extrinsic evidence. Because the trial court found by "clear and convincing" evidence the parties intended Section 8.04(b) to operate exactly as Leaf reads the language, this Court should interpret Section 8.04(b) consistently with the evidence of the parties' shared intent.

Leaf requests this Court reverse and remand with directions to enter an order in the amount of the Target Multiple (plus pre- and post-judgment interest).

SUMMARY OF ARGUMENT

1. The trial court erred by failing to interpret the LLC Agreement according to established contract principles—whether by enforcing the plain language of the agreement that only gave Invenergy two options to consummate a Martial Partial Sale or resorting to extrinsic evidence of the parties' intent to interpret that language to the extent it was ambiguous. At a minimum, Leaf advanced a reasonable interpretation, as the court itself found before trial. Given the trial court concluded the extrinsic evidence was "clear and convincing" that the parties understood Section 8.04(b) of the LLC Agreement to require Invenergy to redeem Leaf's interests for its Target Multiple where Invenergy engaged in a Material Partial Sale without Leaf's consent, it should have enforced that obligation.

2. Because Leaf had bargained for the right to be redeemed if Invenergy chose to proceed with a Material Partial Sale without Leaf's consent, and did not have a bare consent right as in *Fletcher International, Ltd. v. ION Geophysical Corp.*, 2013 WL 6327997 (Del. Ch. Dec. 4, 2013), the trial court erred in relying upon the "hypothetical negotiation" construct in that case. The court should have enforced the parties' bargain that had been *actually* negotiated. But having applied *Fletcher*, the court further erred in concluding Leaf would have accepted $0 had Invenergy sought to negotiate for Leaf's consent rather than breach the agreement.

The trial court's conclusion Leaf lacked negotiating leverage to compel payment of its Target Multiple is inconsistent with the court's other factual findings, including that the parties all believed Leaf could "compel" payment of the Target Multiple. Therefore, the Court should vacate the trial court's order awarding only nominal damages and remand.

STATEMENT OF FACTS

I. Leaf Invests in Invenergy and Bargains for Protections.

Invenergy "develops, owns, and operates utility-scale wind generation facilities in North America and Europe." Op. 2. In 2008, Invenergy announced a Series B convertible note offering. Op. 3. Leaf was seeking investments with the potential to generate significant returns. A940-41; A66 (reflecting expected IRR of 20% on each project). Invenergy's Series B offering seemed an appropriate fit because Invenergy had twice "returned significant value to investors upon exit." A941-42. Liberty Mutual Insurance Company ("Liberty"), which had previously invested through Series A notes, also participated. Op. 3.

Invenergy's proposed term sheet for the Series B notes provided that for certain "Non-Control Transactions"—which would later include a Material Partial Sale—Invenergy "may, at its option, offer to prepay" the Series B notes for a defined return, the Target Multiple, but was not obligated (as in a merger or sale of substantially all of its assets) to seek the noteholders' consent or buy them out. Op. 4-6. Because that "ran counter" to the terms of the Series A notes, the investors rejected it. Op. 6-8.

Instead, the final term sheet provided Invenergy "must offer to prepay" the Series B notes for the Target Multiple if Invenergy engaged in a Material Partial Sale without consent. Op. 8. The final term sheet also included governance rights

that would apply post-conversion, including a requirement that a majority of the unaffiliated interests consent to a Material Partial Sale unless it provided the equity holders with their Target Multiple. *Id.* The trial court found Leaf principal Yonatan Alemu testified "without contradiction" that the parties "intended for the Series B Investors' post-conversion governance rights to 'function in a similar fashion' as their pre-conversion consent rights" and "'to the extent the company did not get consent from the investors that had the equity, that they had an obligation to pay the target multiple.'" Op. 8-9 (quoting A947).

These terms were incorporated into the definitive note purchase agreement ("Series B NPA") and a form of LLC Agreement members would execute upon conversion ("LLC Agreement"). Op. 9-11. The Series B NPA "documented" the parties' agreement with respect to a Material Partial Sale in Sections 1.4(e) and 4.3. Op. 13-14. Section 4.3 said Invenergy "shall not" engage in a Material Partial Sale without the noteholders' consent "unless" the transaction yielded cash proceeds sufficient to provide the noteholders with their Target Multiple "and the provisions of Section 1.4(e) ... are complied with." *Id.* (quoting A111). Section 1.4(e) in turn obligated Invenergy to offer to purchase the notes for their Target Multiple and the noteholders could then elect whether to be bought out. *Id.* As the trial court found, the "[addition] of Section 1.4(e) ... reflected the fact that during the period when their investment was governed by that agreement, the Series B Investors held debt,"

and ensured the noteholders would get the Target Multiple in the event of a breach, which would also be an "Event of Default" and might otherwise only entitle them to principal and interest. Op. 14-15.

The LLC Agreement contained "significant governance rights comparable to those in the Series B Notes." Op. 16. Section 8.01 provided Invenergy "shall not" engage in a Material Partial Sale without the required consent "unless" it provided the Members other than Invenergy with their applicable Target Multiple in cash. *Id.* (quoting A182). Although the LLC Agreement did not contain an "analog to Section 1.4(e)," the trial court found that did "not imply an intent that the investors would not receive their Target Multiple if a Material Partial Sale took place" because, once in equity, "there was no longer any need for a contractual protection that would rule out the possibility of Invenergy paying off the investors for principal plus accrued interest." Op. 17.

Leaf initially invested $20 million in the Series B convertible notes on December 22, 2008, and an additional $10 million in February 2009. Op. 9-10. Considering the risk involved in this type of investment, Leaf projected an IRR of 17%-30% annually. A943-44; A76.

II. The 2011 Amendments Enhance Leaf's Protections.

The parties amended the Series B NPA in 2011. Because it needed the investors' consent to extend the maturity date, Invenergy agreed to their requests (i)

to push out the deadline to convert to equity, and (ii) to modify the rate of return by altering the definition of Target Multiple. Op. 17-18.

As the court found, "[u]nderlying the parties' discussions of the Target Multiple as a return floor was the premise that in any scenario in which Invenergy engaged in a Material Partial Sale without the Series B Investors' consent, the Series B Investors would receive their Target Multiple." Op. 18-19; A208-10 (Leaf expected Target Multiple in the equity to be $126 million in late-2015).

III. The 2013 Amendments Preserve Leaf's Protections.

At the end of 2012, Invenergy sought an investment from Caisse-de-dépôt-et-placement-du-Québec ("CDPQ"), a Canadian pension fund. Op. 20. In return for consent, Leaf/Liberty again negotiated a further extension of the conversion deadline to the end of 2015. *Id.*

Around the same time, Liberty sought to convert a portion of its Series B notes. *Id.* As part of the conversion, the parties agreed to separate Liberty's and Leaf's governance rights in the LLC Agreement. Liberty's (and new member CDPQ's) rights remained in Section 8.01. Leaf's rights were relocated to its own provision, in what became Section 8.04, and were limited to Material Partial Sale and change-of-control transactions. Op. 21-22. Alemu viewed these changes as "significant to [Leaf] because it gave us a protection right on those fundamental things that the company could not do without our consent." A952.

IV. Invenergy Confirms Leaf's Understanding of its Bargained-For Exit Right in the 2014 Amendments.

By early 2014, Leaf began exploring ways to exit its investment. Op. 22. Alemu prepared a presentation analyzing Leaf's bargained-for exit rights under the relevant agreements. "[T]he presentation showed that Leaf's principals understood Leaf would be entitled to receive its Target Multiple if Invenergy engaged in a Material Partial Sale without Leaf's consent regardless of whether Leaf held debt or equity." *Id.* Leaf hired Mark Lerdal in April 2014 to oversee the winding down. Op. 23.

Around this time, CDPQ, Liberty, and Invenergy were considering a recapitalization that would require amendments to the agreements and, thus, need Leaf's consent. Op. 23-24. Leaf initially considered whether it could block the recapitalization to facilitate an exit. Op. 25. In May 2014, Lerdal asked Alemu, "why don't we ask for our guaranteed return [*i.e.*, Target Multiple] today?" *Id.* (quoting A282). Alemu responded Leaf's "guaranteed return" was "only triggered if they undertake a material partial sale ... or [] consummate [a] change of control without seeking our consent." *Id.* The court found "[b]oth Alemu and Lerdal testified credibly to their contemporaneous expectation that if Invenergy engaged in a Material Partial Sale without Leaf's consent, then Invenergy would have to pay Leaf its Target Multiple." *Id.*

Leaf retained Michael Russell, then at Wilson Sonsini Goodrich & Rosati, to advise on the amendments. Op. 26. Russell contacted Invenergy's General Counsel Joseph Condo for clarification that what became Section 8.04(b) of the LLC Agreement provided Leaf would receive its Target Multiple if it did not consent to a Material Partial Sale. *Id*. Condo responded "clearly and directly" that "it is a firm consent right that we can't do a C of C absent Leaf's consent if the Target Multiple is not reach[ed]. *So unless they consent not to receive it, they will always get it*." Op. 27 (quoting A285) (emphasis in Op.); A1076 (Condo testified "C of C" encompassed Material Partial Sale). Based on this exchange, "Russell reasonably perceived Condo to be saying that if a Material Partial Sale took place and Leaf did not consent, then '[y]ou'll get paid.'" Op. 27 (quoting A1088).

Although Russell and Condo both understood the provision to work the "same way," Russell sought further clarification. *Id.* Condo then suggested adding language to Section 8.04(b) to better express the parties' intent—"The intent is that Leaf receives its TM. Do we need language to clarify?" *Id*. (quoting A284). Both lawyers reached out to their principals to confirm their understanding. *Id*. Condo emailed Invenergy's CFO Jim Murphy and asked, "do you agree that the intent is that absent their consent not to get it, Leaf is entitled to receive their TM? They are wrapped around the axle on a semantic game thinking we don't actually have

to pay them." Op. 27-28. Murphy confirmed, "Yes, I agree," and Condo said he would "work with them on reassuring language." Op. 28.

Russell already knew Leaf expected to be paid its Target Multiple absent consent. *Id.* Russell instead asked Alemu whether Leaf wanted to receive the Target Multiple "automatically" if it did not consent, or to be able to "elect" to receive it and be redeemed or to stay in the equity, like the other members. *Id*. Alemu responded, "[Leaf] would like to receive it automatically." Russell conveyed that to Condo and confirmed Leaf wanted clarifying language added. *Id*. The trial court found:

> At this point, the business principals for both sides (Murphy and Alemu) and the lawyers for both sides (Condo and Russell) shared a uniform understanding about how the Series B Consent Right worked: If Invenergy engaged in a Material Partial Sale without obtaining Leaf's consent, then "Leaf receives its TM." There were no ifs, ands, or buts: "[U]nless they [Leaf] consent not to receive it, they will always get it." The only question was how to make sure the language sufficiently confirmed this shared understanding.

Op. 29 (quoting A285).

After getting Murphy's sign-off, Condo proposed the following changes to Section 8.04(b):

From:	Condo, Joe
Sent:	Wednesday, May 28, 2014 12:04 PM
To:	'Russell, Michael'
Cc:	Yonatan Alemu; Jim Potochny (Jim.Potochny@leafcleanenergy.com); Bailey, Joseph
Subject:	RE: Leaf / Invenergy

Does this work:

participate in or permit a Material Partial Sale, unless the transaction giving rise to the Material Partial Sale yields cash proceeds equal to or greater than the amount that~~, if received,~~ would provide the Series B Non-Voting Investor Members, as of the closing of such Material Partial Sale, with cash proceeds equal to or more than their applicable Target Multiple, with such Target Multiple to be paid upon such closing of the Material Partial Sale. At the option of all other Members, any such transaction may be structured to provide such other Members with lower proceeds on a pro rata basis as the Series B Non-Voting Investor Members in order to yield such Series B Non-Voting Investor Members with their Target Multiple.

A284. Russell was "satisfied with the language" Condo proposed. Op. 29. But it also occurred to him Leaf should not be limited to the Target Multiple if Leaf's *pro rata* share was greater and therefore asked Condo to modify the language so Leaf would get the "greater of" those two amounts. Op. 30. Condo understood Leaf was now asking for something "more than what everyone understood the deal to be," so he reached out to Murphy. *Id.*

In ensuing exchanges, Murphy drafted two bullets making clear what he understood to be the business deal. Op. 31-32. He wrote to Alemu:

To summarize,

- If we do a material partial sale with your consent, the value is captured by the Company to the pro rata benefit of the members. And if we have a distribution as a result the value is pro rata.
- If we desire to do an MPS without your consent, then we can transact anyway as long as we pay you your Target Multiple, at which point you would no longer be a member.

A288; Op. 32. Alemu agreed, responding Leaf was "fine with the language (target multiple for MPS without consent)." A294; Op. 33-34. Condo also drafted changes to the definition of Target Multiple to make clear the payment would be in

exchange for the member's interests, *i.e.*, a redemption. Op. 33 (citing A290-91). Condo circulated a draft containing his edits internally and explained in his cover email, "8.04(b) reflects that Leaf actually gets paid the TM." Op. 34; A296. Condo then sent the revised draft to CDPQ and Liberty and neither objected. Op. 34 (citing A374-79; A1059; A1069 (CDPQ confirming it was aware of changes)).

Invenergy also prepared a "matrix comparing member rights in the LLC agreement" that Sane revised and circulated several times to Liberty and CDPQ. Op. 24. It consistently described Leaf's right in the event of a Material Partial Sale as "Consent required unless paying MPS amount," noting "Leaf MPS amount is Target Multiple." Op. 24, 68 (quoting A272; A276; A279). On July 10, 2014, the parties executed the operative LLC Agreement containing the revisions to Section 8.04(b). Op. 34-35.

V. Invenergy Pursues a Material Partial Sale.

By late-2014, Invenergy began to pursue a sale of its wind portfolio assets. Op. 39. Invenergy received expressions of interest from, among others, TerraForm Power, Inc. ("TerraForm"). Op. 40. Leaf initially learned Invenergy was considering an asset sale through Lerdal, who was a TerraForm director. *Id.*

By March 2015, Invenergy determined "by any measure" the proposed sale would be a Material Partial Sale under the Series B NPA but had no intent of getting Leaf's consent or paying the Target Multiple. Op. 40-41. To that end,

Invenergy concealed the potential sale to Leaf for as long as possible, while also exploring arguments to avoid having to pay Leaf. *Id.* Even after consulting outside counsel, Invenergy "believed that [it] had to pay Leaf its Target Multiple if [it] engaged in a Material Partial Sale without Leaf's consent." Op. 43.

In contrast to Leaf, Invenergy approached Liberty and CDPQ and negotiated for their consent. *Id.*; A1165; A1060-61. As Invenergy's founder/CEO Michael Polsky wrote to Murphy, "[W]e need to create a strong case for doing this [asset sale] for CDPQ and Liberty." A452.

VI. Invenergy Attempts to Avoid Leaf's Bargained-For Exit Right in the TerraForm Transaction.

On June 4, 2015, TerraForm offered to purchase seven Invenergy wind projects for $2.4 billion. Op. 47. "By this point, Invenergy had decided not to seek Leaf's consent, but Invenergy had not settled on what argument it would use to justify that course of action." *Id.*

One approach was to depress the stated value of the deal below the 20% threshold in the Series B NPA. *Id.* On June 15 and 16, 2015, Sane "subjected various deal structures to an 'MPS test'" to increase the value of assets retained and to lower the value of assets sold, managing to lower the percentage from 26.5% to 16.9% for "external distribution." Op. 47-48 (citing A1177-78;A453-55;A511-26). By the time Invenergy sent an analysis to Leaf in July 2015, it

showed the transaction represented only 12.5%. Op. 52 (citing A529); A1175. Tellingly, although Invenergy claimed the $2.1-billion sale represented only 12.5% of its value, less than two weeks after the sale closed, it would call Leaf's interests and claim the remaining 87.5% was worth only $1.8 billion. A969-70.

For Invenergy's strategy to avoid Leaf's rights under the NPA to work, Invenergy had to conceal the transaction from Leaf to prevent it from converting because the transaction would easily qualify as a Material Partial Sale under the LLC Agreement's more objective $240-million threshold. A395. For example, when Invenergy held its regularly scheduled meeting of members/creditors on June 16, Invenergy avoided mentioning the $2.1-billion deal, as did the 55-page materials circulated beforehand. Op. 47 (citing A963;A456-510).

Growing suspicious, the Leaf board met on June 18 and decided to convert into equity because, among other reasons, the Material Partial Sale threshold in the LLC Agreement was lower and more objective. Op. 48; A964. Leaf sent its conversion notice later that day. Op. 49. The Series B NPA required Invenergy to convert Leaf's notes within three business days. A221. After "several days of silence," Russell contacted Condo, who said Invenergy decided it needed regulatory approval for the conversion. Op. 49.

Meanwhile, CDPQ and Liberty negotiated for their consents. *Id*. The purchase agreement with TerraForm signed on June 30, 2015 reflected these

negotiations: Invenergy received approximately $1.1 billion in cash proceeds, of which $300 million was paid to CDPQ, including a $50-million prepayment penalty, while Liberty and Invenergy's Polsky (through an entity he owned) were prepaid roughly $110 and $100 million, respectively, on debt not due until December 2016. Op. 50-51; A612-16; A995-96; A1047-48. Thus, CDPQ, Liberty, and Polsky were able to take out tens-of-millions of dollars from their investment while remaining equity holders post-closing.

VII. Leaf Demands its Target Multiple.

It was not until July 2, 2015, after signing the TerraForm agreements, that Invenergy notified Leaf. Op. 51-52. Having manipulated the "MPS tests" to get below 20%, Invenergy claimed the transaction was not a Material Partial Sale under the Series B NPA. Op. 52. On July 23, 2015, Leaf advised Invenergy's Murphy that Leaf believed the transaction was a Material Partial Sale under the LLC Agreement and, absent its consent, Leaf would be entitled to its Target Multiple at closing. Op. 53; A966. Murphy disagreed, claiming Leaf had not converted prior to signing. Op. 53.

On September 23, 2015, Invenergy received regulatory approval to convert Leaf's Series B notes and, the next day, the parties executed an amendment admitting Leaf as a member. Op. 55; A534. Invenergy continued to take the position Leaf had no rights under Section 8.04(b) because it was not a member

prior to signing. Op. 55. The parties' attorneys "agreed to disagree," and Invenergy proceeded, risking Leaf's consent was required prior to closing, thereby entitling Leaf to be redeemed for its Target Multiple. Op. 55-57.

By December 2015, Invenergy decided to remove certain assets from the sale, necessitating updated consents from CDPQ and Liberty. Op. 57-58. But Invenergy still did not seek consent from Leaf. *Id.* Invenergy signed amended and restated sale agreements on December 15, 2015, and the transaction closed the next day ("TerraForm Transaction"). Op. 57.

VIII. This Litigation and the Put-Call Process

A. Leaf Files Suit and the Trial Court Finds Invenergy Breached.

On December 21, 2015, Leaf filed its Verified Complaint. A617. Count I alleged Invenergy had engaged in a defined Material Partial Sale and "[t]he LLC Agreement therefore required [Invenergy] to pay Leaf its Target Multiple upon the closing of the TerraForm Sale because Leaf did not consent to the sale." A631. Counts II and III related to Invenergy's failure to timely convert Leaf's notes per the Series B NPA.

A week later, on December 28, 2015, Invenergy exercised its Call Right under the LLC Agreement, offering $42 million for Leaf's 2.3% interest. Op. 58 (noting the incongruity between Invenergy's offer valuing Invenergy at $1.8 billion when it claimed $2-billion TerraForm Transaction represented only 12.5% of

Company's value). Leaf responded by exercising its Put Right, proposing a price of $214 million, "derived by using the value of the TerraForm Transaction to value Invenergy as a whole." *Id.* (citing A972)

After Invenergy answered the Complaint, Leaf moved for Partial Judgment on the Pleadings. A635-54. Invenergy argued in its opposition (consistent with its position to that point) the relevant time for when a Material Partial Sale occurred was at signing and not closing. A662-63. Invenergy defended this interpretation by arguing it needed to know before signing whether it had the requisite consents because the "consequence" of not receiving consent was non-consenting members could "require" their interest be redeemed:

> Under both sections [8.01(e) and 8.04], the consequence of not obtaining consent is that, if Invenergy nonetheless elects to enter into an agreement without consent, *members may require* that cash proceeds of the sale be applied to buying out their membership interests at closing. *See* LLC Agreement § 8.01(e) (describing notice and election options), § 8.04 (*describing when Series B members may be entitled to the Target Multiple, meaning "an amount, in exchange for its entire Company Interest"* (defined at § 1.01, Target Multiple)).

A678-79 (emphasis added).

On June 30, 2016, the court granted Leaf's motion, finding Invenergy breached Section 8.04(b) of the LLC Agreement when it closed the TerraForm Transaction in December 2015 without getting Leaf's consent *or* paying Leaf its Target Multiple. June 30 Order ¶¶12, 14, 18 (A691-93). The court explained:

> To engage in a Material Partial Sale in compliance with the plain language of the Series B Consent Provision [Section 8.04(b)], *the Company was obligated to follow one of two paths*. Under the first path, the Company could participate in or permit a Material Partial Sale if the Company obtained prior written consent of ... [Leaf] (the "Consent Path"). *Under the second path, the Company could participate in or permit a Material Partial Sale without the required consents if* the Material Partial Sale *both* (i) yielded cash proceeds equal to or greater than the amount that would provide [Leaf], as of the closing of such Material Partial Sale, with cash proceeds equal to or more than [its] applicable Target Multiple, *and* (ii) cash proceeds equal to or more than the applicable Target Multiple were paid upon closing (the "Payout Path").

Id. ¶9 (A690) (emphasis added). The court concluded Invenergy "breached the plain language of [Section 8.04(b)]" because it "did not follow either the Consent Path or the Payout Path." *Id.* ¶12 (A691). The Order did not endeavor to calculate the Target Multiple, leaving the amount of damages for "further proceedings." *Id.* ¶23 (A695).

Hours after the liability order, Polsky lamented in an internal email that Invenergy "could not have possibly transact[ed] without paying Leaf a multiple" because Leaf could always "convert[into equity] and automatically [be] *entitled* to the fee." A696 (emphasis added). In other words, Invenergy's understanding remained the same as Leaf's—if Leaf had the right to but did not consent, it was entitled to receive its Target Multiple.

Following the June 30 Order, Leaf calculated the precise Target Multiple using the 23% IRR and proposed a stipulated final order to Invenergy's then-

counsel. A697. On July 18, after Leaf received no further response, Leaf filed a Motion for Entry of an Order and Final Judgment and requested the court enter the proposed order. A702-08.

B. Invenergy's About-Face Litigation Posture

Meanwhile, Invenergy "presented" Condo with a separation agreement and retained new litigation counsel. Op. 64. On August 12, 2016, Invenergy's new counsel opposed Leaf's Motion for Entry of Judgment, arguing for the first time that Section 8.04(b) did not require it to redeem Leaf's interests for the Target Multiple absent Leaf's consent. Dkt. #62. Shocked by Invenergy's about-face, Leaf, on reply, pointed to Invenergy's prior statements in the litigation and submitted the May 2014 emails (*supra* 11-14) reflecting the parties' understanding about how Section 8.04(b) operated if Invenergy did a Material Partial Sale without Leaf's consent. Dkt. #68. Invenergy submitted a sur-reply, arguing the emails were "cherry-picked" and insisting a trial was needed to explore the extrinsic evidence to learn the parties' understanding of Section 8.04(b). Dkt. #77.

At oral argument, the trial court *acknowledged* Leaf's reading was reasonable and suggested Invenergy was advancing a new interpretation:

> I think *at least a reasonable reading* is that this provision established a binary world where either Leaf could block or it would be in a situation where, *if there was a transaction without its consent, it would get bought out for its target multiple*.
> ...

> And look, if we get to it at trial, there's at least indications so far, pretty strong indications, that [Invenergy], before it became convenient in the litigation to say otherwise, shared that expectation.

A747-48 (emphasis added). Invenergy's counsel again invited the court to examine the extrinsic evidence, urging the "negotiating history" would show Leaf never wanted the payment language in Section 8.04(b) and that it was added for Invenergy's benefit. A748.

C. Court Orders Trial to Develop the Record.

The trial court denied Leaf's motion the next day. A768-76 ("October 7 Order"). The Order noted the court previously held Invenergy breached Section 8.04(b) when it engaged in a Material Partial Sale without Leaf's consent *or* paying the Target Multiple, and "if Leaf had an expectation that it would receive its Target Multiple upon the closing of a Material Partial Sale, then full expectancy damages would result in an award of $126,110,576"—the amount of the Target Multiple. October 7 Order ¶6 (A771). But, the court also stated:

> The problem with this analysis is that the Series B Consent Right [*i.e.*, Section 8.04(b)] does not *explicitly* entitle Leaf to $126 million if its consent to a Material Partial Sale is not obtained. The Payment Path instead establishes a scenario in which the Company does not have to obtain Leaf's consent. The Company did not follow the Payment Path, so that exception does not apply.

Id. ¶7 (A771-72) (emphasis added). In other words, although it had previously held Invenergy was "obligated" to follow either the "Consent Path" or

the "Payment Path," now the trial court apparently concluded Invenergy was not "obligated" to follow the "Payment Path" even though Invenergy admittedly had not sought Leaf's consent before engaging in the Material Partial Sale—*i.e.*, even though it had chosen not to follow the "Consent Path."

The Order did not state Section 8.04(b) was unambiguous or Leaf's interpretation was unreasonable. Instead, it held the Target Multiple *could* be the appropriate measure of Leaf's expectation damages and ordered a trial:

> A more developed record may show that although the Payment Path was drafted as an exception to the requirement to obtain Leaf's consent, and although it was not drafted as a liquidated damages provision, *it nevertheless operated to create a clear set of contractual expectations for Leaf.* Those expectations envisioned two possible outcomes. One resulted from the Consent Path, where Leaf either would consent to the Material Partial Sale, or the transaction would not happen. The other resulted from the Payment Path, where the Company could proceed with a Material Partial Sale and Leaf would receive its Target Multiple. ... If Leaf proved that its expectancy was that it would receive its Target Multiple, [then] the Target Multiple could provide the proper measure of damages.

Id. ¶11 (A773-74) (emphasis added).

Trial was held on October 25, 26, and 27, 2017, during which the principals for the parties and their attorneys who had negotiated the amendment in May 2014 testified. Representatives of CDPQ and Liberty (by deposition) also testified regarding their understanding of the LLC Agreement.

D. Leaf Presents Clear and Convincing Evidence.

In its post-trial Opinion, the trial court found based on the testimony and contemporaneous documents that Leaf proved by "clear and convincing" evidence "all of the parties to the LLC Agreement understood Leaf would receive its Target Multiple if Invenergy engaged in a Material Partial Sale without Leaf's consent." Op. 67-68. "[H]aving considered the evidence as a whole and having considered the credibility of the witnesses, I believe the record supports the view that the parties envisioned only two scenarios: either Invenergy would get Leaf's consent or Invenergy would redeem Leaf's interests for its Target Multiple." Op. 74. The trial court found Leaf's witnesses "testified credibly to their contemporaneous expectation that if Invenergy engaged in a Material Partial Sale without Leaf's consent, then Invenergy would have to pay Leaf its Target Multiple" (Op. 25) and the testimony of Invenergy's witnesses was not credible (Op. 72).

E. Court Holds the Parties' Expectations Unenforceable.

Despite finding Leaf proved the parties intended for Leaf to get its Target Multiple in this exact circumstance, the court concluded "the parties' subjective beliefs about a remedy are not controlling unless they are implemented in a remedial provision in an agreement, such as a liquidated damages clause." Op. 74. The Opinion did not analyze the plain language of Section 8.04(b) or conclude Leaf's interpretation was not reasonable. Rather, it relied on the court's prior

"ruling" in the October 7 Order that the "exception does not apply" because Invenergy did not follow that path and concluded that adopting Leaf's interpretation would "upend" two Court of Chancery appraisal decisions. Op. 76-77. Although the court recognized the LLC Agreement "explicitly" gave Invenergy only two options to consummate a Material Partial Sale—get Leaf's consent or satisfy the "exception" by redeeming Leaf's interests—it held Invenergy had a third option, efficient breach. Op. 77.

Accordingly, "Leaf [had to] demonstrate actual damages" beyond not receiving what it bargained for and expected under the LLC Agreement "by showing either that it suffered harm as a result of the TerraForm Transaction or that it would have secured additional consideration given the opportunity to negotiate for its consent" under *Fletcher*. Op. 77-78. The court concluded Leaf would have had no leverage to demand its Target Multiple in a "hypothetical negotiation" and awarded only nominal damages. Op. 79.

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO APPLY CONTRACT INTERPRETATION PRINCIPLES TO SECTION 8.04(B) OF THE LLC AGREEMENT.

A. Question Presented

Whether the trial court committed legal error by failing to enforce the plain language of Section 8.04(b) and, absent that, failing to recognize the language was, at a minimum, ambiguous such that resort to extrinsic evidence was necessary to effectuate the parties' shared intent? A905-6; A920-24; A1212-13; A1258-63.

B. Scope of Review

The Supreme Court reviews questions of contract interpretation in an LLC Agreement *de novo*. *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). The Court "consider[s] issues involving the language of the contract *de novo*, but to the extent that the [trial court's] interpretation of the contract is based on extrinsic evidence, its findings are entitled to deference 'unless the findings are not supported by the record or unless the inferences drawn from those findings are not the product of an orderly or logical deductive process.'" *Textron Inc. v. Acument Global Techs.*, 108 A.3d 1208, 1218-19 (Del. 2015); *see Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 492 (Del. 2000) (credibility assessments not contradicted by evidence "can virtually never be clear error").

C. Merits of Argument

The question before the trial court was whether Section 8.04(b) of the parties' LLC Agreement required Invenergy to redeem Leaf's shares for its Target Multiple once Invenergy chose to engage in a Material Partial Sale without Leaf's consent. Section 8.04(b) provides:

> Without the prior written consent of ... [Leaf], the Company shall not:
> ...
>
> (b) participate in or permit a Material Partial Sale, *unless* the transaction giving rise to the Material Partial Sale yields cash proceeds equal to or greater than the amount that would provide [Leaf], as of the closing of such Material Partial Sale, with cash proceeds equal to or more than [its] applicable Target Multiple with such Target Multiple to be paid upon such closing of the Material Partial Sale.

A420. Leaf argued the plain language—specifically, the use of "shall not" and "unless"—required Invenergy to redeem Leaf's interests for its Target Multiple where Invenergy engaged in a Material Partial Sale without Leaf's consent but, to the extent the provision was ambiguous, the extrinsic evidence all supported Leaf's interpretation. Invenergy had the *same* interpretation as Leaf until it changed course (and counsel) after the court found it breached Section 8.04(b). Invenergy then argued the provision was only a consent right and everything that followed the word "unless" was not enforceable.

No one argued the Target Multiple operated as a liquidated damages provision or extra distribution where Leaf's consent was not obtained. The parties

agreed the language after "unless" operates as a redemption, *i.e.*, if Invenergy paid Leaf the Target Multiple at closing, Leaf would cease to be a member. Op. 33; A678. The court ultimately concluded Invenergy could not be compelled to redeem Leaf's interests after engaging in a Material Partial Sale without Leaf's consent. The trial court erred in two material respects requiring reversal.

First, once the trial court concluded the language of Section 8.04(b) "explicitly" provided for only two options—either get Leaf's consent or buy Leaf out—it should have enforced that bargain. The trial court, instead, erroneously concluded it was constrained from enforcing the buy-out option by two Court of Chancery appraisal cases interpreting voting provisions in corporate charters (*GoodCents* and *Ford Holdings*). Those cases do not hold that parties to an LLC agreement cannot agree to a bargained-for exit right like the one here and to rely on those cases here is inconsistent with this Court's jurisprudence encouraging freedom of contract in LLC agreements to the "maximum extent."

Second, the court erred by failing to engage in the proper contractual analysis given the parties advanced different readings of the LLC Agreement. Even assuming Invenergy's later interpretation was reasonable, the trial court previously recognized Leaf's interpretation was also a "reasonable reading" before ordering a trial to explore the extrinsic evidence as to how the parties expected the agreement to operate. The trial court, therefore, should have resolved the

ambiguity by relying on the extrinsic evidence, which the trial court found "clearly and convincingly" matched Leaf's interpretation.

1. The Trial Court Should Have Enforced the Parties' "Explicit" Bargain.

The trial court recognized Section 8.04(b) of the LLC Agreement "explicitly gave Invenergy only two options to consummate a Material Partial Sale: get Leaf's consent or satisfy the exception by paying Leaf its Target Multiple." Op. 77. This was consistent with its June 30 Order determining liability: "[t]o engage in a Material Partial Sale *in compliance with the plain language* of the Series B Consent Provision [*i.e.*, Section 8.04(b)], the Company was *obligated* to follow one of [those] two paths." June 30 Order ¶9 (A690) (emphasis added). It was also consistent with the court's findings after trial that "the parties envisioned only two scenarios: either Invenergy would get Leaf's consent or Invenergy would redeem Leaf's interests for its Target Multiple." Op. 74.

Yet the trial court concluded it could not enforce the buy-out option, and require Invenergy to redeem Leaf's interests, as a matter of Delaware law. That was error. The court should have recognized the two options as enforceable obligations in a heavily-negotiated LLC agreement. When Invenergy *chose* to proceed with a Material Partial Sale without getting Leaf's consent—*i.e.*, when it chose not to follow the first option—it was "obligated" to follow the second option and redeem Leaf's interests for the Target Multiple. June 30 Order ¶¶ 9-12 (A690-

91). Invenergy's failure to do so deprived Leaf of its expectancy under the contract—payment of the Target Multiple—which is the proper remedy for Invenergy's breach.

Put simply, Delaware law permits parties to an LLC agreement to "define the contours of their relationships with each other to the maximum extent possible." *CML V, LLC v. Bax*, 28 A.3d 1037, 1043 (Del. 2011); *see* 6 *Del. C.* § 18-1101(b) ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of [LLC] agreements."); *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 295 (Del. 1999) (emphasizing parties' ability to privately order affairs while enforcing LLC provision reflecting intent to arbitrate). That includes agreeing to enforceable contract rights that operate in a binary fashion, such as Leaf's bargained-for exit right in Section 8.04(b) of the LLC Agreement.

Here, the parties expressly agreed that Invenergy "shall not" engage in a Material Partial Sale without Leaf's consent "unless" it redeemed Leaf's interests for its Target Multiple. If Invenergy wanted to proceed with a Material Partial Sale and Leaf did not consent, Invenergy had to buy Leaf out. The LLC Agreement specifies the agreed-upon consideration for that exit (Target Multiple) and when it must be paid (at closing). The parties did not agree Invenergy could force Leaf to remain as a member, deprive it of its exit right *and* its right to consent, and pay it

nothing to compensate for the deprivation. This is how Invenergy and Leaf "define[d] the contours of their relationship[]" in a Material Partial Sale. *CML V*, 28 A.3d at 1043. The trial court's conclusion that it could not enforce this bargain and award Leaf its expectancy is inconsistent with this Court's jurisprudence emphasizing private ordering in LLC agreements.[1]

While the trial court concluded that enforcing Invenergy's obligation to buy-out Leaf where Invenergy engaged in a Material Partial Sale without Leaf's consent would "upend" Delaware law, the cases it cited, *GoodCents* and *Ford Holdings*, do not compel that result. Op. 76-77. Neither case can be read to limit the ability of parties to an LLC agreement to contract for an exit right like the one at issue here.

GoodCents and *Ford Holdings* are both appraisal decisions by the Court of Chancery interpreting voting provisions in corporate charters, not bargained-for rights in LLC agreements. While the cases *do* involve consent rights with an "unless clause," neither holds that the language following "unless" gives no rights

[1] Instead of enforcing the parties' bargain, the court recognized a "third option"—efficient breach—which it acknowledged Invenergy did not "consciously" choose. Op. 77. The concept of "efficient breach" does not allow a party to avoid its bargain. *Halifax Fund L.P. v. Response USA, Inc.*, 1997 WL 33173241, at *1-3 (Del. Ch. May 13, 1997) (purportedly "efficient breach" of contractual conversion right was "a breach nonetheless," and specifically enforcing "bargained for" conversion rights). But that is what the trial court did here.

to the investor "in the event of a breach." Op. 76-77. Indeed, the company in each case was not alleged to have breached the provision at issue, so there was no occasion to consider expectancy damages.

GoodCents rejected the defendant company's argument that, even though the preferred stockholders had *voted in favor* of a merger, the company was still obligated by the charter to pay the preferred stockholders their liquidation preference and, therefore, that amount should be factored into determining "fair value" for purposes of appraisal. *In re Appraisal of GoodCents Holdings, Inc.*, 2017 WL 2463665, at *4-5 (Del. Ch. June 7, 2017). In rejecting that argument, the court held "[n]o part of section B.6.c provides that whenever GoodCents enters a merger, the Preferred Stockholders shall be paid their Liquidation Preference." *Id.* at *4. That is undoubtedly true; the company there entered into a merger after the preferred stockholders had consented. *Id*. at *5 n.25. Indeed, the interpretation urged by GoodCents would be akin to Leaf arguing here it was entitled to its Target Multiple even though it had consented to a Material Partial Sale. But the court there did not consider whether GoodCents would have been obligated by the "language [that] follows the word 'unless'" to pay the preferred stockholders their liquidation preference if the company had undertaken the merger *without* their consent—*i.e.*, the issue here.

Ford Holdings is likewise inapposite and, again, did not involve a bargained-for right in an LLC agreement. The company in *Ford Holdings* also had complied with its obligation under the consent provision, this time by paying the preferred stockholders what it was obligated to pay them under the "unless" clause rather than getting their affirmative vote for a merger. *In re Appraisal of Ford Holdings, Inc. Preferred Stock*, 698 A.2d 973, 974-75 978-79 (Del. Ch. 1997). Although the stockholders had not voted in favor of the merger, the company argued its compliance with that provision also operated to bar the preferred stockholders' right to seek *more* in statutory appraisal. Chancellor Allen disagreed. It was in that context Chancellor Allen observed, "voting provisions are, in the end, voting provisions"—*i.e.*, appraisal rights may be waived but only "when that result is quite clearly set forth when interpreting the relevant document under generally applicable principles of construction." *Id.* at 977, 979.

Neither *GoodCents* nor *Ford Holdings* stands for the proposition that "when an investor's consent right contains an exception grounded in the investor's receipt of particular consideration, the exception does not create a right to receive the specified consideration in the event of breach," as the trial court held here. Op. 76. Section 8.04(b) is a stand-alone right in an LLC agreement that the court recognized was intended to operate as an exit right where Leaf did not give its consent. Op. 63. The trial court should have recognized the ability of parties to an

LLC agreement to privately order their affairs and enforced that bargain by awarding expectancy damages in the amount of the Target Multiple.

To the extent these two cases had any bearing, they should have contributed to finding the language the parties agreed to was ambiguous. *See infra* I.C.2. Notably, Invenergy did not cite either case in opposing Leaf's Motion for Entry of Judgment. It was not until a year later, after *GoodCents* was decided in June 2017, that Invenergy relied on them. The parties certainly were not aware of either case when Invenergy proposed the operative language in Section 8.04(b) in May 2014.

2. Section 8.04(b) Was, at a Minimum, Ambiguous and the Trial Court Should Have Resorted to Extrinsic Evidence.

Because there was no basis for the court to reject Leaf's bargained-for exit right as a matter of Delaware law, the court should have undertaken the analysis required in every contract dispute. Had the court done that analysis, it would have recognized Leaf's interpretation was also reasonable and, faced with an ambiguous provision, resorted to extrinsic evidence, which only confirmed Leaf's reading.

a. The Relevant Contract Interpretation Standards

"Delaware law adheres to the objective theory of contracts, *i.e.*, a contract's construction should be that which would be understood by an objective, reasonable third party." *Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014). "Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no

expectations inconsistent with the contract language." *Id.* at 368 (quoting *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).

An ambiguity exists "[w]hen the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings." *Id.* at 369. "[W]here reasonable minds could differ as to the contract's meaning, a factual dispute results and the fact-finder must consider admissible extrinsic evidence." *GMG Capital*, 36 A.3d at 783 (finding both parties' interpretations reasonable and agreement therefore ambiguous).

Where there is ambiguity, "the interpreting court *must* look beyond the language of the contract to ascertain the parties' intentions." *Id.* at 780 (emphasis added). As this Court noted in *Salamone*, when a sophisticated party has negotiated provisions of a corporate instrument, "it should fairly expect to have those provisions interpreted in the traditional manner, which permits recourse to extrinsic evidence in the event of ambiguity." 106 A.3d at 371. "By permitting the court to consider the parol evidence regarding a negotiated corporate instrument, this approach advances the central aim of contract interpretation, which is to preserve to the extent feasible the expectations that form the basis of a contractual relationship." *Id.*

b. Leaf's Interpretation Is Unquestionably *a* Reasonable One.

By its express terms, Section 8.04(b) of the LLC Agreement provides Invenergy "shall not" engage in a Material Partial Sale without Leaf's consent "*unless* the transaction ... yields cash proceeds equal to or greater than the amount that would provide [Leaf] ... with cash proceeds equal to or more than [Leaf's] applicable Target Multiple *with such Target Multiple to be paid upon such closing of the Material Partial Sale.*" A420 (emphasis added). Although the trial court ultimately read this language as permissive, as merely creating an "exception" that could not be enforced, the parties did not use permissive language. Instead, Section 8.04(b) says Invenergy "shall not" proceed with a Material Partial Sale without Leaf's consent "unless" it redeems Leaf's interest for its Target Multiple "to be paid" at closing.

"Unless" is not a permissive word. It does not convey what "might" happen if something else does not happen, it describes what "will" happen if something else does not happen. *See* Cambridge Dictionary (Cambridge Univ. Press 2018) (https://dictionary.cambridge.org/us/dictionary/english/unless) ("Used to say what will or will not happen if something else does not happen or is not true"). Here, the word "unless" conveys that if Invenergy engages in a Material Partial Sale without Leaf's consent, what "will happen" is that Invenergy will pay Leaf its Target Multiple. At a minimum, the drafters' decision to use the word "unless"

rather than providing, for example, Invenergy "may, at its option," redeem Leaf by paying its Target Multiple (*i.e.*, the language investors rejected in the initial draft Series B term sheet, *supra* 6), suggests the provision is ambiguous as to whether any obligation was intended.

In addition, the trial court never analyzed the import of the language in Section 8.04(b) requiring the Target Multiple "*to be paid* upon such closing of the Material Partial Sale," much less hold it unambiguously does *not* require payment. Comparing Section 8.04(b) with the parallel language in Sections 8.04(a) and 8.01(e) that do not contain "to be paid" language further supports Leaf's reading that Section 8.04(b) of the LLC Agreement was intended to obligate Invenergy to pay the Target Multiple if consent was not obtained or, at least, that Section 8.04(b) is ambiguous in that regard.[2]

It would strain credulity to suggest one could not reasonably interpret Section 8.04(b) as Leaf did when *Invenergy* advanced the same reading earlier in the litigation. *Supra* 19 (A678-79). The trial court cited this "fact" to conclude,

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[2] It is undisputed that language was added to Section 8.04(b)—and the phrase "if received" was removed—in the 2014 amendments. *Supra* 13. *See Eagle Indus.*, 702 A.2d at 1232 n.7 (recognizing "[t]here may be occasions where it is appropriate for the trial court to consider some undisputed background facts to place the contractual provision in its historical setting without violating [the principle that courts should not look to extrinsic evidence to interpret unambiguous terms]"). Without resorting to evidence of the parties' communications, the fact that language was added referring to *payment* of the Target Multiple supports the reasonableness of Leaf's interpretation.

"as of May 2016, Invenergy both believed (as Leaf did) *and represented to the court that Leaf could compel payment* of the Target Multiple in exchange for its interests if Invenergy engaged in a Material Partial Sale without Leaf's consent." Op. 63 (emphasis added). That is not extrinsic evidence. It is a concession in this litigation that Leaf's interpretation of Section 8.04(b) is reasonable.

The trial court also acknowledged at various points prior to trial Leaf's interpretation was reasonable. The court recognized at oral argument the day before its October 7 Order that Leaf had advanced "at least a reasonable reading" of Section 8.04(b) that "if there was a transaction without its consent, it would get bought out for its target multiple." *Supra* 21. The court seemed to echo that observation in its October 7 Order, stating "the Series B Consent Right does not *explicitly* entitle Leaf to $126 million [the Target Multiple] if its consent ... is not obtained." October 7 Order ¶7 (A771) (emphasis added). That the provision was *not* "explicit[]" as to what was required suggests the provision was ambiguous.

Moreover, in ordering a trial, the court did not conclude Section 8.04(b) was unambiguous or that Leaf's interpretation was not reasonable. If it had, then the court's statement that Section 8.04(b) could "operate[] to create a clear set of contractual expectations for Leaf" would have made no sense. As this Court held in *GMG Capital*, "[c]ontract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position

of either party would have *no expectations inconsistent with the contract language*." 36 A.3d at 780 (emphasis added). By ordering a trial to explore the extrinsic evidence, the court acknowledged the provision was ambiguous—that reasonable minds could differ about how it operated.

Ultimately, this Court need not find Leaf's interpretation is the only reasonable interpretation of Section 8.04(b)—or even the better interpretation—to reverse the Opinion. Because Leaf's interpretation was a reasonable one, the court erred when it failed to interpret an ambiguous agreement consistent with the extrinsic evidence of the parties' intent. Here, that extrinsic evidence was "clear and convincing" that "all of the parties to the LLC Agreement understood that Leaf would receive its Target Multiple [and be redeemed] if Invenergy engaged in a Material Partial Sale without Leaf's consent." Op. 67-68. Instead of enforcing that bargain, the trial court forced Leaf to remain a member of the LLC in contravention of its bargained-for right to be redeemed for its Target Multiple in a Material Partial Sale that it did not consent to.

II. THE TRIAL COURT ERRED IN RELYING ON *FLETCHER* TO ASSESS LEAF'S DAMAGES.

A. Question Presented

Whether the trial court erred in applying *Fletcher* to determine Leaf suffered no damages? A924-28; A1280-82.

B. Scope of Review

The court's application of *Fletcher* is a mixed question of law and fact that is reviewed *de novo*. *Zirn v. VLI Corp.*, 681 A.2d 1050, 1055 (Del. 1996). This Court will overturn factual conclusions if they are not "sufficiently supported by the record" or "the product of an orderly and logical deductive process." *Id.*

C. Merits of Argument

For the reasons explained above, the trial court should have enforced Leaf's bargained-for exit right in the LLC Agreement and never reached an application of *Fletcher*. The premise underlying *Fletcher* was that a bare consent right cannot give its holder the "opportunity to coerce value" from a counterparty "in circumstances where [the holder] believed that the transaction it was being asked to consent to was highly beneficial to itself." *Fletcher*, 2013 WL 6327997, at *18. But Leaf was not trying to "coerce value" from a bare consent right. It was

seeking to enforce its contractually agreed-upon exit right in Section 8.04(b) of the LLC Agreement.[3]

Moreover, unlike *Fletcher*, there is no basis to conclude Leaf believed the transaction was "highly beneficial to itself." The Leaf principals' testimony the trial court cited to conclude "Leaf benefited from the transaction as an investor" merely recognized Invenergy sold assets at an attractive price. Op. 78. Both Lerdal and Alemu—who the trial court found credible (Op. 25)—testified Leaf *was harmed* because it did not receive its bargained-for redemption amount. A969; A1006. Alemu also credibly explained how Leaf was worse off than if no transaction had occurred because Invenergy sold its most valuable assets without Leaf's consent in breach of the LLC Agreement—while Polsky, CDPQ, and Liberty extracted tens-of-millions of dollars—and then immediately called Leaf's

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[3] Indeed, *Fletcher* was a very different case. The contractual provision there entitled Fletcher to consent to the issuance of any security of an ION subsidiary. *Fletcher*, 2013 WL 6327997, at *18. There was nothing in the provision contemplating ION would redeem Fletcher's stock for a specified amount if Fletcher's consent was not obtained. In fact, "Fletcher had no right to exit its investment, no put option through which it could require ION to repurchase its Preferred Stock if it refused to consent, and, unlike [certain existing lenders], had no right to declare a default." *Id.* at *14. Given that Fletcher sought damages well beyond the $40-million debt that triggered its consent right and that ION could have structured the broader transaction to avoid consent, the court found Fletcher could not have used the consent right to extract significant value. *Id.* at *13,21. Nevertheless, after weighing expert testimony, the court found ION would have agreed to pay *something* rather than go through the time and expense of restructuring the deal and awarded Fletcher $300,000 in damages. *Id.* at *24-26.

interests for $42.4 million based on an artificially low valuation. A971-72; *supra* 18. Leaf invested $30 million in 2008 expecting an annual IRR of more than 20% consistent with the level of risk and Invenergy's returns on other investments, but Invenergy used its breach to call Leaf's interests at far below even the principal and accrued interest on Leaf's notes (roughly $52 million) despite Leaf's bargained-for exit right in the LLC Agreement.

Once the trial court constructed a "hypothetical negotiation" under *Fletcher*, its conclusion that Leaf lacked leverage was not the product of an "orderly and logical deductive process." *Zirn*, 681 A.2d at 1055. The conclusion "Leaf would not have been able to extract any payment in return for its consent" (Op. 79) cannot be squared with the trial court's extensive findings that all of the parties believed Leaf was entitled to be redeemed if it withheld consent. Op. 62, 67, 76-77. It also ignores Leaf had historically extracted *something* when Invenergy sought its consent to amend the agreements. *Supra* 8-9. In a negotiation, Invenergy would have believed it could be "compel[led]" to pay the Target Multiple if Invenergy could not obtain Leaf's consent or negotiate a lower buyout price. Op. 63; A1006-07 (Lerdal would have accepted $100-$110 million as discount to Target Multiple in negotiations to get "certainty of payment"); A1050 (same). To conclude Invenergy would have refused to pay *anything* is not only speculative but illogical.

The trial court's conclusion is also inconsistent with its findings regarding Invenergy's actual conduct—*i.e.*, that Invenergy manipulated its "MPS test" and concealed the transaction from Leaf to avoid giving Leaf any opportunity to demand its Target Multiple (Op. 40-41, 47-48) and actively negotiated with CDPQ/Liberty for their consent after concluding it "need[ed] to create a strong case" for them to do the deal. A452; A790. That only proves Invenergy and the other members saw the need for, and placed value on, the required consents.

There is also no basis to conclude Invenergy would have walked away from the $2-billion transaction rather than negotiate for some discount to Leaf's Target Multiple. The trial court's findings that Invenergy "had no pressing need" to do the deal (Op. 79-80) are inconsistent with other facts the trial court credited. For example, the trial court found Polsky was "convinced that [Invenergy] need[ed] to proceed with the wind asset sale" to offset losses from another project (Op. 40 (quoting A452)) and that Invenergy pushed hard for an expeditious close at the sign of "softness" in the market. Op. 54 (citing A531-32); A1169. After TerraForm was downgraded by ratings agencies, Polsky was "concerned" TerraForm might try to get out of the deal and urged it to close. Op. 54 (citing A608-11; A794). Based on this evidence, Murphy's testimony that Invenergy would have walked away or delayed the deal is not credible—and the court's

decision to credit this testimony while finding Murphy lacked credibility in other respects is not reasonable. Op. 72.

The trial court also discounted what CDPQ/Liberty got because the payments were not classified as "distributions," but CDPQ/Liberty pulled tens-of-millions of dollars from the investment *while remaining equityholders* post-closing and sharing in any future upside (including whatever they could avoid paying Leaf). *Supra* 16-17; A1064 (CDPQ considered itself in a "long-term" business relationship with Invenergy and not looking to exit). Thus, the trial court's conclusion that "once it became clear that CDPQ and Liberty were not getting any distributions, Lerdal would have realized that he did not have the leverage he thought he had," lacks an evidentiary basis in the record.[4] Op. 83. To assign no leverage to the parties' desire to close what they believed to be a top-of-the-market transaction from which they extracted significant value is not logical. Even in *Fletcher*, the court ultimately found ION likely would have paid Fletcher a reasonable fee rather than go through the trouble of trying to restructure the deal to avoid consent. *Supra* n.3.

[4] That conclusion also ignores that CDPQ's Renault testified no one ever approached CDPQ to discuss whether it would agree to pay Leaf any amount to allow closing to occur and it was "too speculative" to know what would have happened if someone had approached CDPQ. A1069-70.

Because the court failed to give proper weight to these findings, its analysis of how a hypothetical negotiation would have proceeded had Invenergy approached Leaf rather than breached Section 8.04(b) was not the product of an "orderly and logical deductive process." In any event, the record does not support constructing a hypothetical negotiation because the trial court found by clear and convincing evidence the parties had *actually* negotiated for only two options in the LLC Agreement: consent or redemption. Accordingly, the trial court's application of *Fletcher* and determination Leaf was entitled to only nominal damages should be reversed.

CONCLUSION

For the foregoing reasons, the Opinion should be reversed and remanded with directions to enter an order in the amount of the Target Multiple (plus pre- and post-judgment interest), which all parties agreed Leaf would receive in the event Invenergy engaged in a Material Partial Sale without its consent.

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