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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/ Cross-Appellee, v. INVENERGY RENEWABLES LLC, a Delaware limited liability company, Defendant Below-Appellee/ Cross-Appellant.	No. 308, 2018 Court Below: Court of Chancery of the State of Delaware, C.A. No. 11830-VCL **PUBLIC VERSION FILED ON NOVEMBER 13, 2018**

APPELLANT LEAF INVENERGY COMPANY'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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PRELIMINARY STATEMENT

As discussed in Leaf's Opening Brief ("OB"), the trial court considered the extrinsic evidence presented at trial and found that there were "no ifs, ands, or buts" about how Leaf and Invenergy intended Section 8.04(b) of their LLC Agreement to work: if Invenergy proceeded with a Material Partial Sale and Leaf did not consent, Leaf "always" would receive its Target Multiple and would cease to be an LLC member. Op. 29. The trial court found, by "clear and convincing" evidence, that all parties to the LLC Agreement had this understanding. Op. 67-74. Nevertheless, the trial court believed two Court of Chancery appraisal cases constrained it from reading Section 8.04(b) as anything other than a "consent right" with an exception that Invenergy had the option to invoke or not. *Id.* at 76-77.

Leaf's appeal therefore presents essentially two issues. Was the trial court correct that it was constrained from reading Section 8.04(b) of the LLC Agreement as the parties intended? If not, then did Leaf offer a reasonable interpretation of Section 8.04(b)? If Leaf's interpretation was reasonable, the fact that the trial court adopted a different interpretation meant Section 8.04(b) was ambiguous. The trial court should therefore have interpreted the provision consistently with the extrinsic evidence of the parties' intent, which the trial court found overwhelmingly favored Leaf's interpretation.

As Leaf showed, the trial court erred when it concluded that honoring the parties' agreement in Section 8.04(b) of the LLC Agreement would "upend" Delaware law. OB at 31-34. This Court has long recognized the ability of parties to an LLC agreement to "define the contours of their relationships with each other to the maximum extent possible." OB at 30 (citing cases). That is what the parties did here in the context of a Material Partial Sale. They agreed that 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 (the Target Multiple) and when it must be paid (at closing).

Invenergy's Answering Brief ("AB") does not even discuss this Court's jurisprudence regarding the interpretation of LLC agreements, much less explain why it does not apply to Leaf and Invenergy's LLC Agreement. Instead, Invenergy continues to assert that the aforementioned appraisal decisions are somehow dispositive while overlooking critical differences between those cases and the present one, including the fact that neither case involved the proper construction of an LLC agreement or even a breach of contract.

Because the trial court was not precluded from reading Section 8.04(b) as Leaf reads it, the court was required to consider whether Leaf's interpretation was reasonable. Given that Section 8.04(b) expressly states that Invenergy "shall not" engage in a Material Partial Sale without Leaf's consent "unless" the transaction in

question yields enough cash proceeds to pay Leaf its Target Multiple "with such Target Multiple to be paid upon such closing of the Material Partial Sale" (OB at 27), Leaf's reading is hardly an interpretative stretch. Indeed, before trial, the court acknowledged Leaf advanced "at least a reasonable reading" of the LLC Agreement. OB at 21-23, 38. Yet this was not just Leaf's reading. Invenergy itself advanced the exact same reading as Leaf earlier in the case—arguing that a "consequence" of not obtaining Leaf's consent was that Leaf could "require" payment of its Target Multiple (A678-79)—before it became convenient for Invenergy to adopt a different interpretation. OB at 37-38.

As Leaf also showed, the parties' seven-year-long understanding of Section 8.04(b) is supported by the dictionary definition of the word "unless." The word "unless" conveys what "will" happen if something else "does not" happen. OB at 36-37. Here, if Invenergy "does not" get Leaf's consent and then engages in a Material Partial Sale, what "will" happen is that the "Target Multiple [is] to be paid [to Leaf] upon such closing of the Material Partial Sale." *Id.*

Because Invenergy had previously advanced the same interpretation of Section 8.04(b) as Leaf—*i.e.*, that Leaf could "require" payment of the Target Multiple if Invenergy engaged in a Material Partial Sale without Leaf's consent—it is not surprising that Invenergy's Answering Brief makes almost no effort to explain why Leaf's interpretation is unreasonable. For example, Invenergy does

not even discuss the meaning of the word "unless" as it is used in Section 8.04(b). Instead, Invenergy follows the path it successfully persuaded the trial court to adopt. Invenergy assumes that its interpretation—which strips Leaf's bargained-for exit right out of Section 8.04(b) and reads that provision as merely requiring Leaf's consent—is the *only* correct one. To that end, Invenergy quotes statements by the trial court to the effect that Section 8.04(b) was not a "payment right." AB at 43-44. Having characterized Section 8.04(b) as a "consent right," Invenergy argues that the sole question on appeal is how Leaf was damaged by Invenergy's intentional breach of that right when Invenergy engaged in the TerraForm Transaction. According to Invenergy and the trial court, Leaf was actually benefitted by that transaction.

But Invenergy misses the point. Leaf is appealing the trial court's decision to adopt Invenergy's proffered interpretation. And Leaf is appealing that decision because the trial court never undertook the required contractual analysis to determine whether Leaf's reading was also a reasonable one such that the agreement was, at the very least, ambiguous. Invenergy does not dispute that this is the required analysis when construing a contract provision. Because Leaf's reading of Section 8.04(b) was at least *a* reasonable reading of that provision, the trial court should have resorted to the extrinsic evidence to effectuate the parties' bargain. That evidence showed that Leaf's right was *not*, as Invenergy claims, the

right to seek damages for breach of a consent provision. Instead, the trial court found, by clear and convincing evidence no less, the bargain was that if Invenergy engaged in a Material Partial Sale without Leaf's consent, Leaf had the right to be bought out of its interest in the LLC through payment of the Target Multiple. The trial court should have enforced that bargain. Because it did not, its decision must be reversed.

SUMMARY OF ARGUMENT

As to Invenergy's cross-appeal:

3. Denied. The trial court properly concluded Invenergy failed to prove by a preponderance of the evidence that Leaf breached any express or implied obligation in the LLC Agreement in connection with the put-call process. The trial court's detailed factual findings "reflect[] that both appraisers ultimately exercised independent judgment to reach supportable valuation opinions" and that the parties' interactions with their respective appraisers "did not differ in kind." Invenergy cannot show that those findings are clearly erroneous or were not the product of an orderly deductive process, as it must. Invenergy's reliance on a single decision of the Court of Chancery (*Senior Housing*) is unavailing as the record here does not come close to supporting the determination made in that case that the breaching party engaged in conduct that "tainted the process" in such a way as to justify "disregarding" its supposedly independent appraisal. In any event, this Court need not reach this issue if Leaf is successful on its appeal because its interests should have been redeemed for its Target Multiple prior to the put-call process.

ARGUMENT

I. INVENERGY'S ANSWERING BRIEF CONFIRMS THAT THE TRIAL COURT ERRED BY NOT ENFORCING LEAF'S BARGAINED-FOR EXIT RIGHT.

A. There Is Nothing "Contrary to Delaware Case Law" in Agreeing, as the Parties Did Here, to a Bargained-For Exit Right.

As Leaf noted in its Opening Brief, the trial court recognized that Section 8.04(b) "expressly" gave Invenergy only two paths—consent or payment. Op. 77. That conclusion was consistent with, and supported by, the trial court's factual findings that left no "ifs, ands, or buts" that the parties intended Leaf could "compel payment" of its Target Multiple if it did not consent. Op. 29, 63, 71, 77. Yet the trial court concluded it could not enforce that agreement, and compel payment of the Target Multiple here as a result of Invenergy's breach, because it was purportedly constrained by two Court of Chancery appraisal decisions involving "unless clauses" in corporate charters (*GoodCents* and *Ford Holdings*). Op. 77. Invenergy says those cases make Leaf's interpretation of Section 8.04(b) "contrary to Delaware case law." AB at 37. But Invenergy fails to explain why either of those cases should have precluded the Court from enforcing the parties' admittedly mutual seven-year-long understanding of the bargain reflected in the heavily-negotiated LLC Agreement.

Neither *GoodCents* nor *Ford Holdings* stands for the proposition that parties to an LLC Agreement cannot agree upon a bargained-for exit right. Nor would such a holding be consistent with this Court's jurisprudence emphasizing freedom of contract in LLC agreements to the "maximum extent." OB at 30. In fact, neither case involved the interpretation of an LLC agreement, much less an alleged breach of such an agreement. OB at 31-33. Invenergy does not address these critical distinctions in its Answering Brief.

Thus, while *GoodCents* nominally involved the right of preferred stockholders to receive their liquidation preference in a merger, the preferred stockholders were not asserting that they were entitled to that liquidation preference because they did not consent. Instead, the defendant company argued, as the respondent in appraisal litigation, that it was obligated to pay a liquidation preference to those stockholders (and therefore it should be factored in for purposes of appraisal) even though the preferred stockholders *had* consented to the merger and even though the obligation to pay the liquidation preference was only triggered if they did *not* consent. *In re Appraisal of GoodCents Holdings, Inc.*, 2017 WL 2463665 (Del. Ch. June 7, 2017); OB at 32. In other words, *GoodCents* had no occasion to consider the issue analogous to the one presented here, *i.e.*, whether the preferred stockholders could have demanded their liquidation

preference based upon the charter language if the company had engaged in a merger without their consent. *Id.*

More importantly, *GoodCents* also did not claim to be espousing new rules of contract interpretation. Nothing in that case suggests that whenever a provision can be characterized as a "consent provision with an 'unless clause,'" ordinary rules of contract interpretation, including consideration of whether the provision is ambiguous, cease to apply. The parties in *GoodCents* actually agreed that the provision at issue was unambiguous and therefore that resort to extrinsic evidence was unnecessary. 2017 WL 2463665, at *4. That the court in *GoodCents* pointed to the other sub-sections in the charter addressing the liquidation preference to divine the meaning of the provision at issue there only proves Leaf's point that a court must interpret the contractual language in front of it. AB at 40-41. Section 8.04(b) is not part of a broader liquidation preference provision; it is a standalone exit right for Leaf if Invenergy wanted to engage in a Material Partial Sale.

In re Appraisal of Ford Holdings, Inc. Preferred Stock, 698 A.2d 973 (Del. Ch. 1997), is even farther afield from the questions present in this case. In *Ford Holdings*, the question was whether a provision in a corporate charter that contained no reference to a waiver of statutory appraisal rights could nonetheless be interpreted to operate as a waiver of those rights. OB at 33. The *Ford Holdings* court held 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*. Thus, when Invenergy quotes *Ford Holdings* as saying that rights like those in Section 8.04(b) are "in the end, voting provisions" (AB at 41), it misreads that case. The *Ford Holdings* court was not suggesting, as Invenergy implies, that clauses such as agreed-upon exit rights can be read out of provisions that can be characterized as "in the end, voting provisions." Instead, the court was making the point that relying upon a voting provision as the source for a waiver of appraisal rights weakened the argument that there was an intention to waive that right. Indeed, the very next sentence in *Ford Holdings* states that the "stipulated absence of a class vote is too frail a base upon which to rest the claim that there has been a contractual relinquishment of rights under Section 262." 698 A.2d at 979.

Invenergy, again, makes no effort to address these aspects of *GoodCents* and *Ford Holdings* in its Answering Brief. Nor does Invenergy address the Delaware authority emphasizing the freedom of parties to LLC agreements 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); OB at 30. Invenergy cannot credibly argue that the language *it proposed* to reflect the parties' bargain—that Leaf would "always receive [its Target Multiple]" if Invenergy chose to proceed with a Material Partial Sale and Leaf did not consent—is unenforceable as a matter

of law because of two Court of Chancery appraisal cases that neither party was aware of at the time of contracting. OB at 34. Indeed, permitting Invenergy to prevail on that argument would do more to "upend" Delaware law (Op. 76-77) than recognizing that those two cases involving liquidation preferences in corporate charters do not limit the ability of parties to an LLC agreement to agree to a bargained-for exit right like the one intended here.

* * *

Because Delaware law did not constrain the trial court from recognizing Leaf's bargained-for exit right, the trial court should have undertaken the analysis required in every dispute regarding the interpretation of an agreement to determine whether the agreement was susceptible to more than one reasonable reading.

B. Invenergy Fails to Show that Leaf's Interpretation of Section 8.04(b) Was Not Reasonable.

Invenergy's Answering Brief seeks to bypass this required analysis almost entirely. Invenergy therefore begins its Answering Brief by asserting, incorrectly, that the "sole" question in this appeal is damages arising from Invenergy's "breach of [a] contractual consent right." AB at 2. Invenergy even misconstrues the procedural history of this action to support its characterization by claiming (on page 1 of its Answering Brief) that the trial court's initial finding of a "breach" was limited to a breach of Leaf's "consent right." AB at 1-2. In fact, the trial court's June 30, 2016 order granting Leaf's motion for judgment on the pleadings

identified two "paths" that Invenergy was "obligated" to follow to engage in a Material Partial Sale—either "by obtaining Leaf's consent before the TerraForm Transaction closed" or "by paying upon closing to Leaf cash proceeds equal to or more than its applicable Target Multiple." June 30 Order ¶¶10-11 (A690-91). Thus, the trial court concluded, "[b]ecause the Company did not follow either the Consent Path or the Payout Path, it breached the plain language of [Section 8.04(b)]." *Id*. ¶ 12 (A691).

It may be, as Invenergy notes, that the trial court later found that "the Unless Clause—on its face—provided only an 'exception' for Invenergy's benefit to Leaf's preceding consent right" (AB at 33) and that "[p]roperly understood the exception was only an exception." *Id.* But the propriety of that interpretation is the subject of this appeal. For the trial court to have concluded how Section 8.04(b) should be "properly understood"—without regard to the extrinsic evidence that, in the trial court's own view, so clearly demonstrated that the parties had an entirely contrary intent—the trial court was required to find that Leaf's interpretation of the plain language was not reasonable. OB at 37-39. The trial court never did that, as Invenergy tacitly concedes.

Indeed, Invenergy acknowledges, forty-three pages into its brief, that a court may only reject extrinsic evidence of the parties' intent where it finds the provision in question to be unambiguous. AB at 43. But many of the arguments Invenergy

makes—pointing out that the provision appears under a heading entitled "Governance" (*id.* at 31) or that other provisions of the LLC Agreement gave Leaf a "payment right," purportedly in contrast to Section 8.04(b) (*id.* at 41), are only arguments as to why Invenergy's interpretation is purportedly reasonable. To claim there is no ambiguity, Invenergy must show why Leaf's interpretation is *not* reasonable.[1]

On that latter point, Invenergy's brief is largely silent. Invenergy does not, for example, dispute that Leaf's interpretation is supported by the common dictionary definition of the word "unless." OB at 36-37; *see Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738-39 (Del. 2006) (holding trial court's refusal to consider dictionary definitions of critical terms in contract was not supported by precedent and likely error because "[u]nder well-settled case law,

[1] For that matter, Invenergy misses that the parties added a number of *non-voting* rights to Article VIII, titled "Governance," as the LLC Agreement was amended and the parties' rights were moved around over the seven-year investment. *See*, *e.g.*, Op. 20-21, 34-35. For example, Section 8.01(e) on its face provides non-Specified Members with the right to elect to receive their Material Partial Sale Amounts in a Material Partial Sale. That provision is not solely a voting right. As the trial court found, it was the right to elect payment in Section 8.01(e) that precipitated the discussion between Russell and Condo in May 2014 that resulted in the addition of express language to Section 8.04(b) to make clear Leaf would be redeemed for its Target Multiple. Op. 26-28. Likewise, pointing to other provisions in the parties' agreements that refer to payment as instructive of anything ignores that the parties specifically added the "with such Target Multiple to be paid at closing" language to Section 8.04(b) in May 2014 to make clear that Leaf would "always" get paid. OB at 37 n.2.

Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract"). Leaf's interpretation is also supported by the fact that express language was added to Section 8.04(b) in May 2014 to specify when the Target Multiple was to be paid to Leaf, *i.e.*, "upon closing." OB at 36-37 n.2. Invenergy never addresses that language in its Answering Brief.

The closest Invenergy comes to actually addressing Leaf's interpretation is when Invenergy contends that Leaf's interpretation makes no sense since it assumes that the "limitation" in Section 8.04(b)—*i.e.*, everything after the word "unless"—actually "increases [Leaf's] rights by giving it a contractual right to payment in the event of breach." AB at 36. According to Invenergy:

> The plain language of Section 8.04(b) is . . . clear: it provides a consent right but gives Invenergy the right to bypass that consent right if a transaction results in payment of a Target Multiple to Leaf. The exception, set forth in the Unless Clause, gives no rights to Leaf. It serves only as a limitation on Leaf's consent.

Id. In other words, Invenergy asserts, without explanation, that the "Unless Clause" is a "right" of Invenergy to invoke or not invoke and therefore a "limitation" on Leaf's right to consent to a Material Partial Sale. Even if this were a reasonable interpretation (it is not), Invenergy fails to explain why Leaf's contrary interpretation is not also reasonable.

Section 8.04(b) begins with an unqualified prohibition—that Invenergy "shall not" engage in a Material Partial Sale without Leaf's consent "unless" it does something else, *i.e.*, pay the Target Multiple to Leaf. Invenergy does not dispute that "unless" describes what *will* happen if something else does not. OB at 36-37. In other words, although Invenergy reads Section 8.04(b) as giving it the option of avoiding what it characterizes as a "consent right," Section 8.04(b) does not say that Invenergy "may" bypass that right if it decides to do so. Instead, the "plain structure" of the provision states that Invenergy shall not do something, *i.e.*, engage in a Material Partial Sale without Leaf's consent, *unless* it does something else, *i.e.*, redeem Leaf's interest in the LLC through payment of the Target Multiple. *Id*. Contrary to Invenergy's current interpretation, Invenergy's compliance with this provision is not optional. Indeed, the fact that, before trial at least, *both* the court *and* Invenergy read Section 8.04(b) as Leaf does, *i.e.*, as obligating Invenergy to pay Leaf its Target Multiple in the event it chose to proceed without Leaf's consent (Op. 63, 71; OB at 19-20; 37-38), confirms that Leaf's reading is at least a reasonable one.

Ultimately, Invenergy has posited one interpretation, with which the trial court agreed, and Leaf has posited another. Delaware law is clear that "[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 contractual language." *Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014). Invenergy fails to show that no reasonable person would share Leaf's interpretation of Section 8.04(b), which is not surprising given, as noted, Invenergy *itself* "represented to the court that Leaf could compel payment of the Target Multiple" early in the litigation before it changed counsel and it became convenient to adopt a different reading. Op. 63, 71; *see also* OB at 19, 37-38. Invenergy makes no mention of its prior litigation position in its Answering Brief, presumably because it has nothing to say in response.[2] Because Invenergy does not, and cannot, argue, based upon the plain language of Section 8.04(b), that Leaf's interpretation is unreasonable, the trial court was required to look at the extrinsic evidence to effectuate the parties' bargain.

[2] As noted above, the trial court also acknowledged before trial that Leaf's interpretation was "at least a reasonable reading." OB at 21-22, 38-39. Invenergy's attempt to sidestep the trial court's comments by citing other comments, consistent with its subsequent decision, that Section 8.04(b) was "not a payment right" misses the point. AB at 43-44. Leaf is appealing that decision. The trial court erred in its October 7 Order when it seemingly adopted Invenergy's newly proffered interpretation without undertaking any contractual analysis to determine whether the language was ambiguous. That the court observed less than 24-hours earlier that Leaf's interpretation was reasonable and then ordered a trial to explore the extrinsic evidence to determine whether the disputed language "operated to create a clear set of contractual expectations" consistent with Leaf's reading suggests the trial court overlooked its obligation to perform that basic contract analysis. OB at 21-23, 38.

C. The Extrinsic Evidence Demonstrates that Invenergy's Characterization of Section 8.04(b) Is a Fiction.

Although the trial court believed itself constrained by Delaware law from reading Section 8.04(b) as anything other than a consent right, it found that the extrinsic evidence clearly and convincingly supported Leaf's interpretation of that provision as a bargained-for exit right. OB at 24. Indeed, the trial court's extensive findings based on the extrinsic evidence also demonstrate that Invenergy's characterization of Leaf's exit right as a "limitation" on Leaf is pure fiction. The Opinion explains in great detail how, at every step between 2008 and 2014, Leaf and the other investors were focused on protecting their right to be bought out whenever Invenergy engaged in a major transaction. OB at 6-14.

For example, the trial court found that the investors *rejected* proposed language in the initial Series B term sheet providing that Invenergy "may, at its option, offer to prepay" the Target Multiple for certain non-control transactions. In other words, they rejected the very "at its option" language that Invenergy now claims it has in Section 8.04(b), albeit *sub silencio*. Op. 7-8.

The extrinsic evidence also showed that the parties instead "intended for the Series B Investors' post-conversion governance rights to 'function in a similar fashion' as their pre-conversion consent right" and "to the extent the company did not get consent from the investors that had the equity, they had an *obligation* to pay the [T]arget [M]ultiple.'" Op. 4-9 (emphasis added); *see also* Op. 9-17

(finding the precursor to Section 8.04(b) in the original LLC Agreement was meant to track the obligation to pay the Target Multiple contained in the Series B NPA). The trial court further found that "underlying" the parties' negotiations in 2011 over the amount of the Target Multiple in both the debt and the equity 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.

Finally, the trial court found that the words "with such Target Multiple to be paid upon such closing of the Material Partial Sale" were added to the "unless" clause in May 2014 *at the request of Leaf* to insure that if Invenergy engaged in a Material Partial Sale without Leaf's consent, Leaf would be redeemed for its Target Multiple. Op. 27-29. Invenergy never suggests that the trial court erred in making these findings, much less provides a basis to conclude they are clearly erroneous, as it must.

D. Invenergy Cannot Avoid the Extrinsic Evidence.

Invenergy separately argues that the extrinsic evidence purportedly does not support Leaf's position or is not probative of the parties' intent. These contentions do not require much discussion.

For example, Invenergy asserts that the extrinsic evidence must speak to "all" the parties' intent and that therefore communications between Leaf and Invenergy

regarding a provision that solely involved them are not relevant. AB at 45. In support of that contention, Invenergy cites *SI Management L.P. v. Wininger*, 707 A.2d 37, 43 (Del. 1998). However, in *SI Management*, the Court of Chancery had rejected evidence offered by a general partner to show its intent in a contract with 1,850 limited partners who were presented with the contract on a "take it or leave it" basis. *SI Mgmt.*, 707 A.2d at 44. In affirming the Court of Chancery, this Court explained that the "articulation of contract terms in this case appears to have been entirely within the control of *one party* – the General Partner [– so] that party bears full responsibility for the effect of those terms." *Id.*

Here, in contrast, the contemporaneous evidence that Leaf offered, and that formed the basis of the trial court's findings of fact, concerned active negotiations between Invenergy and Leaf in May 2014 over the specific terms at issue here. OB at 6-14. Those terms concerned Leaf's rights, not the rights of other parties to the LLC Agreement, and their understanding does not bear upon the shared expectations of Leaf and Invenergy regarding Section 8.04(b). More importantly, that argument ignores the trial court's findings of fact: the trial court expressly found based upon the evidence introduced at trial that "*all* of the parties to the LLC Agreement" understood the provision to operate as Leaf and Invenergy did. Op. 67-68. That determination was supported by contemporaneous documents, including the "matrix comparing member rights in the LLC agreement" that

Invenergy's Sane revised and circulated several times to Liberty and CDPQ (the other parties to the LLC Agreement), which the trial court characterized as among the "most telling evidence" of the parties' "shared understanding." Op. 24; *id.* at 34 (citing A374-79; A1059; A1069 (CDPQ confirming it was aware of changes)). Invenergy again does not argue these findings were clearly erroneous.

Invenergy also contends that "after the fact evidence" is not helpful in interpreting a contract provision. AB at 45-46. But Invenergy does not explain what "after the fact evidence" it is talking about. In any event, the trial court's decision again makes clear that it was not after-the-fact evidence the trial court was relying upon when it concluded that Leaf and Invenergy shared the same understanding of how Section 8.04(b) operated. Rather, the Opinion states:

> [t]he contemporaneous evidence presented at trial—*spanning a period of more than seven years starting with Leaf's investment in 2008*—demonstrated the parties' shared, pre-litigation understanding. The totality of the evidence easily met the preponderance of the evidence standard. In my view, it was clear and convincing.

Op. 67-68 (emphasis added); *see id*. at 71 (finding based on the contemporaneous evidence that, "as late as May 2016 [well after the parties were in litigation], Invenergy continued to manifest its belief 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").

Lastly, Invenergy's effort to characterize the communications between the parties as dealing with "what was required to comply with the contract" rather than "what would happen if it were breached" (AB at 46) is a distinction without a difference. As the trial court found, the extrinsic evidence showed "clearly and convincingly" how the parties intended Section 8.04(b) to *work*: that "Leaf would receive its Target Multiple if Invenergy engaged in a Material Partial Sale without Leaf's consent." Op. 67-68. Invenergy's assertion that Leaf did not request "that anything be added to the LLC Agreement that governed damages or remedies available in the event of a breach" (AB at 46) assumes Invenergy's premise—that Invenergy's only obligation was to seek Leaf's consent and that therefore some remedial provision was needed in the event of a breach of this consent provision. As both the plain language of Section 8.04(b) and the extrinsic evidence confirm, the provision is not merely a consent right. Rather, the parties understood it as creating a separate obligation: that Leaf could "compel payment" of the Target Multiple if Invenergy engaged in a Material Partial Sale and Leaf did not consent (Op. 29, 63, 71). It is that bargained-for exit that Leaf seeks to enforce here.

E. Invenergy's "No Damages" Argument Is Built Upon the False Premise that Section 8.04(b) Is Only a Consent Right.

Invenergy's argument that Leaf suffered no damages as a result of the breach of its consent right but in fact "benefitted" (AB at 31-32) therefore misses

the point. Leaf was harmed because it was deprived of its bargained-for exit in the event Invenergy engaged in a Material Partial Sale without Leaf's consent.

For the same reason, enforcing Section 8.04(b) consistent with the extrinsic evidence does not "eliminate the possibility of efficient breach" as Invenergy contends. AB at 49. That argument again assumes Section 8.04(b) is only a consent right and that the consequence of a "breach" should be limited to some measure of damages related to Leaf being deprived of its right to consent. That is not the nature of the parties' contractual bargain here—Leaf was deprived of its right to either negotiate for its consent or to withhold consent and, assuming Invenergy still wanted to engage in a Material Partial Sale, compel Invenergy to redeem its interests. Thus, an efficient breach in this context would recognize Leaf's right to receive the Target Multiple as a bargained-for exit right. If Invenergy wanted to proceed with a Material Partial Sale without complying with its obligation to redeem Leaf's interests where Leaf withheld consent, it is free to do so. But the consequence is that it must satisfy a claim for damages in the amount of the Target Multiple.

Ultimately, having recognized that the parties' expressly contracted for only "two paths"—which agreement was only *confirmed* by the extrinsic evidence—the trial court's decision to allow Invenergy to take a third path in the form of an "efficient breach" that neither party contemplated cannot withstand scrutiny. Op.

77. Indeed, Invenergy's invocation of this Court's decision in *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436 (Del. 1996), as recognizing the doctrine of "efficient breach" is ironic. AB at 49. *Pressman* is the seminal Delaware decision recognizing the covenant of good faith and fair dealing that applies to all contracts as "a way of 'honoring the reasonable expectations created by the autonomous expressions of the contracting parties.'" 679 A.2d at 443 (citation omitted). There, the Supreme Court did not rely on the concept of efficient breach to defeat the parties' expectations; to the contrary, the Court "ask[ed] what the parties likely would have done if they had considered the issue involved" and enforced the agreement consistent with those expectations. *Id*.

Here, there is no need to resort to the implied covenant, and ask what the parties would have done had they considered the issue, because the parties *did* discuss what happens if there is a Material Partial Sale without Leaf's consent. They bargained for only one result in those circumstances—that Leaf's interests would be redeemed for its Target Multiple. Op. 67-74. The parties expressly *did not* bargain for a third path in the form of damages that would seek to approximate only the "actual harm" to Leaf as a result of not being able to consent and thereby ignore that Leaf was harmed by not receiving the Target Multiple it bargained to receive in that exact circumstance. Thus, the trial court erred by applying the

"efficient breach" concept to defeat Leaf's bargained-for exit right. Respectfully, its decision should be reversed.[3]

[3] Invenergy's repeated suggestion through its Answering Brief that it simply would not have engaged in a Material Partial Sale if it had to pay Leaf its Target Multiple (AB at 18, 20-21) is beside the point. Setting aside the trial court's findings that Invenergy sought to conceal the potential sale for as long as possible while also exploring arguments for not having to pay Leaf (OB at 15), Invenergy *did* engage in a Material Partial Sale and it did so without obtaining Leaf's consent while knowing that Leaf would "always get [the Target Multiple]" in such a transaction, as the extrinsic evidence overwhelmingly showed. Op. 67-68.

Invenergy's claim that "none of the parties . . . actually expected that Leaf would be paid a Target Multiple in connection with the TerraForm Transaction" (AB at 46-47) is only a variant on that failed argument and is factually incorrect in any event. Invenergy simply misstates the trial court's findings and the record to claim there was not enough proceeds from the $2.1-billion asset sale to pay Leaf's Target Multiple. The trial court properly found the TerraForm transaction yielded cash proceeds of more than $1 billion (Op. 50-51, 57; B1138), and CDPQ's Renault admitted that there was approximately $562-million left before certain "discretionary payments" that were "not required to be paid in connection with the transaction" and thus constituted "proceeds" for purposes of Section 8.04(b). A1065; *see* A971; A1065; B204. That Invenergy committed portions of those proceeds for specific uses before the transaction closed is not relevant to the question of whether the transaction yielded "cash proceeds equal to or more than [Leaf's] Target Multiple." A574.

II. THE TRIAL COURT ERRED IN ENGAGING IN AN ANALYSIS UNDER *FLETCHER*.

To the extent this Court declines to enforce the parties' bargain reflected in Section 8.04(b), the Court nonetheless should reverse the trial court's finding of nominal damages based on *Fletcher International, Ltd. v. Ion Geophysical Corp.*, 2013 WL 6327997 (Del. Ch. Dec. 4, 2013).

As an initial matter, Invenergy's claim that Leaf waived "any *Fletcher* arguments" lacks any basis in the law. AB at 55. The court in *Fletcher* was determining damages for breach of a bare consent right where there was no extrinsic evidence from the time of contracting reflecting the value the parties placed on that right to consent. 2013 WL 6327997, at *1-2. The *Fletcher* court performed a hypothetical negotiation to determine what the parties would have agreed to. *Id.* at *1. Leaf argued below that there was no need to speculate about how the parties valued Leaf's consent right under Section 8.04(b) because that provision separately obligated Invenergy to buy Leaf out where Invenergy engaged in a Material Partial Sale without Leaf's consent. A924-28; A1280-82. And, indeed, unlike in *Fletcher*, here there was substantial extrinsic evidence that showed—"clearly and convincingly" as it turned out—that this was the understanding of "all of the parties to the LLC agreement." Op. 67-68.

The trial court nonetheless expressly relied on *Fletcher* to conduct a hypothetical negotiation. That does not preclude Leaf from identifying the errors

in the trial court's analysis on appeal and requesting that this Court reverse and remand to the trial court to correct those errors. Invenergy cites no authority for that proposition. Invenergy instead cites only Delaware Supreme Court Rule 8, which provides that the Supreme Court may only consider questions fairly presented to the trial court. *See Shawe v. Elting*, 157 A.3d 152, 168 (Del. 2017). Leaf fairly presented to the trial court the question of whether or not *Fletcher* applies to assess damages here and how the facts of this case would impact a *Fletcher* analysis. A924-28; A1280-82. Moreover, Leaf elicited testimony from its principal Lerdal—consistent with the other evidence reflecting the parties believed Leaf could demand payment—that had Invenergy approached him prior to closing to negotiate for Leaf's consent, he likely would have accepted a buyout in the range of "$100 to $110 million" as a discount to the Target Multiple in order to get "certainty of payment." A1006. Invenergy elicited similar testimony from Lerdal on cross-examination. A1050. Leaf's arguments regarding *Fletcher* are therefore proper. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Enrique*, 3 A.3d 1099, at *2 n.2 (Del. 2010) (Table) (citing instances where appellant had raised arguments before the trial court, thereby allowing appellant to challenge ruling on appeal).

For the reasons explained in Leaf's Opening Brief, the trial court's analysis under *Fletcher* was not the product of an "orderly and logical deductive process."

Op. Br. at 40-45. The trial court's conclusion that Leaf lacked any leverage was inconsistent with the trial court's other factual findings—namely (i) that all of the parties understood Leaf would "always get paid" its Target Multiple if Invenergy engaged in a Material Partial Sale without Leaf's consent, (ii) that Invenergy was "convinced" it needed to undertake the TerraForm transaction, and (iii) that Invenergy went to great lengths to prevent Leaf from having the opportunity to exercise its rights under Section 8.04(b) (and similar rights under the NPA) by concealing the transaction and manipulating the so-called "MPS analysis" to avoid Leaf's rights. *Id*.

Invenergy dedicates a single paragraph in its Answering Brief to arguing, largely in conclusory fashion, that the record "fully supports" the trial court's conclusion. AB at 55-56. Invenergy does not address any of the inconsistencies in the trial court's findings in that respect. Instead, Invenergy tries to deflect by claiming that Leaf was in the process of winding down and that Leaf intended to put its shares at the end of 2015 irrespective of whether there was a Material Partial Sale transaction. *Id*. That fundamentally ignores that Leaf believed (as did Invenergy) that Leaf had a clear right to receive its Target Multiple under Section

8.04(b) and that none of Leaf's witnesses testified they would have simply forgone that right to be subject to the uncertainty of an appraisal process.[4]

More importantly, it ignores that Leaf had leverage precisely because Invenergy shared Leaf's interpretation of the LLC Agreement and wanted to proceed with the $2-billion TerraForm transaction. OB at 42-44. Invenergy does nothing to address those facts. Invenergy instead reiterates its CFO Murphy's claim at trial that Invenergy almost walked away from the transaction when Liberty requested a $2-million prepayment premium. AB at 20-21. Remarkably, the trial court credited Murphy's "story" even though it was not supported by *any* contemporaneous emails or other documents and even though the trial court had expressly concluded that Murphy's testimony was not credible in many other respects. Op. 61 n.261 ("Invenergy's witnesses took a different approach [to Leaf's], particularly when seeking to characterize contemporaneous emails in unpersuasive ways."); *id*. at 72 (same).

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[4] Although irrelevant to the analysis, Invenergy's repeated insinuation that Leaf "lay in wait" and somehow tricked Invenergy into proceeding with the TerraForm transaction (AB at 22-23) ignores the trial court's findings of fact. The trial court made detailed factual findings showing that Invenergy spent months prior to entering into the TerraForm transaction focused on ways to avoid paying Leaf's Target Multiple in connection with transaction, initially seeking advice from outside counsel to support arguments it knew were "grasping" and then by pursuing a strategy of manipulating the "MPS tests" under the NPA and concealing the transaction to avoid Leaf converting into equity. OB at 14-17; Op. 40-43, 47-49.

The only contemporaneous document cited in connection with Murphy's "story" is an email exchange between Murphy and CEO Polsky referencing Liberty's request for a prepayment penalty consistent with the terms of its Series A notes and discussing Invenergy's plan to pay Liberty early to satisfy that request. Op. 82 (citing B158). That document does not even suggest Invenergy intended to "walk away" from the transaction. For the trial court to credit Murphy's self-serving, after-the-fact testimony whole-sale on this point was not logical. *Id.* Inexplicably, the trial court credited this one aspect of Murphy's testimony even though no contemporaneous document supported it. In any event, Murphy's testimony should not overcome the numerous other contemporaneous documents reflecting that Invenergy was "convinced" it needed to do the transaction. *See* OB at 43-44.

III. THE TRIAL COURT PROPERLY DISMISSED INVENERGY'S COUNTERCLAIM.

A. Question Presented

Did the trial court err when it concluded that Invenergy failed to meet its burden of proving by a preponderance of the evidence that Leaf breached Section 11.09 of the LLC Agreement in connection with XMS' appraisal?

B. Scope of Review

The trial court's conclusion that Invenergy failed to prove its counterclaim by a preponderance of the evidence is a mixed question of law and fact that this Court reviews *de novo*. *See Zirn v. VLI Corp.*, 681 A.2d 1050, 1055 (Del. 1996). In conducting that review, this Court accepts the trial court's factual conclusions that "are sufficiently supported by the record and are the product of an orderly and logical deductive process." *Id.* (citation omitted). This Court "will affirm the trial court's legal rulings unless they represent an error in formulating or applying legal principles." *Id.* (citation omitted).

C. Merits of Argument

Although Invenergy tries to re-frame the issue on appeal as whether the trial court erred by "giving weight to [Leaf's] 'independent' appraisal," Invenergy's counterclaim is for breach of contract. *See* Invenergy Wind LLC's Verified Counterclaims ¶¶ 56-63 (Dkt. No. 84). The trial court properly concluded that Invenergy failed to show by a preponderance of the evidence that Leaf breached

any express or implied obligation in Section 11.09 of the LLC Agreement in connection with the put-call process. Indeed, the trial court made specific factual findings that undermine any claim that Leaf's appraiser, XMS, was not "independent" as required by Section 11.09 or that Leaf engaged in any conduct that would undermine XMS' independence in breach of that provision. Op. 87-90.

Specifically, after identifying "situations that might compromise an appraiser's independence," including prior relationships or an incentive fee arrangement, the trial court concluded "Invenergy has not pointed to anything that would have compromised XMS's independence." *Id*. at 87-90.[5] With respect to the parties' interactions with their respective appraisers, the trial court found that both appraisers "delivered near final versions of their reports to their clients, discussed the reports with their clients, . . . made changes in the reports as a result of those discussions that benefitted their clients," and then "delivered revised versions of their reports to their respective clients." Op. 61 (citing AR26-27;

[5] The trial court found that there were no prior relationships between XMS and either of Leaf or Invenergy. Op. 89-90. Nor did XMS have a financial interest in the outcome of the appraisal or any other personal or financial relationship that could create a conflict. Rather, the trial court found that, prior to engaging each side's respective appraiser, the parties exchanged lists of appraisal firms they believed had conflicts. *Id.* at 89-90. Invenergy provided Leaf with a list of 23 potential appraisers it deemed conflicted and XMS was not on that list. *Id.* at 90. Leaf's Alemu testified at trial that Leaf chose XMS from a list of appraisers that Leaf and its advisors had compiled as having the necessary qualifications and because XMS was the most cost-effective option—not for any other reason. A973.

AR28-32; AR33-34; AR36; B246; B282; A1050; B551-53, B554-56; B1071-72). Thus, the trial court's factual findings left no doubt:

> The record reflects that both parties engaged with their appraisers and made arguments in favor of valuations that would favor their positon. But the record also reflects that both appraisers ultimately exercised independent judgment to reach supportable valuation opinions. Leaf's interactions with XMS were more extensive in degree than Invenergy's interactions with Navigant (or at least there is more evidence documenting them), but they did not differ in kind.

Op. 90. Accordingly, the trial court concluded that, based on the factual record, "Invenergy failed to establish that Leaf pressured XMS to such a degree that XMS was no longer independent for purposes of the Put-Call Provision." *Id*.

Invenergy does not challenge the trial court's determination that Leaf did not breach any express obligation in Section 11.09 of the LLC Agreement. Rather, Invenergy challenges the trial court's determination that Invenergy failed to prove a breach of the implied covenant of good faith and fair dealing as articulated in *Senior Housing Capital, LLC v. SHP Senior Housing Fund, LLC*, 2013 WL 1955012 (Del. Ch. May 13, 2013). Critically, *Senior Housing* does not modify the standard for finding a breach of the implied covenant or provide for a different standard to "disregard" an appraisal submitted in connection with a contractually-mandated appraisal process. Rather, *Senior Housing* is clear that the relevant inquiry is whether, "as a result of contractual wrongdoing," the appraisal does not "represent the genuine impartial judgment on value that the contract contemplates."

2013 WL 1955012, at *26. That is, the trial court may not "second-guess[] the good faith judgment of the appraiser or examin[e] the appraiser's valuation judgments for consistency with a judge's understanding of relevant corporate finance principles." *Id.* (noting that a party's arguments that an appraiser "got [a] value wrong" or "should have used a different cost of capital" were improper attempts to have a judge second guess those valuation questions where the contract did not provide for such judicial review).

The trial court considered and rejected Invenergy's arguments based on *Senior Housing*. Op. 91-94. In fact, the trial court suggested in its Opinion that Invenergy waived any arguments with respect to the implied covenant of good faith and fair dealing because it "did not engage in a methodical analysis of the implied covenant" and "did not expressly identify the gap it seeks to fill, nor the term it seeks to fill it with." Op. 92. Nonetheless, Invenergy challenges the trial court's determination in two respects: (1) that Leaf's instruction to XMS to use the high end of its valuation range was improper (AB at 58-59); and (2) that Leaf's interactions with XMS improperly led XMS to reach a conclusion on value that was "above the top of its prior range." AB at 61-63. Neither serves as a basis to reverse the trial court's Opinion with respect to Invenergy's counterclaim.[6]

[6] Although Invenergy complains on page 26 of its Answering Brief that Leaf's $214-million opening bid violated its "contractual obligation to negotiate in

1. Invenergy Failed to Prove that Leaf Breached the Implied Covenant by Instructing XMS to Use a Valuation Standard Consistent with the Agreement.

The trial court properly rejected Invenergy's argument that Leaf's instruction to XMS to use the high end of its valuation range was "contrary to Delaware law" and thus breached the implied covenant because it purportedly conflicted with this Court's recent commentary on "fair value" in the context of statutory appraisal. AB at 60 (citing *DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346 (Del. 2017)); Op. 93-94. Rather, the trial court correctly recognized that the LLC Agreement contained a definition for "Fair Market Value." *Id.* (citing A545). Stated another way, the trial court recognized that Invenergy could not rely on the *implied* covenant to override the *express* language of the agreement. Delaware courts will not supply a contract term or "gap fill" where no gap exists. *See, e.g.*, *Allen v. El Paso Pipeline GP Co.*, 113 A.3d 167, 182-84 (Del. Ch. 2014). Where the contract contains a definition of a term, Delaware courts will apply that definition. *See id.* Here, the trial court properly relied on the definition of "Fair Market Value" supplied in the LLC Agreement to reject Invenergy's implied covenant claim.

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good faith," the trial court rejected that claim because, among other things, "Leaf had a reasoned basis for making this ask: it relied on the value implied by the TerraForm Transaction, which comprised a portion of Invenergy's assets, and used that figure to calculate Leaf's share." Op. 86.

The trial court also properly concluded that Leaf's instruction was not "contrary to the language of the parties' integrated agreement" (AB at 60) or the result of bad faith. Op. 93-94. To the contrary, the trial court concluded that instruction was "not unreasonable" given "the circumstances of this case" and "the evolution of the provision." Op. 93-94 & n.362. Specifically, the trial court's conclusion was based on its factual finding that the LLC Agreement defined "Fair Market Value" as "the amount that could be obtained from an arm's length willing buyer" and that, when "there is not an active trading market, the appraisers shall value the interests without ascribing a minority interest or illiquidity discount." Op. 93-94 (citing A545).

It also was based on the trial court's finding that when Leaf initially invested, the LLC Agreement defined the term as "the highest price per unit of equity interest which the Company could obtain from a willing buyer." Op. 93. The trial court found that, although the provision had since been amended to remove the reference to the "highest price" language, it still referred to the amount that "could be obtained" and, therefore, "it was not unreasonable for Leaf to take the position that XMS could derive the highest price that could be obtained from a third party." Op. 94. Indeed, Leaf's Alemu testified credibly about his understanding that the "could be obtained" language implied a situation where "you would get a range of

bids from [] buyers, and the value of that could be obtained as the highest value that you believe the counterparty can execute." A974.

The trial court's conclusion that Leaf's instruction was not in bad faith also rested on its finding that Invenergy similarly provided its appraiser with instructions regarding the valuation standard as well as "key valuation considerations" and that "[b]oth appraisers understood the nature of the appraisal process, the interests of their client, and the competing interests of the other side." Op. 60 & n.254 (citing AR1; AR3-10; AR11; AR12; AR74, 77; B910-11). In other words, to the extent Leaf hoped its appraiser would arrive at a high value for Leaf's interest, Invenergy equally hoped its appraiser would arrive at a low value. Op. 58, 60 & n.254. In light of the trial court's factual findings, Invenergy's argument on cross-appeal that "the 'highest price' instruction was directly contrary to the language of the parties' integrated contract" and therefore constitutes bad faith (AB at 60) fails.

2. Invenergy Failed to Prove that Leaf Breached the Implied Covenant Through Its Other Interactions with XMS.

Invenergy's claim that Leaf's interactions with XMS breached the implied covenant does not fare any better. The trial court properly recognized that the off-hand references to "cajoling" and "bird-dogging" in Leaf's internal communications were just that and that there was no evidence that Leaf actually influenced the inputs used by XMS or prevented XMS from using its independent

judgment. Op. 90. Thus, the trial court properly concluded that the "record [] reflects that both appraisers ultimately exercised independent judgment to reach supportable valuation opinions" and that the parties' interactions with their respective appraisers "did not differ in kind." *Id*.

Invenergy does not explain why the trial court's assessment of Leaf's *conduct* was clearly erroneous or not the product of an orderly deductive process. Instead, Invenergy tries to deflect by pointing out changes in XMS's valuations between the initial draft and the final as proof that Leaf's conduct nonetheless rose to the level found to be improper in *Senior Housing*. In particular, Invenergy relies almost entirely on changes in the discount rate XMS used to value Invenergy's long-term development pipeline, which only represented about 28% of XMS's valuation. B412 (valuing pipeline at [redacted]). Invenergy's focus on the development pipeline is particularly disingenuous given the record of Invenergy's manipulations of the pipeline valuation. Invenergy valued the pipeline at [redacted] just months earlier (in July 2015) in connection with "MPS tests" (when it was advantageous to increase the value of the assets being retained to decrease the percentage of assets being sold). A527; A1181.

Then, in connection with the put-call process, Invenergy's appraiser, Navigant, initially assigned a midpoint value for the development pipeline of [redacted]. A1180-81; AR14. Later that day, Navigant's Neeli Kohan sent "revised"

schedules "based on [Navigant and Invenergy's] conversation[s] earlier." A1181; AR19. Those schedules showed a midpoint for the pipeline of [redacted]. AR21. Navigant's final report, which it issued after multiple further exchanges with Invenergy, reflected a value for the pipeline of [redacted]. A1181; AR42; *see* Op. 61 & n.256.[7]

Senior Housing simply does not help Invenergy here. There, the Court of Chancery found evidence that the breaching party "improperly persuaded" its appraiser to make a "last-second move" in the discount rate where there was "no plausible basis" for the change and, critically, "the appraiser who made the change could not identify any specific reason for it." *Senior Housing*, 2013 WL 1955012, at *39. There are no such facts here.[8] As the trial court recognized, XMS's Jim

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[7] The trial court also was likely swayed by the fact that Navigant's valuation of [redacted] for the pipeline made little sense. Navigant's DCF assumed that Invenergy would spend between [redacted] *per year* on business development expenses related to that pipeline, totaling more than [redacted] over the 30-year projection period. AR55-56. As Alemu credibly testified at trial (A977), that level of assumed investment in the pipeline makes no economic sense if the pipeline is worth only [redacted].

[8] The *Morris Nichols* case Invenergy cites is even more inapposite. There, the court allowed the plaintiff law firm's allegations to survive a motion to dismiss where the defendant landlord allegedly had, among other things, instructed its appraiser (tasked with appraising the fair market value of rent for office space) to disregard known operating cost "pass-throughs" and the fact that substantial discounts were available to other tenants willing to lease equivalent office space and also withheld information from its appraiser that likely would have impacted its valuation (that the landlord had been unable to lease space at the building for the current asking rates). *MNAT v. R-H*

Nygaard testified credibly that he believed the discount rate XMS used for the development pipeline was "justif[ied]" and, while XMS ultimately placed the highest value "possible" on the pipeline, Nygaard did not testify that he thought the value was unrealistic under the circumstances. *Id.* at 62 (quoting B919-20); B905 (testifying that the risk associated with the discount rate used for the development pipeline was "justif[ied]"); *id.* at B921 (Q: Leaf pressured you to get to that top end, didn't they? A: No . . . Leaf did not pressure us. The only thing that they were insistent upon is that [the valuation] needed to be a single number.").

Unable to overcome the trial court's factual findings, Invenergy resorts to *misrepresenting* Nygaard's testimony to suggest he viewed the changes to the value of the pipeline as "speculative." AB at 62. That is not what Nygaard said. Nygaard was merely referring to the fact that the development pipeline itself—which represents future projects that have not been developed, an area for which XMS was relying principally on the information *provided by Invenergy*—is speculative in nature. B903-04 ("Q: How did you determine the discount rate to be used on the development pipeline? A: The rate needed to be above all of the other rates in our model to reflect the speculative nature of the development. So that was

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Int'l, Ltd., 1987 WL 33980, at *2 (Del. Ch. Dec. 29, 1987). The lease also required the appraiser to be a "reputable, qualified, licensed real estate appraiser" and the defendants' appraiser allegedly was not licensed. *Id*. at *1-2.

our primary guidepost in making that determination."); *see also* B920-21. Nygaard properly defended his selection of the discount rate. B904 (testifying that "[w]e felt comfortable" with the 9% discount rate used to value the development pipeline"). Moreover, that Nygaard testified that he "never formed an opinion in terms of what a willing buyer would, in fact, pay for the development pipeline" by itself (AB at 62-63) is irrelevant because that is not what XMS was tasked to do for purposes of providing a valuation of Invenergy as a whole.

Overall, the trial court also credited Nygaard's testimony that Leaf had not improperly influenced XMS, had not told XMS that its valuation needed to be high, and had not dictated a specific number that XMS needed to reach. Op. 90 (citing B920-21, B937-38). Accordingly, in reliance on that testimony and the testimony of Alemu and Lerdal, the trial court properly concluded "the record reflects that both appraisers ultimately exercised independent judgment to reach supportable valuation opinions." Op. 90 (citing A974-75 (testifying that he shared his opinion with XMS based on his experience with the company but never asked XMS to recalculate a figure they had come up with and that "ultimately they had to render an independent opinion that could get approval from their committee"), A976; A1049, A1054; B920-22, B937-38).

Invenergy has pointed to no facts that would undermine that conclusion. To the contrary, Leaf's Alemu testified that XMS "never presented us with any drafts"

and that they only discussed an outline for a draft report with XMS during one phone call. A974-75. Meanwhile, Invenergy's Sane testified that he had conversations with Navigant throughout their appraisal process to clarify questions in their analysis and that in the course of Navigant's appraisal work, it sent drafts of its valuation to Sane to review. A1179; *see* A1180 (describing draft report he received); A1181 (describing another draft report). Sane also testified that he believed commenting on drafts of his appraiser's analysis before it was finalized was appropriate. A1179.

Lastly, Invenergy notes in its Answering Brief that when Lerdal was asked on cross-examination whether he had "no reason to believe that but for Leaf's cajoling and bird-dogging, XMS would have gotten above the top of its prior range," he responded, "that was true." AB at 63 (citing A1050). But Lerdal also testified that he had "no doubt" that XMS operated independently and applied its independent judgment in reaching its ultimate conclusion on the value of Leaf's interest. A1049, A1054. Importantly, the trial court credited Lerdal's testimony while making a point of finding that Lerdal was "honest and forthright" and "did not dissemble or try to run from factual points that Invenergy's counsel sought to elicit [and that] Invenergy's witnesses took a different approach, particularly when seeking to characterize contemporaneous emails in unpersuasive ways." Op. 61 n.261. Therefore, the trial court properly concluded based on its assessment of

Lerdal's testimony, as well as that of Leaf's other witnesses and the contemporaneous documents, that Leaf had not acted in bad faith.

For these reasons, the trial court properly concluded that Leaf's interactions with XMS did not impair its independence and Invenergy's cross-appeal should be dismissed.

CONCLUSION

For the foregoing reasons, Invenergy's arguments on cross-appeal should be rejected and the Opinion's award of nominal damages should be reversed and remanded with directions to enter an order in Leaf's favor 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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