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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LCT CAPITAL, LLC, Plaintiff Below, Appellant/Cross-Appellee, v. NGL ENERGY PARTNERS LP and NGL ENERGY HOLDINGS LLC, Defendants Below, Appellees/Cross-Appellants.	Nos. 565,2019 & 568,2019 **Court Below:** **The Superior Court of the State of Delaware,** **C.A. No. N15C-08-109 WCC CCLD**

APPELLANT'S REPLY BRIEF ON APPEAL AND CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

Appellant/Cross-Appellee LCT Capital, LLC ("LCT") submits this brief in reply to Appellees'-Appellants' NGL Energy Partners LP ("LP") and NGL Energy Holdings LLC ("GP") (collectively "NGL") answering brief and cross-appeal ("Ans.Br.") filed by NGL and in opposition to the portion of the Ans.Br. filed in support of NGL's cross appeal.

The issue for this Court on LCT's interlocutory appeal is whether Delaware law permits NGL to retain hundreds of millions of dollars of benefit derived by fraudulently inducing LCT to be the principal cause in NGL's acquisition of TransMontaigne (the "Acquisition") (Memorandum Opinion on Defendants' Motion for Judgment as a Matter of Law, Ex. A at 1) (the "Opinion"). Specifically, are benefit-of-the-bargain damages recoverable in an action for fraudulent misrepresentation, absent an enforceable contract, when all the reasons why a plaintiff is entitled to benefit-of-the-bargain damages are present, including (1) full performance by LCT, (2) significant benefit derived by NGL, (3) material misrepresentations by NGL, (4) justifiable reliance by LCT on such misrepresentations, (5) certainty of damages, and (6) the moral culpability of NGL, especially NGL's CEO Mike Krimbill ("Krimbill") and the fact that the lack of a written contract was a direct result of the fraud itself which include NGL's outside

counsel's misrepresentations that they were working on a contract. [A949:6-A951:8]

The Superior Court and this Court have stated the availability of such damages involve a question of law resolved for the first time in Delaware and a review of that ruling may terminate the litigation or otherwise serve considerations of justice. In this case of first impression, and under the unique facts and circumstances of this case, benefit-of-the-bargain damages should be available for fraud in the absence of a contract.

NGL contends that "both parties agree, that the jury then awarded fraud damages *as if a contract existed* based on benefit-of-the-bargain measure…" Ans.Br. at 32 (emphasis supplied). LCT disagrees that the jury awarded damages as if a contract existed. The damages were awarded based on NGL's fraudulent misrepresentations to LCT which induced LCT to be the principal cause of the Acquisition.

Regarding the issues on Cross-Appeal, NGL raises two or three issues on interlocutory appeal including: i) whether or not the trial court has acted *sua sponte* in setting aside the *quantum meruit* award, ii) an evidentiary issue related to the reliance element of fraudulent misrepresentation, and iii) that the trial court instructed the jury to apply an incorrect fraudulent misrepresentation standard. This Court accepted at least two of the issues raised by Defendants' for certification –

whether the jury instruction on fraudulent misrepresentation was correct and whether the evidence supported the fraud claim – stating, "it would be inefficient to hear only some of the issues raised by the Superior Court's December 5, 2019 opinion." (Ex. A, at 7)

On July 27, 2020, NGL was ordered to "state the question or questions preserved with a clear and exact reference to the pages…or why interests of justice…may be applicable." [Notice of Brief Deficiency, Trans. ID 65799974] NGL's July 29, 2020 corrected Ans.Br. does not respond to Point 2. Point 2 on page 48 states:

> "Whether the Trial Court erred in denying NGL's motion for a judgment as a matter of law on LCT's fraudulent misrepresentations claims because the $4 million *quantum meruit* award fully compensated LCT." Ans.Br. at 48.

NGL's citations are to its 50(a) motion which makes no mention of the issue and its post-trial motion which is too late to preserve the claim.

There is no argument made as to why the interest of justice exception might apply.

The jury's verdict awarding $29 million for fraudulent misrepresentations and $4 million for *quantum merit* should be affirmed.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

5. Denied. The Trial Court did not act *sua sponte* in ordering a new trial on the jury's award of *quantum meruit* damages and if benefit-of-the-bargain damages are not allowed for fraud, the Trial Court did not err in ordering a new trial on *quantum meruit* damages. *See* §II, *infra*.

6. Denied. The Trial Court correctly denied NGL's Del. R. Civ. P. 50(b) motion on fraud liability because the trial record supported the jury's finding that LCT relied on NGL's misrepresentations and that LCT reasonably relied on the misrepresentations. See §III, *infra*.

7. Denied. The Trial Court properly instructed the jury on fraudulent misrepresentations and, if wrong, it was harmless error and NGL waived its right to raise the issue on appeal by not objecting to the jury charge until after the trial. See §IV, *infra*.

STATEMENT OF FACT

Interestingly, NGL never mentions the Opinion that is the subject of this appeal in its argument until page 60 of its Ans.Br. Instead, NGL has attempted to: a) re-litigate issues that it lost at trial such as (i) the importance of LCT's role in the Acquisition and (ii) "[Krimbill's] authority to authorize the compensation they agreed to"[1] (Ex. A at 7) as well as (iii) re-litigate breach of contract from the summary judgment stage of these proceedings. Ans.Br. at 8-15.

The full performance by LCT of its end of the bargain, as evidenced by LCT'S significant role in the Acquisition and the $500 million of value it created, is indisputable. As the Superior Court observed:

> "Plaintiff LCT played a large and pivotal role in NGL's acquisition of TransMontaigne…As evidenced throughout this litigation, NGL's CEO Mike Krimbill did not deny that LCT played a significant role in the TransMontaigne acquisition that justified a fee beyond what is normally utilized in the industry…" Ex. A at 1.

Even Krimbill admitted that LCT played a significant role in the Acquisition in his letter to NGL GP Owners dated October 24, 2014 (the "October 24 Letter"), [A0236-A0237 and at trial A0832:1-A0834:13]. The letter stated, among other things, the "value created for the NGL General Partner from this transaction is approximately $500 million" and described the "$29 million success fee for LCT"

[1] The Trial Court observed that issues related to NGL's corporate authority were part of NGL's fraudulent misrepresentations. Ex. A at 7.

as a "fair arrangement" because of LCT's extraordinary contribution "as we would never have had the opportunity to purchase TransMontaigne Inc.…without them." [A0236]. Relevant sections of the October 24 Letter are set forth below:

> "LCT Capital, LLC (LCT) (Lou Talarico) was able to initiate negotiations with MS and propose a purchase price in the $200-$250 million range that was not rejected.
>
> ***
>
> The value created for the NGL General Partner from this transaction is approximately $500 million.
>
> ***
>
> We are asking for a compensation arrangement for LCT as we would never have had the opportunity to purchase TransMontaigne Inc. for $200 million or a 3.0x multiple of EBITDA without them. We are proposing that LCT acquire 5% of our NGL General Partner for a $21 million purchase price.
>
> ***
>
> This equates to a $29 million success fee which appears to be high compared to a typical 1%-2% investment banker success fee. We are looking at the fee from the perspective of the value created to the NGL General Partner and the very attractive purchase price of $200 million. LCT was able to get MS to deal directly with NGL outside of an auction process which may have saved us tens of millions of dollars. Other potential buyers such as Buckeye Partners were estimated to be offering $450 million, per the Wall Street Journal." [A0236].

In addition to LCT's full performance and the significant benefit derived by NGL from the Acquisition, NGL made significant and multiple fraudulent misrepresentations that LCT reasonably relied upon to believe LCT would receive

consideration in the form of a unique fee that included NGL GP interests. As stated in the Opinion:

> "The Court has no question that there was sufficient evidence for the jury to find that NGL made fraudulent representations to Plaintiff regarding its fee arrangement. In fact, the evidence was overwhelming that Krimbill failed to be candid and honest in his dealing with Plaintiff, he misled Talarico regarding his authority to authorize the compensation they agreed to, and he continued the pattern of misrepresentation for a significant period of time." Ex. A at 7-8.

In the end the Superior Court concluded:

> "It is clear the jury agreed with Plaintiff that NGL, specifically Krimbill, misled Plaintiff on numerous occasions to believe a unique fee arrangement was both plausible and going to happen, and there was evidence that would clearly support this conclusion. Krimbill's testimony was unbelievable, and it was supported by several other witnesses who were less than candid or credible…There is no basis to overturn the jury's considered judgment and there is a reasonable basis in the record to support the jury's finding of fraudulent misrepresentation and the verdict will not be disturbed." Ex. A at 8.

Benefit-of-the-bargain damages are appropriate when damages can be calculated with reasonable certainty. Here, damages are not speculative. Damages were easily calculated by LCT's expert and the unique $29 million success fee was confirmed in the Oct 24 Letter. Krimbill even admitted at trial "we certainly had 5% for [$]21 million." [A1224:8-9]

The moral culpability of NGL is without question. The Court need look no further than Judge Carpenter's own words describing NGL, specifically Krimbill, to

justify awarding benefit-of-the-bargain damages: "$44 million liar," "clearly outrageous conduct by any rational business plot," "misconduct that I find to be outrageous," "Krimbill's testimony was unbelievable, and it was supported by several other witnesses who were less than candid or credible," and "reprehensible conduct." See App.Br. at 6-8, 17-18.

ARGUMENT ON REPLY

I. THE SUPERIOR COURT IMPROPERLY EXCLUDED BENEFIT-OF-THE-BARGAIN DAMAGES AS A REMEDY FOR DEFENDANTS' FRAUD UNDER THE FACTS OF THIS CASE

A. LCT Is not Estopped From Recovering Benefit-Of-The-Bargain Damages

NGL argues that LCT is estopped from asserting the right to benefit-of-the-bargain damages due to an inaccurate bench memo citing *Olson v. Kendrick*, 1984 Del. Super. Lexis 712 at *8 (Del. Super. Ct. May 1, 1984) (quoting 31 C.J.S. Estoppel §117) and *U.S. Bank. Nat. v. Swanson*, 2006 WL 1579779 (Del. May 1, 2006).

As *Kendrick* notes

> "where a party assumes a certain position in a legal proceeding he may not thereafter, simply because his interest has changed…is a phase of equitable estoppel which prevents a litigant from maintaining that the facts are different from those which he argued successfully in the first litigation." *Id*. at *8.
>
> ***
>
> "it is also well grounded on a positive rule of procedure based on 'manifest justice.'" *Id*., at *9.

Here the bench memo did not succeed at anything. It was ignored. Neither an out-of-pocket nor a benefit-of-the-bargain damages charge was given. Since the Superior Court never acted on the memo, there was no issue of manifest justice.

Kendrick's source, 31 C.J.S. §173, also demonstrates that the doctrine is inapplicable here.

> "An equitable estoppel may come into existence because of the conduct or action of a person in a court…especially if it would be to the prejudice of the party who has acquiesced in the position formally taken…"

NGL asserts that it repeatedly objected to an award of contract-based damages, (Ans.Br. at 31) and "LCT's contention that NGL argued the unavailability of contract damages for the first time post-trial…is plainly erroneous given NGL's numerous objections." Ans.Br. at 32. *If* these assertions are true, there was never any acquiescence in LCT's bench memo, prejudice to NGL or evidence of detrimental reliance. LCT took the position it was entitled to benefit-of-the bargain damages well before the Court decided the issue.

31 C.J.S. §173 also provides:

> "This doctrine, principle or rule of estoppel is subject to certain limitations or exceptions and generally it may not be invoked where the position first assumed was taken as a result of ignorance or mistake…"

LCT's counsel put NGL on notice at the April 11 Hearing that the bench memo was inaccurate; therefore, the doctrine is inapplicable for this reason as well.

B. Delaware Case Law On Fraud Damages

While both sides have cited a few Delaware cases that they contend are applicable to this issue, this Court stated in its Order granting the parties' request for an interlocutory appeal:

> "The Superior Court's ruling on the availability of benefit-of-the-bargain damages involves a question of law resolved for the first time [in] this state…" Sp. Ct. Order at 4.

The benefit-of-the-bargain rule is the most common and accepted standard in Delaware. *See Stephenson v. Capano Dev. Inc.*, 462 A.2d 1069, 1076 (Del. 1983); Op.Br. at 20-21. Under this rule, a "plaintiff recovers the difference between the actual and the represented values of the object of the transaction . . . The aim of this method is to put the plaintiff in the same financial position that he would have been in if the defendant's representations had been true." *Id.* This language of *Stephenson* has been adopted in Delaware's Pattern Jury Instructions on "FRAUD: BENEFIT OF THE BARGAIN RULE." *See* Del. P.J.I. Civ. § 22.17 (2000).

The object of the transaction was the GP interests Krimbill represented LCT would receive if it performed its end of the bargain by providing essential services to NGL. Krimbill represented to LCT that it would receive a 2% ownership in NGL GP, an option to purchase an additional 3% and NGL would pay the taxes resulting from giving LCT that 2%. The jury could have concluded LCT should get at least $29 million based on Krimbill's own trial testimony which provided certainty around the value of the transaction with LCT. "[W]e certainly had 5% for [$]21 million." [A1224:8-9]. Krimbill also represented in his October 24th Letter that buying 5% for $21 million would equate to $29 million in consideration, which was described by Krimbill as a "fair arrangement…as [NGL] never would have had this opportunity at our price without LCT bringing it to us." [A0236-A0237]. The $29 million figure was also supported by the expert's valuation. *See supra* at 41, n. 16.

The Superior Court also recognized the jury could have decided to disregard the tax component. As stated at the April 11, 2019 hearing:

> "But couldn't the jury find that your client represented that he was going to get the two percent, was going to have the option of the three percent? There was lots of confusion about the tax situation.
>
> I mean there is really no dispute that your client had discussions with Mr. Talarico about the two percent and three percent and for a long period time, led him to believe that was the deal that was going to be entered." [A1430:20-A1431:6].
>
> "...When the jury comes up to a damages number, they simply said we are not going to accept either side in regards to the tax number. We are just going to void it out." [A1432:20-22].

LCT played a significant role in the Acquisition and created, by NGL's own admission, $500 million of value for NGL on closing. NGL made significant and multiple fraudulent representations to LCT about the unique fee arrangement that LCT reasonably relied upon to believe it would receive. The jury's award of $29 million, in the language of *Stephenson* and the Delaware pattern jury instructions, was aiming to put LCT "in the same financial position that it would have defendants' representations had been true.[2] 462 A.2d at 1076.

[2] NGL attempts to argue the Delaware Pattern Jury Instructions on benefit-of-the-bargain is inapplicable by further muddling the distinction between contract, bargain and transaction. Ans.Br. at 28, n.2. However, nowhere does the instruction mention contract or the need for a contract. Instead it describes the transaction, not the contract.

NGL tries to distinguish *Stephenson* by quoting this Court out of context that "[t]he financing plans involved here cannot be regarded as independent and divisible from the sale of the land and the townhouse." Ans.Br. at 30.

Stephenson involved two different claims: a claim to compel the sale of a home and a claim for damages for the failure to offer a mortgage with attractive financing. In the first trial, the Chancery Court resolved the first claim, and compelled the sale of the home to plaintiff. 462 A.2d at 1072. The discussion of fraud damages occurred in the context of the second claim, and while there is language about an "intrinsic relationship," that discussion was not in reference to the relationship between the purchase of the home and the damage award; it was the relationship between the two transactions at issue solely in the context of bringing the mortgage financing within the consumer fraud statute. *Id*. at 1075-1076.

As, this Court stated:

> "Recognizing the intrinsic relationship between the purchase of a specific house, and financing that purchase, we conclude from the facts which Capano is collaterally estopped from denying, that it misrepresented the circumstances regarding the availability of relatively low cost mortgages, and in doing so, violated the Consumer Fraud Act." *Id*. at 1075.

If there was any doubt the Court made it quite clear when it said "there was no enforceable contract right with respect to financing." *Id*. at 1072. When it subsequently addressed damages, this Court specifically said that benefit-of-the-bargain is the most common and accepted standard and its purpose is to put "the

plaintiff in the same financial position he would have been in if defendant's representations had been true." *Id*. at 1076.

NGL relies on *Harnish v. Widener Univ. Sch. of Law*, 833 F.3d 298, 309 n.5 (3d Cir. 2016) by misleadingly "citing *Stephenson* and explaining that benefit-of-the-bargain damages require plaintiffs to prove they 'reasonably expected more *from the bargain* than what they received.'" Ans.Br. at 30 (emphasis in Ans.Br., not original). The actual source of that quote, however, is not *Stephenson* but *Marcus v. BMW*, 687 F.3d 583, 607-08 (3d Cir. 2012). The proposition that *Stephenson* is cited for in footnote 5 is the following:

> "A benefit-of-the-bargain claim by contrast, is contract-like. We look to the injuries that resulted from the defendant's having not lived up to the misrepresentation, and the goal is to place the plaintiffs in the position that they would occupy if the misrepresentations were true. *See Furst*, 860 A.2d at 441-42; *Stephenson*, 462 A.2d at 1076." *Harnish*, 833 F.3d at 309, n.5.

Despite LCT having reasonably relied on NGL's numerous representations that "a unique fee arrangement was both plausible and going to happen," LCT has received nothing in exchange for the $500 million of value it created for NGL. Opinion, Ex. A at 8. Under *Harnish*, the jury's $29 million damage award would be reinstated and affirmed.

NGL relies on *Shuttleworth v. Abramo*, 1994 Del. Ch. Lexis 126 (Del. Ch. July 14, 1994) for their contention that a plaintiff may recover "benefit-of-the-bargain damages for fraud only where the plaintiff was 'induce'[d] to form a

contract." Ans.Br. at 24 (citing *Shuttleworth* at *6). NGL, however, ignores the Superior Court's acknowledgment that *Shuttleworth* involved "a notably different factual context" (See Op.Br. at 27-30 for a discussion of *Shuttleworth*) and, as such, it is not particularly instructive given the Court's role to apply the measure of damages that is most appropriate given the facts and circumstances of a particular case. *See,Zeliff v. Sabatino,* 104 A.2d 54, 56 (N.J. 1954). Also, NGL ignores the Court's finding in *Shuttleworth* that plaintiff's time-barred contract claim would leave her to "recover special damages caused by the deceit" and restitution defined as "returning both plaintiff and defendant to their original positions…." *Id*. at *6.

Here, returning the parties to their original positions would involve NGL disgorging the $500 million benefit it received. *Shuttleworth* does not stand for the proposition that benefit-of-the-bargain damages are not available under the facts of this case where NGL has received an enormous benefit through its fraud and restitution is apparently not feasible. *See* Ans.Br. at 27-30.

NGL's reliance on *Manzo v. Rite Aid Corp.,* 2002 WL 31926606 (Del. Ch. Dec. 19, 2002), *Tam v. Spitzer,* 1995 WL 510043, at *10 (Del. Ch. Aug. 17, 1995) and *E.I. DuPont de Nemouers Co. v. Florida Evergreen Foliage*, 744 A.2d 457 (Del. 1999) is misplaced because these cases do not stand for the proposition that benefit-of-the-bargain damages are unavailable as a remedy for fraud in the absence of an enforceable contract. *Manzo* involved a class action lawsuit where the court

found the plaintiff could not allege a bargain from which benefits flowed. 2002 WK 31926606, at *5. Unlike here, *Manzo* did not involve a bargain in which fraud caused the plaintiffs to fully perform and from which benefits in the form of windfall profits flowed directly to the defendants. Equally irrelevant is *Tam*, which stands for the obvious proposition that a defrauded party may elect to affirm the contract or seek rescission in a fraudulent inducement case. 1999 WL 510043, at *10. Notably, however, *Tam* does rely on *Stephenson* to define benefit-of-the-bargain damages. *Id.* at *12.

The only factual similarity to *DuPont* is the Court's cite with approval to *DiSabatino v. U.S. Fidelity & Guar. Co.*, 635 F. Supp. 350, 355 (D. Del. 1986) where the plaintiff was permitted to sue an insurance company that was not a party, but instead a beneficiary, to the fraudulently induced release. Here, LCT was a beneficiary to the Morgan Stanley and NGL Purchase Agreement because NGL represented to Morgan Stanley that it would pay LCT's fees and expenses as part of the Acquisition. [A0872:16-20; A0874:17-A0876:4]

C. There Are Strong Public Policy Reasons To Apply The Benefit-Of-The-Bargain Rule Based On The Facts Of This Case

The policy rationale for letting the plaintiff initially choose the remedy subject to "the circumstances of a given case and the interests of justice" (*Stephenson*, 462 A.2d at 1076, n. 4) is especially clear in a case like the present one where NGL through fraud obtained a tremendous benefit and now seeks to limit

LCT, who was defrauded into causing the benefit to happen, to little or non-existent out-of-pocket damages.

> "In the first place, it seems that in every case the defrauded plaintiff should be allowed to claim under the 'out-of-pocket' loss theory if he prefers. In the second place, the plaintiff should be allowed to choose the other theory [benefit-of-the-bargain], and recover the value of the bargain as represented, if the trial judge, in his discretion considers that, in view of the probable moral culpability of the defendant and of the definiteness of the representations and the ascertainability of the represented value, the case is an appropriate one for such treatment."

Charles T. McCormick, *Handbook on the Law of Damages* §122 at 454 (1935); *Williston on Contracts*, §1392 at 3886 (Rec. Ed. 1937); *see also* William L. Prosser, *Handbook of the Law of Torts* §105 at 752 (3rd ed. 1964). Here, there can be no question about the moral culpability of NGL, especially Krimbill. As noted by Judge Carpenter, the denial of benefit-of-the-bargain damages is "incredibly unfair to the unique factual setting of this case in light of the reprehensible conduct of the Defendants." Ex. A at 15-16.

"The chief virtue of the benefit-of-the-bargain rule is that it prevents a person from committing fraud without the possibility of loss" 37 Am.Jur.2d, Fraud and Deceit §354 (1968); Annot., 13 A.L.R.3d 883 (1967). "The only real objection to its application relates to the difficulty of proof and the sometimes speculative nature of the damages." Annot., 13 A.L.R.3d, *supra*, at 883. Here there is nothing speculative

about the damages given the testimony of LCT's expert, the October 24 Letter and Krimbill's testimony at trial.

The principal disadvantage of the out-of-pocket measure is that it "does not discourage fraud, since the fraudulent party takes no chance of losing anything because of his fraud: if he is not called to account, he enjoys his plunder; if he is called to account, he merely gives back what was not rightfully his, and thus is no worse for the fraud. It has been said in this respect that if active fraud is to carry no greater penalty than to make price and value agree, honesty will not be much encouraged." 37 Am.Jur.2d *supra*, § 356 (1968) (citations omitted).[3]

By denying LCT benefit-of-the-bargain damages, NGL seeks to retain its $500 million plunder while disregarding the commitment it made six years ago to LCT and its obligations under the Morgan Stanley and NGL Purchase Agreement to pay LCT's fees and expenses. NGL now argues that benefit-of-the-bargain damages would result in a windfall to LCT despite Krimbill, in his own words, describing the $29 million as a "fair arrangement…as [NGL] never would have had this opportunity at our price without LCT bringing it to us." [A236- A237]. Indeed, the

[3] Even federal courts have recognized that although 17 CFR § 240.10b-5 damages are normally measured by the plaintiff's out-of-pocket losses, "the out-of-pocket rule is not a talisman. Indeed, this court has shown no hesitation in varying that measure when necessary on the facts of a given case. Our function is to fashion the remedy best suited to the harm." *Garnatz v. Stifel, Nicolaus & Co., Inc.*, 559 F.2d 1357, 1360 (8th Cir. 1977) (citations omitted)

effect is quite the contrary. Not awarding benefit-of-the-bargain damages to LCT would reward NGL with a $500 million windfall for its "reprehensible conduct."

D. Since A Plaintiff Can Recover Benefit-Of-The-Bargain Damages In Delaware Under Promissory Estoppel They Should Be Available For Fraud

NGL deliberately ignores the point of Delaware's law on promissory estoppel. Ans.Br. at 41-44. LCT did not allege and is not alleging a promissory estoppel claim. The point is that one essential aspect of promissory estoppel is the absence of a contract. If there is an applicable contract there cannot be a claim for promissory estoppel. *Siga Technologies, Inc. v. Pharmathene, Inc.*, 67 A.3d 330, 348 (2013). Under Delaware law, a plaintiff under appropriate facts can recover benefit-of-the-bargain damages for a promissory estoppel claim. *RGC Int'l Investors v. Greka Energy Corp.*, 2001 WL 984689 at *14-15 (Del. Ch. Aug. 22, 2001) (overturned on other grounds); *see also Chrysler Corp. v. Quimby*, 144 A.2d 123, 133-34 (Del. 1958); *Grunstein v. Silva*, 2011 WL 378782 at *11 (Del. Ch. Jan. 31, 2011). For a detailed discussion of the cases see Op.Br. at 30-32.[4] A defendant who is found liable for fraud has done something far more repugnant than one who is liable under promissory estoppel.

[4] For citations stating that expectation damages are appropriate in promissory estoppel cases relied upon the Court. *See RGC Investors*, 2001 WL 984689, at *15, n. 87.

NGL cites a subsequent post-trial *Grunstein* decision, *Grunstein v. Silva*, 2014 WL 4473641 (Del. Ch. Sept. 5, 2014) which ultimately found that plaintiffs had not established their promissory estoppel claim. Ans.Br. at 43-44. However that is irrelevant here. LCT did not sue for promissory estoppel and NGL was not found liable under promissory estoppel. It would be completely inconsistent and inappropriate for a plaintiff to be able to obtain benefit-of-the-bargain damages for a promissory estoppel claim in the absence of a contract but not for a fraud claim in the absence of a contract.

E. Since NGL Did Not Object To Benefit-of-the-Bargain Damages Until After Trial This Court Should Not Address That Issue

Since NGL challenged LCT's right to benefit-of-the-bargain damages for the first time after trial, it has waived the right to raise the issue on appeal. NGL did in fact object at times during the trial to any reference to a contract; however, NGL never once argued that, in the absence of a contract, LCT was not entitled to benefit-of-the-bargain damages. Ans.Br. cites on pages 31-32 contain no reference to such objection.

NGL did *not* file a request for an instruction on damages for fraudulent misrepresentation, but did file a request for a Verdict Sheet on July 30, 2018 [A1313-A1315], which included:

> (7) IF you answered "YES" to all of Questions #2-6, what is the amount of damages that LCT has proven were the result of its objectively reasonable reliance on that representation?

$_____

NGL never mentioned, in any of its requested jury instructions, that fraud damages did not include benefit-of-the-bargain damages or should be limited to out-of-pocket damages.

In the last paragraph of the "Fraudulent Misrepresentation" instruction, the Court adopted the damages language requested by LCT:

> If you find that LCT has met the elements of fraudulent misrepresentation, you should determine the damages that LCT suffered that are the direct result of the false representations. [A1323]

NGL waived making any such argument on appeal when it did not object to the jury instruction or the verdict sheet. Rule 51 requires that any objection to "giving or failure to give an instruction" must be made immediately after the jury retires to consider its verdict, and unless such an objection is made, a party may not assign as error the giving or failure to give an instruction. The failure to do so is a waiver of any such objection. *Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A. 2d 1024, 1032 (Del. 2003); *Chrysler Corp. v. Quimby*, 144 A.2d 123, 130 (Del. 1958). The Court in *Quimby* stated the policy behind the rule:

> The very purpose of Rule 51 is to abolish the old practice of general exceptions to the charge, on the basis of which counsel for the defeated litigant could examine the instructions at his leisure, after verdict, and take advantage of any slips of the trial judge in submitting to the jury the contentions and legal principles growing out of the case. This practice was manifestly unfair." *Id*. at 139.

See also Cohen-Thomas v. Lewullis, 2016 WL 721009, at *4 (Del. Super. Ct. Jan. 29, 2016) ("The Court will not retroactively cure any perceived mistake created by trial counsel's failure to object at trial."); *see Broughton v. Wong*, 2018 WL 1867185, at *8 (Del. Super. Ct. Feb. 15, 2018), *aff'd.* 204 A.3d 105 (Del. 2019). The Rule 51 waiver includes the verdict form. *See Dickens v. Costello*, 2004 WL 1731136, at *4 (Del. Super. Ct. July 20, 2004).

The first time NGL raised this issue was in their Post-Trial Motion. Accordingly, NGL has waived any right to raise this issue on appeal.

F. Decisions In Other Jurisdictions Have Found That Benefit-Of-The Bargain-Damages Are Not Dependent On The Existence Of A Contract

Numerous jurisdictions have ruled that benefit-of-the-bargain damages are available to a fraud victim in the absence of a contract. *Villeux v. National Broadcasting Co.*, 206 F.3d 92 (1st Cir. 2000); *Leftwich v. Gaines*, 134 N.C. App. 502 (N.C. Ct. App. 1999); *Dastgheib v. Genentech Inc.*, 438 F.Supp. 2d 546 (E.D. Pa. 2006) (applying North Carolina law); *Midwest Home District v. Domco Indus.*, 585 N.W. 2d 735 (Iowa 1998); *Aerotech Resources, Inc. v. Dodson Aviation, Inc.*, 91 Fed. Appx. 37 (10th Cir. 2004) (applying Florida law); *Lewis v. Citizens Agency of Madelia*, 306 Minn. 194 (1975). All of these cases are discussed at length in Op.Br. at 33-38. *See also McConkey v. AON Corp.*, 354 N.J. Super. 25, 51-52 (N.J. 2002); *Matter of Kratzer*, 9 B.R. 235, 241-42 (Bankr. W.D. Mo. 1981).

In *McConkey v. AON Corp.*, *supra*, a New Jersey appellate court awarded benefit-of-the-bargain damages to an at-will employee who was fraudulently induced to leave his job. Plaintiff did not have an employment agreement. "Defendants claimed…that New Jersey courts do not recognize benefit-of-the-bargain based on claims of misrepresentation, especially where the misrepresentations amount to fraud." *McConkey*, 354 N.J. Super. at 51. The Court found otherwise holding:

> "Moreover, despite the problem in measuring damages in a fraud case, so long as the amount of the lost benefit can be established by the proof with sufficient certainty, a court will award damages equal to that which a plaintiff would have received had the representation been true. *Id*. at 52, citing to *Gardner v. Rosecliff Realty Co.*, 41 N.J. Super. 1, 10-11, 124 A.2d 30 (App. Div. 1956).

In *Matter of Kratzer, supra*, the plaintiff alleged the defendant had fraudulently promised him 50% of the shares of a corporation the defendant was purported to be forming if the plaintiff performed as a salesperson for the company. *Id*. Relying on the promise, the plaintiff performed as a salesperson.

The court held that the claim was not dischargeable in bankruptcy and then went on to discuss damages:

> "If a person is induced by false and fraudulent representations to render services gratuitously to the person making the representations, without any compensation therefor, the measure of damages is the reasonable value of the services fraudulently procured.
>
> But this rule presumes a contract, express or implied, for compensation of the services according to their value. And,

> according to the evidence in the action at bar, such contract did not exist in this case. Rather, plaintiff offered his services for half of the profits of defendant's business.
>
> ***
>
> [I]t was the expectation of the plaintiff, in making the agreement with defendant, that his services and expenses would be compensated and reimbursed by the profits of the defendant[s] prospective corporation.
>
> Under such circumstances, the rule of reason is that the expectation interest of the defrauded party should be compensated. For the plaintiff's reasonable reliance was upon his services' being compensated by half of the profits which he believed himself to be undertaking with the defendant. This rationale gives to plaintiff, in substance, the 'benefit of the bargain' which compensates him more handsomely than the 'out-of-pocket' standard and also provides a better basis for arriving at the value of the contract under the circumstances of the action at bar." *Id*., at 241, n.8.[5]

G. NGL Has Failed To Accurately Distinguish Any Of LCT's Cases Awarding Benefit-Of-The-Bargain Damages Even Though There Wasn't A Contract

Like here, *Veilleux, supra,* did not involve a contract but involved a situation where the defendant's misrepresentations caused the plaintiff's performance which resulted in a benefit of the defendant. Defendant's representations misled the plaintiff into participating in a television program just as Krimbill's misrepresentations led LCT to be a principal cause of the Acquisition taking place.

[5] The court mentions contract but it is clear from the case and the court's preceding statement "according to the evidence…such a contract did not exist in this case." Similar to LCT, the plaintiff offered his services without a contract based on a fraudulent misrepresentation.

NGL mischaracterizes the Court's use of the word "bargain" as indicating a contract. However, bargain is used to identify "the proper measure of damages" the plaintiff is entitled to receive. 206 F.3d at 125.

Similarly, in *Midwest, supra,* there was no contract and defendant's misrepresentations about receiving an exclusive dealership were the proximate cause of the plaintiff's lost profits when the defendant awarded the dealership to someone else. Here, the Iowa Supreme Court found benefit-of-the-bargain damages, defined as placing "the defrauded party in the same financial position as if the fraudulent representation had in fact been true," are appropriate when the plaintiff suffers no out-of-pocket losses as well as when the plaintiff may have benefited despite the fraud. 585 N.W.2d at 739, 742.

The Iowa Supreme Court in *Midwest* noted, citing Restatement (Second) of Torts §549, comment i:

> "[A] defrauding defendant will not be heard to say that its intentional misrepresentations were not the cause of any damages to the plaintiff because the plaintiff was not out anything. The public policy…will allow a fact finder to find a causal connection between the misrepresentations and injury by holding the defendant to what it has represented to the plaintiff. *Id*.

The Court also noted a rule preventing recovery of benefit-of-the-bargain damages where a plaintiff is still earning profits would "allow a defrauding defendant to retain the bounty of its fraud contrary to the public policy." *Id.* at 742.

In *Dastgheib, supra*, the Court rejected defendant's argument that the plaintiff should be limited to reliance damages not the benefit-of-the-bargain damages because "his claim is based on an unenforceable promise." 438 F.Supp.2d at 552. Although the Court never ruled that "the alleged agreement was unenforceable" and did not find that the voluntary dismissal of the contract claim was dispositive of the issue," *Id*. n.6, the Court rejected the defendant's assertion that North Carolina law limits benefit-of-the-bargain damages to fraudulent inducement cases involving an enforceable contract. *Id*. at 552-3.

Despite NGL's insinuation to the contrary, *Aerotech* is not a fraud case awarding benefit-of-the-bargain damages where a contract exists between the plaintiff and the defendant. Ans.Br. at 39. Plaintiff never alleged a breach of contract claim against the defendant, rather it alleged a tortious interference claim involving its contract with a third party. The Court found the jury could have rejected the tortious interference claim against the defendant even though the contract was between the plaintiff *and the third party*. *Aerotech,* 91 Fed.Appx. at 41. Although there was no contract between the plaintiff and the defendant and the contemplated transaction did not take place, the Court affirmed the jury's damage award:

> "Here, the jury found Plaintiff was wrongfully deprived of its expected benefit under the TAME bargain due to Defendant's fraudulent actions." *Id*. at 47.

NGL cites *Trytko v. Hubbell Inc.*, 28 F.3d 715, 723 (7th Cir. 1994), a negligent misrepresentation case, in an attempt to distinguish *Lewis, supra,* Ans.Br. at 40.[6] The Court noted that under §552B of the Restatement only out-of-pocket damages are permitted in a negligent misrepresentation case. *Trytko*, 28 F.3d at 723. After pointing out the Eighth Circuit considered *Lewis* to be an exception to the out-of-pocket rule, the Seventh Circuit disagreed by calling *Lewis* an out-of-pocket decision but then went on to say:

> "The Lewis court simply and appropriately awarded the 'pecuniary loss suffered…as a consequence of the recipient's reliance, upon the misrepresentations,' namely the value of a valid life insurance policy she would have acquired had the defendant not made her think she possessed one already." *Trytko,* 28 F.3d at 723.

Again, the plaintiff recovered damages equal to the value of a contract she never entered into.

H. NGL's Non-Delaware Damage Award Cases

NGL discusses four non-Delaware cases, all factually distinguishable from the case here, for the proposition that "expectancy damages [are] inapplicable without an underlying contract." Ans.Br. pp. 33-37. In *Roboserve, Inc. v. Kato Kagoku Co. Ltd.*, 78 F.3d 266, 274-75 (7th Cir. 1996), the plaintiff was not given the

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[6] NGL relies on other inapplicable cases because they do not involve common law fraud. *Rauch v. Rauch*, 2017 WL 3722545, at *7, n.5 (N.J. Super. Ct., App. Div. Aug. 30, 2017); *U.S. v. Turner*, 465 F.3d 667, 681 (6th Cir. 2006); *Pelletier v. Stuart-James Co., Inc.*, 863 F.2d 1550 (11th Cir. 1989).

opportunity to install additional minibars in a Hyatt hotel. In denying benefit-of-the-bargain damages, the Court noted there was at most a "misleading competition" for future business that wasted plaintiff's time and efforts and unjustly raised plaintiff's expectations for future business and profits. *Id*. at 274. In discussing damages the Court said:

> "Even if Hyatt had acted in good faith…the negotiations still may not have resulted in the contracts Roboserve sought." *Id.* at 275.

NGL's relies on *Roboserve* to support its position that benefit-of-the-bargain damages are unavailable absent a contract because "[d]amages for common law fraud are not intended to restore what one never had." *Id.* at 274, Ans.Br. p. 36. But what bargain did LCT not have? Unlike here, where plaintiff did not perform and Hyatt did not receive any benefit as a result of the fraud, LCT fully performed its end of the bargain.[7] As a result of LCT's "unique services," NGL was able to enter into a contract with Morgan Stanley whereby it derived a $500 million benefit.

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[7] Inapplicable cases cited by NGL because the wrongdoer did not receive a benefit: *Sorenson v. Gardner*, 334 P.2d 471 (Or. 1959); *IPFS Corp. v. Cont'l Cas. Co.*, 2013 WL 11541918 (W.D. Mo. Aug. 15, 2013); *Edward J. DeBartolo Corp. v. Coopers & Lybrand*, 928 F.Supp. 557 (W.D. Pa. 1996). Inapplicable cases cited by NGL because benefit-of-the-bargain damages were speculative: *Roil Energy LLC v. Edington*, 2016 WL 4132471 at *15 (Wash. Ct. App. Aug. 2, 2016); *Sudo Props, Inc. v. Terrebonne Parish Consol. Gov't*, 2008 WL 2623000, at *7 (E.D. La. July 2, 2008).

NGL's reliance on *Bohnsack v. Varco L.P.*, 668 F.3d 262 (5th Cir. 2012) has limited utility because Texas law, unlike Delaware, distinguishes between common law fraud and fraud in the inducement. *See id*. at 277.

Although the Court concluded that under Texas law benefit-of-the-bargain damages are only available for fraud in the inducement, the Court indicated they might be available in common law fraud as consequential damages. *Id*. at 276.[8] Like here, the Court also noted that a failure to preserve an objection to jury instructions regarding damages results in a waiver. *Id*.

In *Twin Fires Investment, LLC v. Morgan Stanley Dean Witter & Co.*, 837 N.E.2d 1121 (Mass. 2005), the Supreme Court of Massachusetts explained why it was inappropriate to award benefit-of-the-bargain damages to a plaintiff who sued for fraudulent misrepresentation after defendant failed to allocate shares to them in an IPO. The Court found the plaintiff had only lost the opportunity to make a profit on securities it did not own. *Id.* at 1135. Moreover, the defendant had received nothing from the plaintiff and was not unjustly enriched by the defendant's misrepresentation. *Id*. at 1136. The Court found benefit-of-the-bargain damages

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[8] *Auto Chem Labs. Inc. v. Turtle Wax, Inc.*, 2010 WL 3769209 (S.D. Ohio Sept. 24, 2010) (court not limiting fraud victim to out-of-pocket damages). Inapplicable cases cited by NGL because plaintiffs did not seek benefit-of-the-bargain damages. *Parks v. Macro-Dynamics, Inc.*, 591 P.2d 1005, 1009 (Ariz. Ct. App. 1979); *Harnish v. Widener Univ. Sch. of Law*, 833 F.3d 298, 308 (3d Cir. 2016); *Dierker v. Eagle Nat'l Bank*, 888 F. Supp. 2d 645, 657 (D. Md. 2012).

were not appropriate "[w]here the plaintiffs have not lost the benefit of a bargain because of a misrepresentation and a defendant has not gained anything thereby." Id.[9]

Equally unpersuasive is NGL's reliance on *In re Rollison*, 520 B.R. 109,112-13 (D. Colo. Bankr. 2014) where a bankrupt defendant built a house for the plaintiff in 2003 that was defective. In 2007, the defendant promised to build a new house but was unable to obtain financing. *See In re Rolleson*, 2013 WL 5797861, at *1-2 (B.A.P. 10th Cir. Oct. 29, 2013).

The Court found "a promise made in 2007 could not have caused damages that were suffered by the [plaintiffs] as a result of the sale to them of a defective house in 2003, as that damage was suffered long before [defendant] promised to rebuild." *Id*. at *4. Unlike here, LCT was damaged as a result of its reasonable reliance on NGL's misrepresentations. As observed by the Trial Court, "[i]t was not

[9] Inapplicable cases cited by NGL because there was no underlying transaction/bargain: *Simon v. San Paolo U.S. Holding Co., Inc.*, 113 P.3d 63, 67-68 (Cal. 2005); *Zanakis-Pico v. Cutter Dodge, Inc.*, 47 P. 3d 1222, 1226 (Haw. 2002); *Weinshel v.Willott LLC*, 2006 WL 1229933, at *8 (Conn. Super. Ct. Apr. 13, 2006); *Streeks Inc. v. Diamond Hill Farms, Inc.*, 605 N.W. 2d 110, 116 (Neb. 2000) *overruled on other grounds by Knights of Columbus Council 3152 v. KFS BD, Inc.*, 791 N.W.2d 317, 334 (Neb. 2010); *CGI Fed. Inc. v. FCI Fed. Inc.*, 814 S.E.2d 183, 168-87 (Va. 2018); *B&P Holdings I, LLC v. Grand Sasso, Inc.*, 114 F.App'x. 461, 466-67 (3d Cir. 2004); *LHC Nashua P'ship, Ltd. v. PDNED Sagamore Nashua, L.L.C.*, 659 F.3d 450, 464 (5th Cir. 2011).

unreasonable for Talarico to believe Krimbill could deliver on the compensation they discussed and to rely on those representations." Ex. A at 8.[10]

[10] Inapplicable case cited by NGL because defendant's misrepresentations did not induce justifiable reliance: *McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 531-32 (Iowa 2015)

ARGUMENT ON CROSS-APPEAL

II. IF BENEFIT-OF-THE-BARGAIN DAMAGES ARE NOT ALLOWED, THE TRIAL COURT DID NOT ERROR BY SETTING ASIDE THE *QUANTUM MERUIT* DAMAGES AWARDED OF $4 MILLION

A. Questions Presented

1. Whether the Trial Court erred in *sua sponte* ordering a new trial on LCT's *quantum meruit* claim.[11]

2. Whether the Trial Court erred in denying NGL's motion for a judgment as a matter of law on LCT's fraudulent misrepresentation claim because the $4 million *quantum meruit* award fully compensates LCT.

B. Scope of Review

The decision to order a new trial is reviewed for an abuse of discretion. *Scott v. Amisial*, 2019 WL 4724815, at *2 (Del. Sept. 26, 2019). "A decision to set aside a jury verdict warrants appellate deference due to the trial judge's presence at trial and his [or her] duty to see that there is no miscarriage of justice." *Id*. (internal quotations omitted).

C. Merits of Argument

[11] It is not clear if this issue is before the Court. The Court in its Order granting certification stated: "As to the issues raised by NGL for Certification -- whether the jury instructions on fraudulent misrepresentation was correct and whether the evidence supported LCT's fraud claim -- the Superior Court found that certification was not appropriate." Ex. C, ¶5. This Court then granted certification. Ex. C, ¶¶7,8.

1. The Superior Court Did Not *Sua Sponte* Order A New Trial On *Quantum Meruit* Damages

The Superior Court ordered a new trial on *quantum meruit* damages as a result of NGL's argument that there was jury confusion. The precise issue was raised by NGL in its Post-Trial Motion where it stated that "LCT's damages presentation created a significant risk of jury confusion, especially if there was a second damages blank."[12]

Accordingly, it was NGL who first raised the issue of jury confusion in its Post-Trial Motion not the Superior Court in its Opinion. Therefore, Superior Court Civil Rule 59(c) requiring the Court to act within 10 days of entry of judgment of its orders for a new trial on its own initiative is inapplicable.

2. The Superior Court Properly Ordered A New Trial On Damages In The Event That Benefit-Of-The-Bargain Is Not Allowed For Fraud

The Superior Court, upon receiving the jury verdict, acted decisively with respect to NGL's Del. R. Civ. P. 50(a) motion finding, "The Court finds there is a reasonable basis for the decision rendered by the jury and the motion for judgment as a matter of law is hereby denied." [A1340].[13]

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[12] Even though it was NGL who requested two blanks for damages in its verdict sheet submitted to the Court. [A1313-A1315]

[13] It is noteworthy that ***none*** of the issues related to the damages instruction for fraud were before the Court in the Rule 50(a) motion.

Only after, and apparently upon reflecting on the unsettled nature of Delaware law on the issue of benefit-of-the-bargain damages in the absence of an enforceable contract, did the Superior Court express concern about the distribution of damages between *quantum meruit* and fraud explaining:

> "But I take your arguments to the end of the thought process, what I have is one figure, which is the 29 million which was presented in the case. And I have another figure of 4 million that was presented in the case. So it would reflect, perhaps, a confusion that would not cause me to say, well, the 4 million must be right and the 29 million is wrong. It's simply, counsel, it's been great having you. I will see you in another six months and we will do the damage case again because I'm not convinced one way or the other that the jury did not confuse the number.
>
> Because I will tell you, when I initially heard -- if the numbers were reversed, I wouldn't have even called you in. The jury's verdict stands." [A1389:19-A1390:17]

The Superior Court reiterated its support of the jury verdict in the Certification of an Interlocutory Appeal stating if:

> "Plaintiff is entitled to benefit-of-the-bargain damages on the fraudulent misrepresentation claim, the jury's verdict would be supported by the evidence and the Court's decision to order a new trial on damages would be unnecessary. Ex. B, ¶4.

This Court followed suit in its acceptance of the interlocutory appeal summarizing the Superior Court's December 5 Opinion. Ex. C, ¶2.

The *quantum meruit* jury instruction improperly precluded the use of "value created," despite both LCT and NGL having used that measurement to determine LCT's compensation, when instructed:

> "The value of LCT's services under quantum meriut ***is not measured by reference to any value created after NGL's acquisition of TransMontaigne***. Instead, the standard for measuring the value of LCT's services under quantum meruit is the reasonable value of the services at the time they were provided." (Emphasis added) (Jury Instructions pp. 4, 5 attached as Exhibit "A.")

Despite Krimbill admitting in the October 24 Letter that LCT's compensation was not being measured as a "typical 1%-2% investment banker success fee" but rather it was "***looking at the fee from the perspective of the value created to the NGL Partner***" (emphasis added), the language "not measured by reference to any value created [*after*] NGL's acquisition of TransMontaigne" was inserted at NGL's request. [A1320-A1321; AR032][14]

If given an out-of-pocket jury instruction, the jury would have realized that no damages could be awarded for fraud because LCT put in no evidence of out-of-pocket damages. For these reasons and the Superior Court's reasons in its Opinion, it is impossible to determine the "real value of the services" and the "real damages" if benefit-of-the-bargain damages are unavailable to LCT. Therefore, it is impossible to determine if given this charge on fraud damages the jury would have still awarded $4 million for *quantum meruit* or $29 million, $33 million or something else.

[14] But for the improper *quantum meruit* jury instruction, LCT believes the jury may have relied upon the letter for *quantum meruit* damages.

III. LCT RELIED ON NGL'S FRAUDULENT MISREPRESENTATIONS

A. Question Presented

Whether the Trial Court erred in denying NGL's motion for judgment as a matter of law on LCT's fraud claim because LCT failed to prove reliance and in fact, admitted non-reliance.

B. Scope Of Review

Where a Rule 50(a) motion has been denied, the lower court's decision must be affirmed on appeal unless the "jury verdict on this matter was clearly erroneous or unsupported by the evidence." *Town of Cheswold v. Vann*, 9 A.3d 467, 472 (Del. 2010).

C. Merits of Argument

At trial, the Court gave a jury instruction on Fraudulent Misrepresentation [A1322-A1323] This instruction told the jury that "to establish the claim of fraudulent misrepresentation, LCT must prove the following by a preponderance of the evidence:

1) NGL made false representations of material facts that are important to LCT;
2) that NGL had knowledge or belief that these representations were false, or were made with reckless indifference to the truth;

3) the misrepresentations were made with the intent to induce LCT to act or to decline to act on the false representations;

4) that LCT justifiably relied on the false representations; and

5) as a result of that reliance, LCT suffered damages."

[A-1322-1323]

Yes Talarico testified at trial that Krimbill represented LCT would be paid a 2% interest in the GP, cash to cover taxes and an option to acquire a 3% interest. However, this isn't the only misrepresentation Krimbill made. Among other examples, the evidence at trial demonstrated that NGL made numerous false representations of material facts[15]: (a) NGL allowed LCT to believe that a fee arrangement had been reached ([AR 001]; [A0527:17-A0529:1]; [B1762]; [A0541:2-A0545:7]; [A0228]; [A0558:11-A0561:2]; [A0233]; [A0573:10-A0574:9]); (b) Krimbill falsely represented the required process by the NGL board necessary to approve the issuance or transfer of units ([A0879:12-18]; [AR002]; [A0910:9-A0911:13]; [A1250]); (c) Krimbill falsely represented (on June 4, 2014) that he had spoken to most of the board and received approval of the LCT fee ([A0229]; [A0568:4-23]; [A0911:8-A0912:7]); (d) NGL had told their lawyer, Mr.

[15] NGL's assertion that the evidence fails to support the reliance element misconstrues the evidence. Ans.Br. at 54-59. In those pages, NGL argues only a misrepresentation that occurred in October and November 2014 and ignores all the material misrepresentations set forth here.

Toth, to paper the fee arrangement ([A0561:11-A0563:21]), (e) Mr. Toth later told Mr. Talarico that Winston & Strawn (as NGL's agent) was "working on it" when they knew that they were not [A0949:12-A0951:8]), and (f) the numerous excuses given by NGL before and after July 1, 2014 to string along LCT. Ex. A at 7-8.

As the Superior Court said at the April 11, 2019 hearing:

> "[A]ny reasonable review of the jury's decision found that *they believe your client was a $44 million liar*.

[A1348:14-A1349:16] (emphasis added)).

The Superior Court went on in is opinion to say:

> "It was not unreasonable for Talarico to believe Krimbill could deliver on the compensation they discussed and to rely on those representations." Ex. A at 8.

As the Superior Court recognized there were repeated misrepresentations that LCT relied on, not the October 24 letter, and that reliance was reasonable. The Superior Court further charged the jury:

> "If you find that LCT has met the elements of fraudulent misrepresentation, you should determine the damages that LCT suffered that are a direct result of the false misrepresentation." [A1323]

No one objected to the charge when presented. Determining damages pursuant to this charge was a separate step the jury was directed to take if it found all the elements of fraud including misrepresentation, reliance and reasonable reliance.

As in *Stephenson*, which was ultimately a decision regarding whether or not there were damages for liability purposes, this Court went on to explain in Section

III of the opinion, the separate factual inquiry by the trier of fact in determining damages for fraud. The October 24 letter was not presented as a representation that LCT relied on but as support for the bottom range of damages testified to by LCT's expert.[16]

As the Superior Court said:

> "But couldn't the jury find that your client represented that he was going to get the two percent, was going to have the option to the three percent? There was lots of confusion about the tax situation.
>
> I mean there is really no dispute that your client had discussions with Mr. Talarico about the two percent and three percent and for a long period of time, led him to believe that was the deal that was going to be entered. [A1430:20-A1431:6]
>
> …[W]hen the jury comes up to a damages number, they simply said we are not going to accept either side in regards to the tax number. We are just going to void it out." [A1432:19-22]

NGL has the issue backwards. The $29 million verdict has nothing to do with reliance, which had already been found. It did have to do with damages as the jury was charged.

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[16] The plaintiff's expert testified as to three separate components of the [fee arrangement] allowing the finder of fact to accept or reject each of the components separately in the damage award calculation.

2% interest	$20,000,000.00
Payment to cover taxes	$14,800,000.00
3% option	$9,000,000.00

IV. THE SUPERIOR COURT PROPERLY INSTRUCTED THE JURY ON FRAUDULENT MISREPRESENTATIONS AND IF WRONG IT WAS HARMLESS ERROR AND NGL WAIVED ITS RIGHT TO RAISE THE RAISE THE ISSUE ON APPEAL BY NOT OBJECTING TO THE JURY CHARGE UNTIL AFTER THE TRIAL

A. Question Presented

1. Did NGL waive its right to appeal the jury charge on fraudulent misrepresentations by not objecting until after the trial.

2. Did the Superior Court properly instruct the jury on fraudulent misrepresentations.

3. If the Superior Court did not properly instruct the jury on fraudulent misrepresentations was it harmless error.

B. Scope of Review

A new trial should not be granted "unless…the jury's verdict is tainted by legal error committed by the Court during the trial." *Cohen-Thomas v. Lewullis*, 2016 WL 721009, at *3 (Del. Super. Ct. Jan. 29, 2016). Further, "[w]here the allegation is that the Court committed legal error, there must be a finding that the alleged legal error, if substantiated, also prejudiced the movant in some way." *Id*.

C. Merits of Argument

1. NGL Waived Its Right to Appeal the Superior Court Fraudulent Misrepresentations Jury Charge

NGL argues the Superior Court incorrectly instructed the jury that 'the term 'misrepresentation' is sufficiently broad to encompass fraudulent, negligent or even

innocent statements." Ans.Br. at 60-61. This charge was not a surprise to NGL because the Superior Court used the exact same language in its decision on NGL's motion for summary judgment when discussing the fraud count. [A0334]; Ans.Br. at 64. As discussed *supra* at p. 22, Rule 51 requires that any objection to "giving or failure to give an instruction" must be made immediately after the jury retires and unless such an objection is made a party may not assign as error the giving or failure to give such an instruction.

The policy reasons behind Rule 51 are discussed at pp. 22-23, *supra*. *See Chrysler Corp. v. Quimby,* 144 A.2d at 130. *See also Cohen-Thomas v. Lewallis,* 2016 WL 721009 at *4.

NGL in an effort to get around its fatal failure to object argues the Court's use of the words negligent and innocent in the summary judgment decision was law of the case and therefore they did not need to object to the jury charge. Ans.Br. 64-65. These words weren't law of the case. *May v. Bigmar, Inc.*, 838 A.2d 285, 288 n.8 (Del. Ch. 2003) describes what is law of the case and it is not the words negligent or innocent.

> "The 'law of the case' doctrine requires that *issues* already decided by the same court should be adopted without relitigation and *once a matter has been addressed in a procedurally appropriate way* by a court, it is generally held to be the law of the case..." *Id*. (emphasis added) (internal quotations omitted).

More importantly NGL fails to cite a single case holding that law of the case relieved NGL of the obligation to object to the jury charge under Del. R. Civ. P. 51.

2. The Superior Court Properly Instructed The Jury On Fraudulent Misrepresentation

In analyzing the correctness of the jury charge the Superior Court said that it was consistent with this Court's opinion in *Twin Coach Co. v. Chance Voieght Aircraft, Inc.*, 163 A.2d 278, 284 (Del. 1960).

> "Moreover, the term 'misrepresentation' is sufficient broad to encompass fraudulent, negligent or even innocent statements." Ex. A at 6.

The Superior Court also said it was consistent with the Restatement (Second) of Contracts § 164 (1981). Ex. A at 6-7.

3. If The Superior Court Did Not Properly Instruct the Jury On Fraudulent Misrepresentation It Was Harmless Error

First, the words negligent and innocent have to be read in the context of the entire charge:

> "2) that NGL had knowledge or belief that these representations were false, or were made with reckless indifference to the truth;
>
> 3) the representations were made with the intent to induce LCT to act or to decline to act on the false representations." Jury Instructions p. 6 [A1322].

Therefore, if the use of the words negligent or innocent was error this clear instruction would have made that error harmless.

The evidence was overwhelming, not of negligent or innocent misrepresentation, but of NGL's deliberate and intentional repeated fraudulent misrepresentations. *See also* the misrepresentations listed *supra* at p. 39-40.

As the Superior Court stated in the Opinion:

> "The Court has no question that there was sufficient evidence for the jury to find that NGL made fraudulent representations to Plaintiff regarding its fee arrangement. In fact, the evidence was overwhelming that Krimbill failed to be candid and honest in his dealings with Plaintiff, he misled Talarico regarding his authority to authorize the compensation they agreed to, and he continued the pattern of misrepresentation for a significant period of time." Ex. A at 7-8.

The Superior Court's decision upholding the jury verdict on fraud liability should be affirmed.

CONCLUSION

It is respectfully requested that this Court (1) find that benefit-of-the-bargain damages are available under the facts of this case and reinstate the jury's $29 million award for fraudulent misrepresentation and $4 million award for *quantum meruit*, or (2) if benefit-of-the-bargain damages are not allowed, affirm the Trial Court's order for a new trial on damages and (3) affirm the Trial Court's denial of NGL's motion seeking a new trial on fraud liability. Plaintiff also respectfully requests any other relief the Court deems just and proper.

Dated: July 31, 2020

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