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IN THE SUPREME COURT OF THE STATE OF DELAWARE

NGL ENERGY PARTNERS LP and NGL ENERGY HOLDINGS LLC,	:	
Appellants, Defendants below,	:	No. 265, 2023
v.	:	Case Below: Superior Court of the State of Delaware
LCT CAPITAL, LLC,	:	C.A. No. N15C-08-109 JJC [CCLD]
Appellee, Plaintiff below.	:	

CORRECTED APPELLANTS' OPENING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

The instant appeal results from what should have been a narrow trial limited to this Court's remand on the singular question of *quantum meruit* damages. *LCT Cap. v. NGL Energy P'rs*, 249 A.3d 77 (Del. 2021).

Rather than adhere to that clear mandate, LCT Capital ("LCT") impermissibly recycled its previously dismissed fraud and contract claims—thereby evading the mandate—and was allowed to present a benefit-of-the-bargain case tied to value-creation evidence rather than establishing the reasonable market value of its services. LCT's approach was improper, as the Superior Court held in a December 2022 opinion resolving seven motions focused on LCT's attempts to contravene established *quantum meruit* law. *See* Ex. D. Those rulings should have governed the trial. But that is not what happened.

Rather, on the cusp of jury selection, the judge to whom this case had just been reassigned verbally announced his disagreement with the December opinion's core rulings, then overruled them in a January 30, 2023 decision—thereby allowing LCT to advance all manner of value-creation and benefit-of-the-bargain evidence that was prohibited by Delaware law and utterly disconnected from the value of LCT's services. *See* Ex. B.

The resulting verdict was returned on February 15, 2023, after LCT spent eight days confusing the jury with inadmissible and highly prejudicial evidence. A001085.

Appellants (together, "NGL") seek this Court's reversal of: (a) the verdict; (b) the last-minute decision that enabled it by departing from the December opinion and established law (including law-of-the-case); and (c) related rulings allowing admission of improper evidence. A001089.

SUMMARY OF ARGUMENT

1. The trial court erred in admitting evidence and arguments about the value/benefit supposedly gained by NGL because such evidence is irrelevant/prejudicial to measuring the *quantum meruit* value of LCT's services. §I and pp. 38-47, *infra.*

2. The trial court erred in admitting evidence of and allowing LCT to recover benefit-of-the-bargain/expectancy damages because they are unavailable under *quantum meruit* law. §II, *infra*.

STATEMENT OF FACTS

The background of this litigation has been recounted by multiple opinions (*e.g.*, *LCT Cap.*, 249 A.3d 77 (Del. 2021); Ex. D). The following discussion therefore focuses on elements with particular relevance to this appeal, including: (a) LCT's pursuit of damages that are unavailable as a matter of law; and (b) the eleventh-hour decisions from a newly assigned trial judge that enabled LCT to obtain those damages.

A. Parties.

NGL Energy Partners LP ("LP"), a Delaware publicly traded limited partnership, provides pipeline, hauling, and terminaling logistics in the "midstream" energy sector. NGL Energy Holdings LLC ("GP," together with LP, "NGL"), a Delaware limited liability company, is the privately held general partner of the LP. H. Michael Krimbill is the LP's CEO and an NGL board member.

LCT is a Delaware entity whose sole member was its namesake, Louis C. Talarico, III. LCT provided financial advisory services to NGL in connection with NGL's acquisition of TransMontaigne Inc. and related assets (the "Transaction"). Although Talarico operated LCT as a one-person shop, he consulted non-employees Olav Refvik and Karl Kurz regarding the Transaction.

NGL purchased TransMontaigne for $200 million. *See LCT Cap.*, 249 A.3d at 80. NGL's involvement with the Transaction began in mid-April 2014, the deal

documents were executed approximately six weeks later, and the Transaction closed on July 1, 2014. *Id.* at 82. NGL and LCT began negotiations over LCT's compensation during this period, but no agreement was ever reached. *Id.* at 80-83.

The remand trial centered on a single question: what was the *quantum meruit* value of LCT's services to NGL in connection with the Transaction? NGL contended it was a fee in the industry-standard range of 2% or less of the purchase price. LCT contended it was the amount Talarico says the parties' failed contract negotiations would have yielded, which he calculated as approximately 22% of the purchase price.

B. First Trial.

The first trial proceeded on LCT's claims for fraudulent misrepresentation and *quantum meruit* because its breach of contract and unjust enrichment claims had been dismissed on summary judgment. Ex. E at 23, 26.

As the Superior Court found (and this Court explained), the parties never formed a binding contract about LCT's compensation. *Id.* at 23; *LCT Cap.*, 249 A.3d at 82. LCT nevertheless sought to reap the benefit of those failed negotiations in its fraud-centric trial presentation, advancing a unitary benefit-of-the-bargain damages model based on the amount Talarico said his non-existent contract would have been worth. *LCT Cap.*, 249 A.3d at 81. The resulting verdict awarded LCT benefit-of-the-bargain damages in the fraud blank but, notably, awarded a standard

investment banking fee of $4 million (or 2% of the purchase price) in the *quantum meruit* blank.

Following Rule 50 motion practice, the fraud verdict was set aside because it impermissibly awarded benefit-of-the-bargain damages, and a new *quantum meruit* trial was ordered due to potential jury confusion. *See LCT Cap.*, 2019 WL 6896463, at *7-8 (Del. Super. Dec. 5, 2019). Consolidated interlocutory appeals ensued.

C. First Appeal.

After acknowledging (in a trial memorandum) that benefit-of-the-bargain damages were unavailable as a matter of law, LCT changed its tune on appeal. This Court rejected those arguments, explaining why LCT was not permitted to seek damages for the benefit of an unconsummated bargain:

> [W]e do not know what terms the parties would have agreed to because the parties never agreed to all of the material terms of LCT's fee. Given this uncertainty, it is unclear how LCT could have provided the jury with a reasonable basis for inferring the value of the hypothetical bargain to which LCT and NGL would have agreed. ***This uncertainty also creates a risk that benefit-of-the-bargain damages would provide LCT with a windfall by awarding LCT with the benefit of a generous bargain to which NGL would not have agreed. Such a windfall would be contrary to Delaware law.***

LCT Cap., 249 A.3d at 95-96 (emphasis added). This Court further explained that, with no viable fraud claim remaining, the retrial would be limited to a narrow issue: the *quantum meruit* value of LCT's services. *Id.* at 101-02.

The details of LCT's strategy to evade that clear mandate are important to the posture of this appeal.

D. LCT's Post-Remand Tactics.

The Superior Court convened a scheduling conference after the mandate issued. A000394. Although the case had been appreciably narrowed, LCT made a surprise announcement at the conference, advising that it: (a) would be changing experts; and (b) had been working on a new report for some time; but (c) was unwilling to commit to any disclosure date. *E.g.*, A000400, A000401-02 (5/4/21).

Despite repeated follow-ups, LCT refused to discuss a schedule dealing with its new strategy—ignoring the matter for 100 days after NGL's last such communication and forcing judicial intervention. *E.g.*, A000405-07, A000409-13, A000415-18, A000420-21, A000423-26, A000428-29. And when the new expert report finally landed months later, it made clear LCT was planning to: (a) retry its defunct contract/fraud claims under the guise of *quantum meruit;* and (b) thereby seek recovery under two theories that are not available as *quantum meruit* damages—benefit-of-the-bargain and value-created/benefit-received. *See, e.g.*, A000433 at 0438, 0441.

E. The December Opinion.

LCT's tactics had two primary impacts: (i) they delayed matters beyond Judge Carpenter's retirement, leading to Judge Adams' assignment (A000582); and (ii) they necessitated various *Daubert* and *in limine* motions, which were resolved by Judge Adams' detailed opinion on December 22, 2022 (the "Opinion"). *See* Ex. D. The extensive work underlying the Opinion is self-evident. Among other things, it assimilated: (a) 300 pages of briefing; (b) 450 pages of exhibits, including expert reports; and (c) 250 pages of transcript, reflecting six hours of oral argument over the course of two days. Analysis of the issues also implicated hundreds more pages from the original trial and appellate records.

The Opinion required months of judicial effort, as noted from the bench when LCT later sought to diminish that effort. *See* A000739:12-21 (1/18/23) ("[LCT's] suggestion ignores the extensive preparation this judge did for the hearings on November 9th and 15th, 2022, and the December 22, 2022 [Opinion] in this matter, including reviewing the very large record from the prior trial, prior rulings in this matter from both this Court and the Supreme Court and wide-ranging researching regarding quantum meruit law both inside and outside Delaware, among other things."). But Judge Adams understood the importance of all that work/analysis because—as both parties had stated on the record—resolution of those issues would

govern trial preparations and the fundamental nature of trial itself. *See* A000587-89 (9/21/2022).

LCT strayed outside the lines in an attempt to influence the court and alter the law of the case, including by filing multiple argumentative and unauthorized submissions. *E.g.*, A000617; A000633. That approach was telling, as were the tactics LCT deployed after the Opinion resolved matters in a way it disliked.

Specifically, the Opinion excluded as a matter of law several categories of evidence for which LCT had advocated—including evidence that: (a) sounded in fraud/contract; or (b) related to the impermissible pursuit of value-created/benefit-conferred damages and benefit-of-the-bargain/expectancy damages. Ex. D at 15, 25, 33-39.

As became immediately evident, LCT was unwilling to abide by those rulings.

F. LCT Sows Chaos.

First, LCT attempted to circumvent them during preparation of the pretrial order by referencing evidence/theories that had been expressly excluded as a matter of law. NGL objected to that maneuver and LCT was ordered to submit a version conforming with the Opinion. A000661 at '0681; A000689.

Second, unable to change the law that governs *quantum meruit*, LCT tried to change who would be applying it by suddenly pressing for Judge Adams' recusal/disqualification on the morning of the pretrial conference—having never

raised any concern during six months of prior interaction with Her Honor. *See* A000683-87. LCT argued that recusal/disqualification was mandatory because Judge Adams had been affiliated with a local firm during a short period in 2017 when other lawyers at the firm were involved with a non-party subpoena in this action. *Id.* at '0864.

The court's thoughtful analysis found there was never a credible basis for LCT's maneuver:

> In conclusion, having examined this matter carefully, I conclude that Rule 2.11(A)(4) does not mandate my recusal and I can be impartial in this matter. Moreover, the timing of the motion for recusal after the Court's December [Opinion] gives the appearance that [LCT's] request is made as a litigation tactic which violates the purpose and spirit of these rules;
>
> ***
>
> Notwithstanding [LCT's] displeasure with this Court's rulings, the decisions of this Court were all granted on an impartial application of Delaware law to the unique factual circumstances of this case.

A000738:8-16 & A000740:3-7 (1/18/23); *see also* A000710-20. Among other things, that determination made clear Judge Adams: (a) never worked on this case or any matter involving the subpoenaed non-party; and (b) never learned anything "about this case that would suggest it is so closely related to a matter handled by [her] former firm while [she] was there that it should be considered in the same manner in controversy[.]" A000737:1-10 (1/18/23).

LCT nevertheless created the chaos it wanted when the President Judge decided to reassign this case as an administrative matter. A000740:16-A000741:3 (1/18/23).

G. The Countermand Decision.

Judge Clark was designated to CCLD solely for this case on January 18, 2023, and the following afternoon advised that a conference would be held on January 23. Dkt. 594. It appeared to be about trial logistics because there were no outstanding motions and no agenda was provided. Instead, it was a sea-change event that disregarded Delaware precedent, deviated from law-of-the-case doctrine, and threw the trial into disarray just days before jury selection.

Judge Clark unexpectedly announced that he disagreed with key aspects of the Opinion—specifically, the exclusion of value-creation/benefit-conferred evidence—and was planning to countermand them. *See* A000745:20-A000756:18, A000758:1-A000763:3 (1/23/23). That announcement came as a complete surprise. Trial preparations had been underway for months and specifically guided by the Opinion, so the resulting prejudice to NGL was manifest. NGL raised these and other points, seeking a written submission ahead of the court's planned action.

The court instead stated that it in roughly 36 hours it would hear what amounted to re-argument on the Opinion (even through the time for reargument had passed without LCT ever requesting it, and the Opinion was law of the case). After

LCT's presentation on January 25 re-advanced most of the same arguments that had been previously rejected, the court confirmed that it was indeed overruling/reversing the Opinion as previously announced. *See* A000772:2-A000777:7 (1/25/23).

The court also denied NGL's verbal motion for a continuance, stating that trial would proceed as scheduled because (a) the case had been pending for years; and (b) this turn of events somehow should have been anticipated. *See id.* at A000766:12-A000770:9; Ex. C.

The court advised that its full rationale for overruling/reversing the Opinion would be read to counsel the following week—leaving NGL four business days to make wholesale changes to its trial presentation. Then, in response to NGL's written motion for an emergency continuance, A000779, that teleconference was cancelled in favor of a written decision countermanding the Opinion on January 30, just ahead of jury selection. Ex. B (the "Countermand").

Notwithstanding the Countermand's remark that it simply "revisit[ed] one issue" and did "little to alter the litigation's landscape," its real-world fallout fundamentally altered the imminent trial. *Id.* at 2, 6.

NGL submits that the resulting prejudice and unfairness is self-evident. Indeed, even the Countermand acknowledged its about-face on "a central piece of evidence" that had been largely inadmissible until that moment: the October Letter that was the centerpiece of LCT's fraud claim and such a large part of LCT's remand

strategy that it was a principal topic of the parties' *Daubert* and *in limine* briefing. *Id.* at 3; A000279-80.

The Opinion correctly concluded that, other than comments about the quality of LCT's services (which NGL agreed would be admissible), the October Letter and related testimony must be excluded because it exemplified the value-creation/benefit-conferred evidence that is barred in *quantum meruit* law and was likely to mislead or confuse the jury. Ex. D at 25.

The Countermand disregarded (or misunderstood) both Delaware precedent and law-of-the-case doctrine when overruling the Opinion, proclaiming that "the jury must be permitted to consider [value-creation/benefit-conferred evidence when] it decides how much LCT 'deserves.'" Ex. B at 3.

That proclamation opened the door to inadmissible and prejudicial evidence less than one week before trial, just as NGL's emergency continuance motion explained it would. A000779 at '0785. NGL sought a 30-day continuance to account for that situation—shorter than circumstances warranted, but approximately the same amount of time it had been preparing in reliance on the Opinion. *Id.* And even that short continuance would have roughly tripled the period in which the newly assigned court could educate itself about this case. The court nevertheless refused any continuance, erroneously predicting that the Countermand has not "materially altered" the "scope of the trial." *See* Ex. C at 1.

The timing of these extraordinary events underscores the other grounds for this appeal. Less than five days elapsed between reassignment and the court's surprise announcement on January 23; less than two more days elapsed before that Countermand was confirmed. No jurist could have come up-to-speed during such a short time. Indeed, the court acknowledged as much when advising the parties that it was still only "about at the 60-percent level of education on the case" after the trial had commenced. *See* A000832:1-6 (2/6/2023). Yet a Countermand-related continuance was denied, even though "the need for more time was neither foreseeable nor [NGL's] fault," and refusing it "create[d] a substantial risk of unfairness" to NGL. *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1107 (Del. 2006).

H. The Resulting Trial.

As discussed herein, the Countermand enabled LCT to focus its presentation on a damages model tied exclusively to value-added/benefit-conferred and benefit-of-the-bargain/expectancy evidence. LCT did so by bombarding the jury with massive "value" numbers throughout trial—including speculative figures in the **billions** based on events that never occurred and from which Talarico calculated the benefit of his nonexistent bargain. The inevitable chaos resulting from LCT's strategy was accurately assessed by the Opinion, which explained that allowing LCT

to present such evidence would create confusion and be inconsistent with the proper measure of damages in this case. Ex. D at 25.

After eight days of exposure to such evidence, the jury entered a $36 million verdict disconnected from *quantum meruit* law. A001085.

Critically, however, LCT did nothing to carry its burden of establishing the objective market value for similar services in the banker community at the time in question. And settled law confirms that is the only measure of damages available in a case limited to *quantum meruit* damages, underscoring the Rule 402/403 impropriety of LCT being allowed to present other evidence at all.[1]

[1] The court's errors included admitting evidence of Talarico's subjective "valuation" of the parties' failed negotiations that far exceeded anything contemplated by Delaware law or the Opinion. *See infra* pp. 38-47.

ARGUMENT

I. VALUE-CREATED/BENEFIT-CONFERRED EVIDENCE IS IMPROPER IN *QUANTUM MERUIT*.

A. Question Presented

Whether the trial court erred as a matter of law in admitting evidence and arguments about the value/benefit supposedly gained by NGL from the Transaction as relevant to measuring *quantum meruit* damages. A000822:9-A000830:21 (2/6/23); A000799:14-A000801:21, A000815:2-9 (2/2/23); A000822:9-A000830:21 (2/6/23); A000943:23-A000944:12 (2/10/23); A001088; Ex. B; *e.g.*, A000743 (1/23/23), A000764 (1/25/23), A000593.

B. Scope of Review

Legal conclusions are reviewed *de novo*. *Bank of N.Y. Mellon Tr. Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011). Standalone evidentiary rulings are reviewed for abuse of discretion, as when a trial court "exceeded the bounds of reason in light of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice." *McNair v. State*, 990 A.2d 398, 401 (Del. 2010).

C. Merits of the Argument

Allowing LCT to advance value-created/benefit-conferred evidence constituted legal error for multiple reasons, including that it: (1) violated black-letter

quantum meruit precedent; (2) caused uncurable jury confusion; (3) deviated from law of the case; and (4) would lead to untenable results in future cases.

1. Value-Creation/Benefit-Conferred Evidence Is Legally Improper.

The prohibitions against such "evidence" (and the practical problems of introducing it) had been carefully analyzed by the Opinion, which correctly held that:

- "[*q*]*uantum meruit* damages are based on an objective reasonable valuation of the services provided by reference to the fair market value of those services," not value-creation/benefit-conferred concepts that examine the defendant's financial situation;

- evidence about NGL's value or the supposed increase in that value from the Transaction was irrelevant to measuring *quantum meruit* damages; and

- LCT therefore "was not permitted to introduce evidence or testimony based on a value creation theory of *quantum meruit* damages" or any "calculations of damages that are based on value created to [NGL] from the transaction[.]"

Ex. D at 11, 24-25. The Superior Court had also rejected LCT's similar attempt to infect the *quantum meruit* record at the 2018 trial, ruling that:

- "It doesn't matter that NGL all of a sudden say, for example, was increased in value tenfold. That doesn't have anything to do with the services [LCT] provided" (*See* A000306 (6/11/18)); and

- LCT therefore was not permitted to present any "calculation as to how much [ ] that value [created to NGL] is." A000349:23-A000350:7 (7/24/18).

In short, the Countermand departed from Delaware precedent that "[t]he standard for measuring the value of [a plaintiff's] performance under *quantum meruit* is the amount for which such services could have been purchased [in the marketplace] from one in the plaintiff's position at the time"—"***not* the value of the benefit received"** by defendant. *Hynansky v. 1492 Hospitality Grp., Inc.*, 2007 WL 2319191, at *1 (Del. Super. Aug. 15, 2007) (emphasis added); *Middle States Drywall, Inc. v. DMS Properties-First, Inc.*, 1996 WL 453418, at *10 (Del. Super. May 28, 1996) (same); *accord Caldera Properties-Lewes/Rehoboth VII, LLC v. Ridings Develop., LLC*, 2009 WL 2231716, at *31 (Del. Super. May 29, 2009) ("Recovery under a quasi-contract action is the value of the services provided, not the value of the benefit received." (citation omitted)); *McKenna v. Singer*, 2017 WL 3500241, at *21 (Del. Ch. July 31, 2017) (rejecting plaintiff's efforts to "put forth damages evidence related to the value of [defendant's business]").

There is nothing complicated about this bright-line rule. Nor is it somehow unique to Delaware. For example, the Seventh Circuit explained additional problems inherent in admitting value-creation/benefit-conferred evidence in *quantum meruit* cases:

> ***[T]he plaintiff is entitled to the market value of his services rather than to the benefit that he conferred on the defendant…*** [*Quantum meruit*] tries to simulate a competitive market; and in such a market, price is based on the cost to the seller ***rather than on the subjective value to the buyer***, which often is much greater.

ConFold Pac., Inc. v. Polaris Indus., Inc., 433 F.3d 952, 958 (7th Cir. 2006) (emphasis added).

Similarly, the California Court of Appeals reversed an $84 million verdict because the jury had been permitted to consider value-created/benefit-conferred evidence, thereby allowing the *quantum meruit* value of plaintiff's services to be measured by "their *impact* on a defendant's business rather than their [own] legal value" as established by market evidence. *Maglica v. Maglica*, 66 Cal.App.4th 442, 451 (Cal. Ct. App. 1998) (emphasis original). The Countermand allowed LCT to do precisely the same thing here, and the resulting verdict must be reversed for the same reason. As the Court of Appeals further explained in *Maglica*:

- ***"At root, allowing quantum meruit recovery based on 'resulting benefit' of services rather than the reasonable value of beneficial services affords the plaintiff the best of both contractual and quasi-contractual recovery***.";

- "Allowing recovery based on resulting benefit would mean the law imposes an exchange of equity for services, ***and that can result in a windfall—as in the present case—or a serious shortfall in others***."; and

- "***To impose such a measure of recovery would make a deal for the parties that they did not make themselves***. If courts cannot use quantum meruit to change the terms of a contract which the parties did make … it follows that neither can they use quantum meruit to impose a highly generous and extraordinary contract that the parties did not make."

Id. at 450-51 (emphasis added).

Such problems were also noted in *Baer v. Chase,* a lengthy and contentious dispute about the value of services plaintiff had rendered to David Chase in creating *The Sopranos* series. After multiple decisions and a remand from the Third Circuit, the U.S. District Court for New Jersey was faced with plaintiff's attempt to seek *quantum meruit* damages based on the enormous value/benefit Chase received from the resulting series, rather than the objective market value of similar services in the entertainment industry. Addressing that impropriety of that model, the District Court explained that:

- plaintiff was only entitled to the reasonable value of his services based on objective market evidence, where "***damages are calculated according to industry custom or practice for similar services***";

- plaintiff's attempt to pursue a value-created/benefit-conferred model that instead focused on how much financial gain Chase obtained from *The Sopranos* was "the very type of 'woefully inadequate and speculative' damages evidence that New Jersey law abhors";

- "***the only relevant and competent evidence regarding the value of [plaintiff's] services is that which tends to show what others in the entertainment industry would pay***" for similar services.

Baer, 2007 WL 1237850, at *5, *6 (D.N.J Apr. 27, 2007) (emphasis added).

Similar holdings abound. It is beyond peradventure that "an award of *quantum meruit* fees should be made ***independent of any benefit to the [defendant]*** and according to the objective and reasonable value of [plaintiff's] services." *Morris L. Off., P.C. v. Tatum,* 388 F. Supp. 2d 689, 711 n.20 (W.D. Va. 2005) (emphasis added); *accord Farrell v. Whiteman,* 152 Idaho 190, 195 (Id. 2012) ("Determining

the reasonable value of service under *quantum meruit* is an ***objective measure*** and is proven by evidence demonstrating the nature of the work and ***the customary rate of pay for such work in the community*** at the time it was performed." (citation and internal quotations omitted) (emphasis added)).

The Countermand's wholesale departure from these black-letter precepts was erroneous and prejudicial on its face. It also occurred without the benefit of any written submissions or anything close to the months of judicial analysis that shaped the Opinion. And while the Countermand downplayed its significance as merely "revisit[ing]" a single ruling, in reality it upended decades of *quantum meruit* precedent and transformed this entire case on the cusp of trial. Those facts alone warrant reversal.

To the extent any rationale was offered for that momentous event, it constitutes additional grounds for reversal because the Countermand rested on a demonstrably incorrect premise: the contention that value-creation/benefit-conferred evidence had been excluded by the Opinion "because no claim for unjust enrichment remain[ed]" in the case. Ex. B at 3 & n.11. But the Opinion said no such thing. Indeed, it never mentioned unjust enrichment.

Instead, the Opinion correctly noted several reasons that exclusion was compelled by both legal precedent and Rules 402/403, including that: (i) *quantum meruit* damages cannot be "based on value created to Defendants from the

transaction because this methodology is contrary to … relevant case law"; (ii) "[t]his Court has already ruled [during the original trial] that Plaintiff was not permitted to introduce evidence or testimony based on a value creation theory of *quantum meruit* damages;" (iii) "admitting value creation evidence would likely confuse and mislead the jury"; and (iv) "[t]he introduction of such evidence would most likely present intractable causation issues for the jury which is likely to result in … a windfall for plaintiff that *quantum meruit* damages does not permit." Ex. D. at 23-24, 25.

The Countermand also adopted LCT's previously asserted argument—rejected by the Opinion—that inadmissible evidence somehow became admissible because the "unique" goal of LCT's services was "to add value to NGL's deal." Ex. B at 4. LCT was never able to cite any authority supporting its argument, so none appears in the Countermand. And that lack of support is not surprising because LCT's advocacy: (a) was at odds with well-established law; and (b) ignored the reality that all professional services can be reduced to the exact same goal.

The Countermand nevertheless allowed a flood of inadmissible testimony and documents through which LCT was permitted to reframe the trial into a speculative exercise about how much value/benefit NGL might ultimately have gained from the Transaction—a number LCT was allowed to repeatedly tell the jury should be measured in nine figures—rather than the *quantum meruit* value of investment banking services based on objective market evidence. The resulting prejudice to

NGL was self-evident, as was the trial court's related error that "a limiting instruction [would] adequately mitigate [the] unfair prejudice" after LCT had spent the entire trial presenting huge dollar figures that were legally and factually untethered from the reasonable value of its services. *See id.*

2. Admission of Such Evidence Causes Incurable Jury Confusion.

Jury confusion is an inevitable consequence of value-creation/benefit-conferred evidence in a case limited to *quantum meruit* damages. Indeed, beyond concluding that such evidence was irrelevant as a matter of law, the Opinion carefully considered the Rule 403 impact when concluding that "admitting value creation evidence would likely confuse and mislead the jury." Ex. D at 25. The Opinion also correctly recognized that: (a) the claimed "value" figures could not be fully attributed to LCT because they were "a result of the complex interplay of myriad factors beyond [LCT's] control"; and (b) even if otherwise admissible, the prejudice of such evidence substantially outweighed any claimed relevance because it would require "mini-trials" about attribution of the claimed value/benefits. *Id.*

Moreover, recognizing that Delaware law measures *quantum meruit* damages on the objective value of plaintiff's services rather than through evidence about supposed value/benefit to the defendant, the Opinion further explained that "[t]he introduction of such evidence would most likely present intractable causation issues for the jury which [was] likely to result in their confusion and a windfall for Plaintiff

that *quantum meruit* damages does not permit." *Id.* The Opinion included a balancing analysis, which correctly concluded that the unfair prejudice, jury confusion and inevitable issues that would result from such evidence could not be mitigated in light of applicable Delaware precedent.

That fallout is exactly what happened here because of the Countermand, which referenced Rule 403 in passing when noting the "risk of jury confusion[] and unfair prejudice to NGL," then permitted inadmissible value-creation evidence anyway based on a flawed understanding of the Opinion, *quantum meruit* law, and the facts in this case—including speculation about why Judge Adams excluded such evidence regardless of what the Opinion said. Ex. B at 3, 7.

The Countermand's contention that a limiting instruction would mitigate those problems was another way in which the trial court erred. Indeed, when "[the facts in issue] are so readily subject to misinterpretation by a jury … a curative or protective instruction [is] of dubious value." *United States v. Prescott*, 581 F.2d 1343, 1352 (9th Cir. 1978).

So, too, was the Countermand's newfound acceptance of LCT's unsupported claim (rejected by the Opinion) that all of the value/benefit it argues was received by NGL from the Transaction somehow existed at the moment of closing—even when the documents in question feature uncertain projections, incorporate post-

closing efforts/investment by NGL, or expressly include disclaimers about future value-creation. *See infra* pp 38-47.

3. The Countermand Departed From Law-Of-The-Case Doctrine.

The Opinion indisputably triggered law-of-the-case doctrine, requiring that its holdings "be adopted without relitigation" and that "matters previously ruled upon by the same court be put to rest." *May v. Bigmar, Inc.*, 838 A.2d 285, 288 n.8 (Del. Ch. 2003), *aff'd*, 854 A.2d 1158 (Del. 2004); *Frank G.W. v. Carol M.W.*, 457 A.2d 715, 718 (Del. 1983). These rules ensure judicial efficiency and fairness, which is why this Court takes an especially "dim view of a successor judge in a single case overruling a decision of his predecessor." *Frank G.W.*, 457 A.2d at 718.

As aptly explained in *State v. Madison*:

> A successor judge overruling a decision of a predecessor judge of the same Court is strongly disfavored. Such a situation is guided by the doctrine of the law of the case so as to promote fundamental fairness and … judicial efficiency. Unless there are demonstrated change[s] or extraordinary circumstances warranting a reconsideration of a decision that was clearly wrong, the Court will not revisit a prior ruling. This ensures that the parties are not entrapped by varying philosophies of different judges of the same Court in the case.

2015 WL 1119540, at *6 (Del. Super. Mar. 10, 2015) (cleaned up, emphasis added); *accord State v. Wright*, 131 A.3d 310, 321 (Del. 2016). And while the doctrine theoretically allows for revisitation of predecessor judge's decision, this Court has made clear how high the threshold was for the Countermand: "[a]dherence to prior rulings" and the law of the case is particularly important when, as here, a successor

judge inherits a case. *Frank G.W.*, 457 A.2d at 718-19 (quotations omitted). And thus the Opinions rulings "should [have been] considered as firmly established." *Id.*

The Countermand did not clear its high threshold, a fact which is alone enough to warrant reversal here. And the need for this Court's relief is even clearer when one considers how the Countermand came to be, the relative paucity of its legal analysis, and the prejudice it visited upon NGL. In short, the Countermand exemplified what law-of-the-case doctrine exists to prevent: a newly assigned judge overruling his predecessor because he disagreed with her ruling.

4. Affirmance Would Have Wide-Ranging Implications.

Allowing value-creation/benefit-conferred evidence in a *quantum meruit* damages trial would have at least three broad implications beyond this case. *First*, as noted above, it would result in unfair windfalls for some litigants and unfair shortfalls for others—the inexorable consequence when damages are permitted to be disconnected from the objective, market value of a plaintiff's services. *Second*, as recognized in the Opinion, trials-within-trials would be required to parse whether claimed value/benefits were created by plaintiff's services or resulted from unrelated factors—a dynamic that would materially increase the volume of discovery disputes, evidentiary issues and appeal points in every case. *Third*, claims for *quantum meruit* would be transformed from (1) a narrow theory of restitution based on objective market evidence, into (2) an expansive cause of action where plaintiffs could pursue

almost any damages model conceivable and/or obtain enforcement of non-existent bargains based on their own subjective views of expectancy damages.

Nor do the problems end there. Adding/providing value to clients is the task of **every** service-industry professional—not just financial advisors. The Seventh Circuit thus used the example of a doctor's life-saving services to demonstrate the irrationality of allowing *quantum meruit* to be determined by the subjective value-created/benefit-conferred on her patient rather than objective market evidence about what doctors get paid for similar services in the medical industry. *ConFold,* 433 F.3d at 958. And taking that example further illustrates how such an approach would spawn absurdly divergent damage models for identical services, as when the patient is a 45-year-old billionaire versus a 90-year old indigent. *Accord Maglica,* 66 Cal.App.4th at 442, 451 (observing the fallacy of *quantum meruit* measured by the "impact" services have on a defendant rather than the objective value of those services in the applicable marketplace, and the jury confusion that would result).

Adopting LCT's preferred theory would also unfairly deprive plaintiffs of the market value of their services when, through no fault of their own, the defendant enterprise experiences a financial downturn. It would be the defendants promoting such evidence to decrease the "value" in those cases, but it is two sides of the same coin. That is not even remotely the point of *quantum meruit,* which exists as a last-resort claim to make plaintiffs whole for services they provided. Nothing more,

nothing less. Which is why Delaware instead subscribes to an objective, market-based measure of damages.

Any one of these reasons is enough to warrant reversal of the Countermand and resulting verdict.

II. BENEFIT-OF-THE-BARGAIN DAMAGES ARE IMPROPER IN *QUANTUM MERUIT*.

A. Question Presented

Whether the trial court incorrectly allowed LCT to recover benefit-of-the-bargain/expectancy damages. A000882:12-A000886:13 (2/7/23 PM); A000822:9-A000830:21 (2/6/23); A000893:17-A000894:7 (2/7/23 PM); A001002:23-A001008:20 (2/13/23); A0001088; Ex. B, *e.g.*, A000743 (1/23/23), A000764 (1/25/23).

B. Scope of Review

Legal conclusions are reviewed *de novo*. *Bank of N.Y. Mellon*, 29 A.3d at 236. Standalone evidentiary rulings are reviewed for abuse of discretion, as when a trial court "exceeded the bounds of reason in light of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice." *McNair*, 990 A.2d at 401.

C. Merits of the Argument

NGL explained in pre-trial briefing that LCT was seeking to enforce a bargain the parties never entered. *See* A000594; A000433. The Opinion correctly held that such benefit-of-the-bargain/expectancy damages are an improper measure of *quantum meruit*, citing the parallel reasoning in this Court's remand decision (the "Remand Opinion"). Ex. D at 16, 22 ("[B]enefit-of-the-bargain damages are an impermissible measure of *quantum meruit* damages.") & ("The Supreme Court's

decision makes clear that the benefit Plaintiff asserts it would have received from the unconsummated contract should not factor into *quantum meruit* damages.").

Acknowledging law-of-the-case doctrine, however, the Opinion noted that Judge Carpenter had previously admitted evidence of the parties' failed negotiations (albeit at a time when that evidence was integral to LCT's then-extant fraud claim and admissible on those grounds). The Opinion therefore established guardrails that honored Judge Carpenter's ruling but excluded anything in the nature of value-creation/benefit-conferred and benefit-of-the-bargain evidence—including evidence regarding the "equity buy-in proposal" referenced in the October Letter that had featured prominently in the LCT's fraud case and became a primary subject of motion practice on remand. *See* Ex. D at 36.

Judge Carpenter's erroneous ruling is part of this appeal, as a standalone matter and reflected in the Opinion. A001089. So is the Countermand's related decision granting LCT virtually unfettered permission to pursue a benefit-of-the-bargain/expectancy award with inadmissible evidence—which is exactly what LCT did by focusing on Talarico's personal belief that he was entitled to roughly $40 million because that was the figure he subjectively attributed to failed negotiations about the equity buy-in.

Nor is there any question that LCT urged the jury to award those very damages based on that strategy, including through an animated presentation in closings that

completed the verdict form with Talarico's subjective benefit-of-the-bargain/expectancy calculation – a figure never sponsored by any other witnesses or tied to any objective market evidence. *See* A001075:10-15 (2/15/23) ("All we ask is that you award what's reasonable, ***which is what the parties discussed at the time*** … That value is $43.8 million, that's what we're asking to award." (emphasis added)).

The impropriety of LCT's approach was addressed in the *Daubert* and *in limine* motions that were resolved by the Opinion. And it wasn't a close call. Among other things: (a) NGL had cited LCT's own filings as confirmation that it was attempting to resurrect its dismissed contract claim; and (b) when confronted with that record at oral argument, LCT had no choice but to acknowledge that its benefit-of-the-bargain/expectancy damages strategy "runs pretty close to reviving [its dismissed] breach of contract claim." A000614:12-14 (11/09/22).

The Opinion correctly rejected LCT's strategy, recognizing that it sought "to controvert [the prior] dismissal of its breach of contract claim" and ran afoul of Delaware law that benefit-of-the-bargain/expectancy damages "are an impermissible measure of *quantum meruit* damages" because they are akin to recovering under a never-formed contract. Ex. D at 16 (citing this Court's Remand Opinion).

As noted above, however, the Countermand and its implementation turned that ruling on its head—along with decades of precedent. Doing so was legally erroneous and unduly prejudicial to NGL, warranting reversal by this Court for at least two reasons.

First, benefit-of-the-bargain/expectancy damages are unavailable as a matter of black-letter *quantum meruit* law. *Second*, the Remand Opinion specifically rejected LCT's attempt obtain such damages on its now-defunct fraud claim, and the logic underlying that holding applies with equal or greater force in the *quantum meruit* context. *See LCT Cap.*, 249 A.3d at 94-96.

Specifically, this Court's analysis noted several insurmountable problems that barred LCT from seeking such damages: (i) "the difficulty of fairly and accurately valuing the benefit of a bargain that the[se] parties never formed"; (ii) the absence of any non-speculative way that "LCT could have provided the jury with a reasonable basis for inferring the value of the hypothetical bargain to which LCT and NGL would have agreed"; (iii) the "risk that benefit-of-the-bargain damages would provide LCT with a windfall by awarding LCT with the benefit of a generous bargain to which NGL would not have agreed"—precisely what happened at the remand trial—and; (iv) the fact that "[s]uch a windfall would be contrary to Delaware law." *Id.* at 95-96 (citing *Stayton v. Delaware Health Corp.*, 117 A.3d 521, 534 (Del. 2015) ("In Delaware, 'a plaintiff is entitled to compensation to make

him whole, but no more.' In other words, the remedy for the tort should put the plaintiff as close as possible to the same position as she was in before the injury.") (citation omitted)).

None of these problems were somehow lessened on remand without a fraud claim; if anything, the opposite is true. While subjective evidence about what litigants allegedly said/did/intended is generally admissible in fraud cases, the *quantum meruit* analysis is an objective assessment that definitionally precludes such evidence under longstanding Delaware law. *See, e.g.*, *Middle States*, 1996 WL 453418, at *10-11 (confirming *quantum meruit* damages are defined as the reasonable amount "for which such services could have been purchased [in the marketplace] from one in the plaintiff's position at the time and place the services were rendered").

Indeed, Justice Ridgely recognized that exact point when serving on the Superior Court, explaining in *Cheeseman v. Grover* that: (a) *quantum meruit* damages are measured based on their objective reasonable value rather than any purported negotiations/expectations between the parties; and (b) evidence of purported negotiations/expectations could only be admitted for the singular purpose of establishing liability if the defendant contended the plaintiff had provided its services gratuitously—a circumstance that indisputably did not occur here because NGL conceded liability (at both trials) and the sole point of the remand proceeding

was to assess the *quantum meruit* value of LCT's services. 490 A.2d 175, 177 (Del. Super. Feb. 1, 1985) (citing *Somerville v. Epps*, 419 A.2d 909, 911 (Conn. Super. 1980)).

Cheeseman is a foundational case in our law, which is why it continues to be featured in Delaware's Pattern Jury Instruction for *quantum meruit.* And it is far from the only precedent LCT would have this Court overturn in pursuit of a damages model that cannot be reconciled with Delaware's jurisprudence on the topic. *See, e.g.*, *Caldera Properties-Lewes/Rehoboth VII, LLC*, 2009 WL 2231716, at *31 ("Quasi-contractual relationships are imposed by law in order to work justice and without reference to the actual intention of the parties." (citation omitted)); *United Health Alliance, LLC v. United Med., LLC*, 2014 WL 6488659, at *7 (Del. Ch. Nov. 20, 2014) ("An 'implied, or quasi-contract, is one where the law will infer the existence of a contractual relationship without regard to the actual intention of the parties…"); *Middle States*, 1996 WL 453418, at *11 (holding that "*[q]uantum meruit* is a retrospective remedy" for the value of services rendered "rather than a prospective remedy which looks at what [a party] *expected* to receive." (emphasis original)).

There is nothing novel about these principles. Indeed, they have been part of New Jersey's *quantum meruit* jurisprudence for more than 100 years. *See McElroy v. Ludlum*, 32 N.J.Eq. 828, 838 (E. & A. 1880) (holding that where there is no valid

contract, evidence of the contract was inadmissible to prove the reasonable value of the services rendered under *quantum meruit*). They also have long been part of Connecticut law, as Justice Ridgely's *Cheeseman* analysis recognized when citing that sister jurisdiction for its particularly on-point holding that the correct measure of *quantum meruit* "***is the reasonable value of the services and not the value of the promised consideration***" because "that would indirectly enforce the [unenforceable] contract." *Somerville,* 419 A.2d at 911 (emphasis added) (cited by *Cheeseman* at 490 A.2d at 177). And, as noted above, these same principles were echoed in the Opinion's rejection of LCT's various arguments about why it should be entitled to benefit-of-the-bargain/expectation damages. *See LCT Cap.*, 2022 WL 17851423, at *7 ("In the context of *quantum meruit*, evidence of an alleged agreement is only permitted to rebut an allegation that the plaintiff provided the services gratuitously.")

Unable to confront this body of law when it was raised in the remand proceedings, LCT tried to end-run it with arguments drawn from two decisions where (unlike here) a valid contract existed between the litigants: *Pike Creek Pro. Ctr. v. Eastern Elec. & Heating, Inc.*, 540 A.2d 1088 (Del. 1988) and *Bellanca Corp. v. Bellanca*, 169 A.2d 620 (Del. 1961). The Opinion rejected LCT's inapposite advocacy, joining every operative decision in this case when highlighting the absence of a contract between LCT and NGL. *LCT Cap.*, 2022 WL 178514, at *14 ("Plaintiff cites [two cases] to support its position that the parties' alleged agreement

is admissible to show the value of its services. Neither *Pike Creek* nor *Bellanca* stand for the proposition Plaintiff asserts.").

LCT's contrary arguments aside, Delaware defines *quantum meruit* damages as (i) the objective market value of a given service in the community where that service was rendered, (ii) without regard to either party's subjective intentions/beliefs/perceptions about value. Those bedrock tenets would be shattered if plaintiffs were nevertheless allowed to rely on numbers bandied-about in failed contract negotiations—especially when, as LCT's own expert admitted at trial, he failed to experience any precedent for such numbers in the applicable marketplace. *See* A000961:3-9 (2/10/23 AM).

And there is no doubt LCT knew it was unable to meet the legal requirement that its damages be grounded in objective market evidence of fees actually paid to bankers. Which is why LCT resorted to evasion tactics instead, concocting a new standard for its expert that re-defined "market value" to capture the entire universe of theoretical fee arrangements that "informed parties [even] ***discuss***," no matter how disconnected from objective market evidence of actual fees or whether those discussions ever led to an actual contract. A000945:23-A000946:2 (2/10/23 AM) (emphasis added). That conceit is directly at odds with black-letter *quantum meruit* law, as previously explained, underscoring the need for reversal here. *See* pp. 20-31, *supra*.

Affirming the verdict would therefore overrule a longstanding line of authority, giving LCT an unfair windfall that enforces a non-existent contract and/or impermissibly awards benefit-of-the-bargain/expectancy damages for failed negotiations. It would also overlook the manifest juror confusion that resulted from a trial presentation where LCT: (a) focused on large-dollar figures and argumentative math that Talarico subjectively attributed to those failed negotiations; (b) made no attempt to tie its figures/math to the actual marketplace for investment banking services at the time; and (c) failed to introduce any evidence about the objective market value of LCT's services, as required by law.

The point bears repeating. LCT presented no market evidence whatsoever supporting its claimed entitlement to the eight-figure fee Talarico advocated at trial (roughly 22% of the TransMontaigne purchase price) because no such evidence exists.

LCT's expert admitted that fact on cross, testifying that he could not identify a single instance in his lengthy investment banking career where any fee fell above the customary market maximum of 2% established by NGL's experts (or a maximum fee of $4 million in this case). *See* A000961:1-9 (2/10/23 AM) ("Q. [T]hink back to your own experience … 70 deals, 35 years, you couldn't come up with one with falls out of the customary range [NGL's experts] have identified. … A. I've said that."); A001021:1-A001025:20, A001026:5-19, A001027:6-A001029:3,

A001044:9-A001045:19 (2/14/23) (NGL expert confirming customary range of up to 2% of the deal price for a deal like TransMontaigne, which would generate a maximum fee of $4 million here).

***

The nature and extent of the legal errors discussed in Sections I - II is dispositive for appeal purposes. Nevertheless, to underscore the inevitable prejudice and confusion that resulted, it is helpful to consider some of the inadmissible material that the Countermand allowed LCT to present (including fraud/contract evidence the trial court had previously recognized was precluded by both the Opinion and this Court's rulings).

Most notably, and contrary to controlling law, LCT was allowed to confuse jurors with (a) bloated monetary amounts in the **billions** of dollars based on projections of future value/benefit from the Transaction, even though "value created" is not the applicable damages measure, was speculative, and was based on activities unrelated to LCT; and (b) negotiations over LCT buying an NGL equity stake, even though those proposed terms were never agreed to by either side and required an investment by LCT to become an ongoing stakeholder (rather than a payment to LCT for past services under *quantum meruit*).

Only reversal by this Court can remedy the prejudice from allowing LCT to infect jurors with value-created/benefit-of-the-bargain evidence that was utterly

disconnected from the reasonable value of its services. And the cumulative effect of allowing LCT to do so throughout trial magnifies the need for reversal here. *E.g.*, *Davis v. Maute*, 770 A.2d 36, 40, 43 (Del. 2001) (new trial warranted when "considered together … the cumulative effect of the argument resulted in error"); *Henne v. Balick*, 51 Del. 369, 376-77 (Del. 1958) (evidence improper when the purpose is to "introduce and keep before the jury figures out of all proportion to those which the jury would otherwise ha[ve] in mind with the view of securing from the jury a verdict much larger than that warranted by the evidence").

- *The October Letter.*

LCT prominently featured the October Letter (PX403) throughout trial, including in opening and closing statements, as well as with the principal witnesses and experts. It was prejudicial error to admit the full letter, over NGL's continuing objections, on both value-creation and benefit-of-the-bargain grounds. A000822:9-A000830:21 (2/6/23); A000853:3-A000855:4 (2/7/23 AM); A000943:23-A000944:12 (2/10/23 AM); A000933:17-A000934:7 (2/8/23); *see* A000799:14-A000801:21, A000815:2-9 (2/2/23).

More than four months after LCT ceased providing its services, Krimbill circulated the October Letter, labelled "TransMontaigne Update and Request," to explain his personal perspective to GP owners regarding the Transaction and LCT's potential equity buy-in. Following NGL's post-acquisition management of

TransMontaigne—wholly unrelated to LCT—the Letter projected that the acquisition was "***on track to produce EBITDA*** of about $50 million annually with new projects … which will result in EBITDA increasing to $70 million ***in year 2 or 3***. … ***The value created for the NGL General Partner from this transaction*** [based on projected EBITDA] ***is approximately $500 million***." *See* A000279-80 (emphasis added). The Letter further addressed potential compensation for LCT, "***looking at the fee from the perspective of the value created to the NGL General Partner."*** *Id.* At trial, LCT used that inadmissible evidence as a springboard to argue that the $500 million projection related only to the GP and should be taken to mean **$1 billion of value created** for the GP and LP combined. *See* A000948:18-A000949:1, A000951:14-17 (2/10/23 AM); A000966:2-7 (2/10/23 PM).

In short, the trial court's admission of those figures cannot be reconciled with the Letter's own text—which not only confirmed they were legally irrelevant value-created/benefit-conferred amounts, but also that they were based on speculative projections that extended multiple years into the future and included post-acquisition developments unrelated to LCT. It is likewise facially apparent that the Letter: (a) offered personal views from the "perspective of the value created" to the GP, which decidedly is not the legal measure for *quantum meruit*, and (b) described a never-agreed-to equity buy-in proposal whereby LCT would "acquire 5% [of the GP] for a $21 million purchase price," thus representing benefit-of-the-bargain damages that

are legally unavailable in *quantum meruit*—a point underscored by the undisputed fact that LCT would have been required to pay NGL $21 million under that complex proposal, not the other way around.

The Opinion therefore correctly granted NGL's motions regarding such evidence, specifically excluding the majority of the October Letter (including those parts quoted above) as legally irrelevant on multiple grounds. (Ex. D 22-25).[2] That should have been the end of it. But the Countermand's surprise about-face on those rulings allowed LCT to make value-created/benefit-conferred and benefit-of-the-bargain evidence omnipresent at trial, with the October Letter taking center stage.

LCT read the Letter to jurors right away, tying the proposed equity buy-in to its value-creation and benefit-of-the-bargain model during opening statements. A000843:22-A000845:22 (2/6/23). LCT featured the Letter as the very first exhibit admitted during Talarico's testimony about the failed fee negotiations, then raised it repeatedly with five other witnesses, including Krimbill. A000890:7-A000892:23 (2/7/23 PM) (Talarico); A000934:12-23 (2/8/23) (Raymond); A000948:18-A000956:3 (2/10/23 AM) (McQuilkin); A000993:5-A000997:18, A001015:2-A001017:12 (2/13/23) (Krimbill); A001030:17-A001034:21 (2/14/23) (Lancaster),

[2] The Countermand acknowledged the need for redactions to the October Letter "because it references value creation *after* the purchase" (emphasis in original), but did not identify what portions concerned value created solely before the purchase. *See* Ex. B at 6 n.18. No part did.

A001039:8-A001043:8 (2/14/23) (Lancaster); A001053:3-A001055:13 (2/14/23) (Keller); A000279-80; A000282-84. And LCT trumpeted the Letter again in closing arguments, imploring the jury: "This October 24th letter, read it please. It says value created… I would encourage you to read this October letter just as a starting point to see what they say about [LCT] and the value it delivered." A001076:8-A001077:1 (2/15/23).

The resulting prejudice would warrant reversal if these were the only examples of such inadmissible evidence being admitted. And they were not.

- *Other Value-Creation Examples.*

LCT was also allowed to confuse the jury with a series of long-range projections which speculated that the value of the NGL GP could be **over $3.2 billion** by the end of 2015 (and up to $4.5 billion by 2018). A000264-65; A000270-71. Beyond the legal irrelevance of those value-created/benefit-received figures, it is undisputed they were built on the assumed occurrence of two events that never occurred: (1) a merger between NGL and TransMontaigne and (2) an IPO of the NGL GP.[3]

Moreover, it is undisputed that NGL was not involved with those projections. As shown in PX94, they resulted from a May 2014 call between Talarico and EMG,

[3] While NGL acquired the TransMontaigne GP and certain LP units in what was referred to as Step 1, Step 2, which never occurred, would have involved NGL acquiring all the LP units and merging the TransMontaigne LP with the NGL LP.

(an investor in NGL with board seats but not purporting to speak for NGL) during which Talarico "request[ed] the math for the potential value of the NGL GP once it is public and merged into TransMontaigne." A000264-65. EMG's response showed those assumptions could potentially make the GP worth $3.2 billion and a 2% stake worth $66.8 million by the end of 2015. *Id*. *See also* A000267-68; A000270-71. Talarico then extrapolated that the merger with TransMontaigne would create $1.2 of the GP value and, subtracting the purchase price, further relayed his view that "Uplift is ~$1 billion." A000273-75; *see* A000828:12-A000829:4 (2/6/23); A000901:6-A000906:12, A000910:4-A000913:6 (2/7/23 PM); A000923:20-A000927:4, A000927:5-19 (2/8/23). ***In other words, Talarico fabricated a $1 billion value-creation measure based on assumptions that never occurred***.

The Opinion correctly excluded such evidence and those rulings initially survived the Countermand. They were also applied at a hearing on jury-selection day, when the trial court noted that: (a) it was "mindful of the two basic assumptions [that] never happened," and (b) "the issue when you get to the projections and you get to the dollar figure based on something that never happened, what you've got is those projections have ***very little or no relevance***, and you've got a ***pretty hefty chance of it confusing the jury and confusing the issue***." A000802:15-23, A000814:1-10 (2/2/23) (emphasis added).

On the first morning of trial, however, the court announced that such evidence would be admitted anyway because it had been part of LCT's fraud-centric case at the first trial and "evidentiary rulings [from] the first trial will control in this one" despite the lack of a fraud claim. A000825:2-8, A000828:12-A000830:21 (2/6/23). No legal foundation was provided for that unexpected turnabout. But LCT exploited it almost immediately in Talarico's direct, introducing PX101 (A000270) for its post-merger, post-IPO valuation projections (which remained on display for pages of testimony) and using PX94 (A000264) to further confuse jurors with the massive numbers Talarico/EMG had projected by assuming the occurrence of events that never happened. A000901:6-13, A000907:9-14 (2/7/23 PM); A000926:1-18 (2/8/23).

LCT again displayed those projections on an expert demonstrative, even though its expert's report never focused on that document. A000957:14-A000958:7 (2/10/23 AM). And the expert testified that PX101 reflected a "counterproposal" for LCT to take equity in NGL, even though the document does not mention a proposal at all. *See id.* And those same notions were repeated in LCT's closing argument. A001071:15-19 (2/15/23).

All told, the Countermand enabled LCT to confuse jurors with those fantastical billion-dollar figures nearly three dozen times over the course of trial. *E.g.*, A000837:1-13, A000838:19-A000839:11, A000840:6-11, A000842:5-14,

A000846:8-16 (2/6/23); A001069:7-18, A001070:14, A001071:15-A001072:3, A001075:8 (2/15/23); A000869:13-A000870:13, A000871:18-A000872:3, A000873:16-20, A000878:20-22 (2/7/23 AM); A000891:19-A000892:1, A000916:20-A000917:7 (2/7/23 PM); A000921:19-A000922:8 (2/8/23); A000948:18-A000949:6, A000951:14-17, A000952:13-A000953:10 (2/10/23 AM); A001060:17-A001061:23, A001062:6-11, A001067:15-A001068:2 (2/15/23). There was nothing subtle about that tactic. And it served as the anchor for LCT's equally improper pursuit of benefit-of-the-bargain/expectancy damages tied to the unconsummated equity buy-in proposal.

- *The Unconsummated "Equity Buy-In."*

As noted above, the Opinion acknowledged Judge Carpenter's law-of-the-case ruling about the parties' failed negotiations over that proposal (which are irrelevant to *quantum meruit* damages) but established clear guardrails that prohibited all value-created/benefit conferred and benefit-of-the-bargain evidence—including the "equity buy-in proposal" referenced in the October Letter. Ex. D at 22-25, 36. Thus, the Opinion precluded evidence focused on LCT's unconsummated 5% buy-in of the NGL GP for $21 million, and the Countermand did not hold otherwise.

The trial court nevertheless allowed LCT to introduce both October Letter and other evidence discussing that inadmissible topic. *See* A000882:12-A000886:15

(2/7/23 PM); A000799:14-A000801:21, A000807:23-A000808:11 (2/2/23); A000822:9-A000831:5 (2/6/23). For example, LCT presented the initial equity buy-in proposal from LCT to EMG in May 2014 (PX82 – A000260), and a related text message from Talarico to Kurz purportedly summarizing a buy-in structure (PX133 – A000277). A000893:17-A000894:8, A000913:7-11 (2/7/23 PM). Those documents reflected the failed negotiations that primarily occurred before LCT completed its services, with the same points of impasse persisting. And since *quantum meruit* retrospectively measures the market value of services provided, early-stage negotiations do not reflect cognizable damages in any event. *See Middle States*, 1996 WL 453418, at *11 ("*[q]uantum meruit* is a retrospective remedy").

Likewise, the trial court allowed LCT to play recordings of two Krimbill voicemails about the possible equity buy-in (PX442 (A000297) and PX426 (A000288)) after initially sustaining NGL's objections and ruling that those voicemails had to be excluded because they ran afoul of the Opinion's prohibitions against evidence sounding in fraud or contract, thereby creating the "risk of confusion and unfair prejudice" to NGL. A000984:12-A000985:3; A000976:1-A000978:4 (2/10/23 PM). That ruling was correct. The trial court changed its mind the next day, however, deciding those voicemails could be introduced as "admissions by a party opponent." *See* A001002:23-A001008:20 (2/13/23). And that decision constituted its own legal error because NGL's objections were based

on relevance and prejudice, not hearsay. *See Paron Cap. Mgmt, LLC v. McConnon*, 2012 WL 214777, at *3 (Del. Ch. Jan. 24, 2012) (allowing statements of party opponent "[p]rovided [they] are not inadmissible based on some other objection [the party] has raised…"). *See* A001002:23-A001008:20 (2/13/23).

The disconnect between failed negotiations about the proposed equity buy-in and the *quantum meruit* value of LCT's services is further confirmed by the positions LCT advanced at trial. For example, when advocating about a demonstrative exhibit, LCT contended that different alleged values of the failed buy-in negotiations (including those referenced in PX82 and PX133) "simply depend[ed] on whether the GP interests are valued as a consequence of the entity being worth a billion dollars [for buy-in purposes] or the entity being worth 1.2 billion. That's the only difference." A000859:16-20 (2/7/23 AM). The Opinion had correctly rejected such advocacy, since buy-in valuation figures—which fluctuate based on the GP value, not LCT's services—have nothing to do with the objective market value of LCT's services. The trial court nonetheless allowed LCT to conflate those distinct concepts by filling the record with inadmissible buy-in evidence.

CONCLUSION

LCT ultimately leveraged the Countermand to introduce an array of inadmissible exhibits and testimony that the Opinion had been correctly excluded. *E.g.*, A000260 (PX82), A000264 (PX94), A000267 (PX95), A000270 (PX101), A000273 (PX118), A000277 (PX133), A000279 (PX403), A000282 (PX424), A000286 (PX426), A000295 (PX442); A000822:9-A000831:5, A000843:22-A000845:22 (2/6/23); A000882:12-A000886:15, A000890:7-A000892:23, A000893:17-A000900:19, A000901:6-A000907:14, A000910:4-A000915:4 (2/7/23 PM); A000923:20-A000930:5, A000933:17-A000935:11 (2/8/23), A000943:23-A000944:12, A000948:18-A000958:7 (2/10/23 AM); A000966:2-7 (2/10/23 PM); A000993:5-A000997:18, A001002:23-A001012:20, A001015:2-A001017:10 (2/13/23); A001030:17-A001034:21, A001039:8-A001043:8, A001053:3-A001055:22 (2/14/23); A001071:15-19, A001076:8-A001077:1 (2/15/23). The resulting parade of exaggerated figures was tied to Talarico's subjective views, speculative future-value projections and failed negotiations—none of which were legally cognizable for *quantum meruit* damages.

Jury confusion was inevitable. And LCT used that evidence to inflame the jurors toward an inflated award—as confirmed by the punchline of its closing argument, when LCT improperly urged the jury to **"send a message"** with their verdict. A001078:4-8 (2/15/23). It was the three-word embodiment of a trial

presentation that had nothing to do with *quantum meruit* and made no attempt to comply with Delaware law.

Accordingly, NGL submits that reversal is warranted for each of the reasons discussed herein.

GREENBERG TRAURIG, LLP

/s/ Steven T. Margolin
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Dated: September 27, 2023

EXHIBIT A

EFiled: Jun 28 2023 04:29PM
Transaction ID 70295532
Case No. N15C-08-109 JJC CCLD

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

LCT CAPITAL, LLC,	:	
Plaintiff,	:	
v.	:	C.A. No. N15C-08-109 JJC [CCLD]
NGL ENERGY PARTNERS LP and **NGL ENERGY HOLDINGS LLC,**	:	
Defendants.	:	

~~[PROPOSED]~~ FINAL ORDER AND JUDGMENT

WHEREAS, on February 15, 2023, a jury returned a verdict in favor of Plaintiff LCT Capital, LLC ("LCT") and against Defendants NGL Energy Partners LP and NGL Energy Holdings LLC (collectively, "NGL") after a trial;

WHEREAS, on March 2, 2023, LCT filed an Application for (i) Costs, (ii) Pre-Judgment Interest, and (iii) the Setting of the Post-Judgment Per-Diem Interest Rate (the "Application");

WHEREAS, on May 2, 2023, the Court heard argument on LCT's Application;

WHEREAS, on June 20, 2023, the Court issued a Memorandum Opinion granting, in part, LCT's Application;

AND NOW, in consideration of the above, IT IS HEREBY ORDERED this 30th day of June, 2023, that:

1. Judgment is entered in favor of LCT for the full amount of the jury award in the amount of $36,000,000.00, plus costs and interest itemized below.

2. LCT is awarded costs of $74,833.18, as follows:

a.	Filing Fees and Costs	$14,919.26
b.	Trial Tech Fees	$35,262.50
c.	Copy Costs	$6,458.34
d.	Expert Witness Fees	$18,193.08

3. LCT is awarded pre-judgment interest on the jury verdict of $36,000,000.00 from July 1, 2014 to February 15, 2023, at the rates set forth in LCT's Application for a total of $19,945,726.02.

4. LCT is awarded post-judgment interest at the legal rate of 9.75% on the jury verdict of $36,000,000.00, accruing from the next day following the entry of the verdict (February 16, 2023), for a *per diem* of $9,616.44.

5. There being no further claims or issues to resolve, this order constitutes a Final Order and Judgment of the Court.

Judge Jeffrey J. Clark

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

LCT CAPITAL, LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. N15C-08-109 JJC CCLD
	:	
NGL ENERGY PARTNERS LP and NGL ENERGY HOLDINGS LLC,	:	
	:	
Defendants.	:	

Submitted: January 25, 2023
Decided: January 30, 2023

ORDER

On this 30th day of January 2023, after considering the parties' positions regarding the admissibility of evidence in the new trial, it appears to the Court that:

1. In 2015, Plaintiff LCT Capital, LLC ("LCT") sued Defendants NGL Energy Partners LP, and NGL Energy Holdings LLC (collectively "NGL") for breach of contract, fraud, and quasi-contractual damages. Initially, LCT's quasi-contractual claims included unjust enrichment and *quantum meruit*. After a first trial, post-trial decisions, and an interlocutory appeal, only a *quantum meruit* claim remains. Jury selection for a second trial will be on February 2, 2023, and it will begin on February 6, 2023.

2. At this stage of the litigation, the Superior Court's and the Supreme Court's prior decisions provide a tripartite law of the case. First, the Superior Court's undisturbed rulings before, during, and after the first trial control.[1] Second, the Delaware Supreme Court's decision on an interlocutory appeal commands

[1] *See e.g.*, *LCT Capital, LLC v. NGL Energy Partners LP*, 2019 WL 6896463 (Del. Super. Dec. 5, 2019).

primacy regarding the issues it either explicitly or implicitly decided.[2] Third, the Superior Court's recent decision regarding the parties' motions *in limine*, issued on December 22, 2022 (the "December decision"),[3] provides the evidentiary road map for next week's trial.

3. The Court's forty-page December decision decided five motions *in limine* and navigated the parties' numerous contentions. Namely, it granularly and carefully examined *Daubert* issues, issues of relevance based upon claims now removed from the case, and Delaware Rule of Evidence 403 concerns.

4. To navigate the law of the case, the Court first looks to the Delaware Supreme Court's explanation of the doctrine:

> the law of the case doctrine is a self-imposed restriction that prohibits courts from revisiting issues previously decided, with the intent to protect "efficiency, finality, stability, and respect for the judicial system." . . . The doctrine is not an absolute restriction, and it allows the Superior Court . . . to reexamine issues that are "clearly wrong, produce[] an injustice[,], or should be revisited because of changed circumstances.[4]

Here, the tripartite law of the case, when considered in its entirety, requires the Court to revisit one issue decided in the December decision.

5. To explain why it is necessary to do so, the Court first summarizes the nature of the two quasi-contractual claims that LCT originally pled. First, a contract implied in law may provide for a quasi-contractual claim for unjust enrichment. Damages under that mechanism turn on the *value of unfair gain enjoyed by the defendant*.[5] In that respect, it has more of a punitive and equitable flavor. LCT's claim for unjust enrichment no longer remains as part of the case.

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[2] *LCT Capital, LLC v. NGL Energy Partners* LP, 249 A.3d 77, 80 (Del. 2021); *see also Estate of Krieger v. AmGuard Insurance Co.*, 2021 WL 733442, at *2 (Del. Super. Feb. 25, 2021) (recognizing that the doctrine encompasses matters both explicitly and implicitly decided).
[3] *LCT Capital, LLC v. NGL Energy Partners LP*, 2022 WL 17851423 (Del. Super. Dec. 22, 2022).
[4] *State v. Wright*, 131 A.3d 310, 321 (Del. 2016) (citations omitted).
[5] *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010).

6. A second quasi-contractual claim provides recovery in *quantum meruit.* Recovery in *quantum meruit* turns on the *value of the plaintiff's services to the defendant.*[6] The phrase translates literally to "as much as he deserves."[7] The measure of value of the services must be "based on the facts of the case, as to the worth of *the specific services* rendered to the defendant[]."[8] The difference between unjust enrichment and *quantum meruit* claims distills to whether the plaintiff recovers for (1) the value of the benefits unjustly provided to the defendant (in the case of unjust enrichment), or (2) the value of the plaintiff's services (in the case of *quantum meruit*). In some cases, such as this one, the same evidence is admissible to prove both claims. In other cases, evidence offered to prove one may be separately inadmissible to prove the other.

7. Here, the Court's December decision bars LCT from attempting to prove the value that LCT added to NGL's acquisition. When doing so, it believed such value to no longer be relevant because no claim for unjust enrichment remains. LCT's claim seeks *quantum meruit* damages, however, for highly specialized and particularized investment banking services that it provided to NGL. In such a case, the appropriateness of a flat fee for LCT's services, as urged by NGL's expert, Ms. Lancaster, is not a foregone conclusion. Apart from Ms. Lancaster's testimony, there is evidence of record that supports an inference that the value of LCT's services cannot be reduced to such a flat fee. In fairness, the jury must be permitted to consider the increased value LCT added to the TransMontaigne acquisition when it decides how much LCT "deserves."

8. Along those same lines, the Supreme Court's decision in this case recognized that "LCT played an unusually valuable role in the transaction."[9]

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[6] *Marta v. Nepa*, 385 A.2d 727, 730 (Del. 1978).
[7] *Hynansky v. 1492 Hospitality Group, Inc.*, 2007 WL 2319191, at *1 (Del. Super. Aug. 15, 2007).
[8] *Id.* (emphasis added).
[9] *LCT Capital,* 249 A.3d at 80.

Elsewhere in the decision, the Supreme Court recognized that LCT's efforts were "extraordinary," "unique," and "critical," based upon the evidence presented at the first trial. [10] If the jury finds that LCT's efforts were unique, extraordinary, and critical in the retrial, it can permissibly place a value on those efforts when it determines how much LCT deserves.[11] After all, the *sole* goal of LCT's services was to increase the deal's value for NGL. It follows that for such unique, or one-of-a-kind, services, LCT should not be precluded from presenting evidence or argument that the reasonable value of its services cannot be ascertained without understanding the value it added to NGL's acquisition.[12]

9. To determine whether evidence is admissible, the Court must first ask the proponent to explain what he or she offers that evidence to prove. The answer dictates the relevancy of the evidence, and steers the balancing required by DRE 403. Here, LCT, does not offer the evidence of the value that it added to the TransMontaigne acquisition to prove NGL's unjust enrichment. Rather, it offers the evidence to prove the value of LCT's services given their unique character. Again, the relevance is properly viewed in the context of the goal of the services at issue – to add value to NGL's deal. Because the evidence is highly probative when offered to prove the value of what LCT did for NGL, and since a limiting instruction can adequately mitigate unfair prejudice, the Court modifies its previous decision of December 22, 2022, to clarify that such evidence is admissible.

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[10] *Id.* at 82, 101.

[11] The December decision incorrectly treats evidence of the value that LCT added to the deal as irrelevant because the Court dismissed LCT's unjust enrichment claim.

[12] While the Court recognizes LCT's argument that the Supreme Court's decision in *Marta v. Nepa*, 385 A.2d 727 (Del. 1978) could be read to preclude evidence of a typical commission or fee in this case, the Court will not revisit the December decision's ruling that Ms. Lancaster's opinion is admissible. She is expected to testify that a typical banker investment fee of .5 to 2 percent appropriately values LCT's services. The jury will be free to accept or reject her opinion. Similarly, it would be manifestly unfair to preclude LCT from presenting alternative evidence about how much value LCT's services provided NGL, since the goal of LCT's services, as indicated *supra*, was to increase value for NGL.

10. This ruling has at least one important implication regarding a central piece of evidence. Namely, the December decision found Mr. Krimbill's letter of October 24, 2014 (the "letter") inadmissible, at least in critical part.[13] The December decision also precluded one of LCT's experts, Mr. McQuilken, from discussing the letter in his testimony.[14] Mr. Krimbill wrote the letter in his capacity as Chief Executive Officer of NGL. In it, he recommended to NGL's owners that a certain buy-in arrangement for LCT was equivalent "to a $ 29 million success fee . . . [and was] a fair arrangement [to compensate LCT for its services]. . . as we never would have had this opportunity at our price without LCT bringing it to us." The letter assumed center stage in the first trial.[15] Next, after the first trial and on appeal, the Supreme Court quoted the letter approvingly when it recognized that a *quantum meruit* claim survived.[16] Here, the reasonable value of LCT's services *may,* in large part, depend on the value that LCT brought to NGL. When offered for that purpose, the letter is a highly relevant admission by a party opponent that the value of LCT's services was equivalent to $29 million.[17] Accordingly, it would be manifestly unfair to exclude important portions of the letter from evidence because those portions directly address what is in controversy. On balance, the letter is relevant, no DRE

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[13] *Id.* at *22–23.
[14] *Id.*
[15] *See LCT Capital*, 249 A.3d at 101, n.188 (quoting LCT's closing argument that addressed in detail the importance of Mr. Krimbill's $29 million valuation found in the letter).
[16] *Id.* at 100.
[17] NGL's arguments that the Court should exclude the letter because it interjects subjective opinion into what should be an objective determination is not availing for two reasons. First, there was never a contract, so there is no integrated agreement that generates parol evidence considerations. Nor does the objective theory of *contract* apply because there was no contract. Second, and more directly, the Delaware Rules of Evidence directly contemplate that an admission against interest includes the beliefs and opinions of a party-opponent if they are offered against the opponent's interest. D.R.E. 801(d)(2)(D).

403 concerns substantially outweigh its relevance, and it is non-hearsay as an admission.[18]

11. Apart from the letter and other NGL statements that may qualify as admissions regarding the value of LCT's services, this modification does little to alter the litigation's landscape. All other aspects of the case remain controlled by the December decision, with only these minor adjustments.

12. For instance, the permitted scope of Mr. McQuilken's proposed testimony remains nearly unchanged. In the December decision, the Court barred some of his opinions under *Daubert* as *ipse dixit* and as otherwise lacking foundation. [19] Those *Daubert*-based decisions provide that LCT may not offer Mr. McQuilken's opinions (1) that a reasonable fee range in this case would have been between $43.8 and $60 million, or (2) any other calculation that reduces his opinion regarding value to a firm figure.[20] Nevertheless, it would be inappropriate to preclude an expert from testifying about a document that is in evidence. He may explain the terms in the letter and how the equity buy-in proposal could have worked, as well as how the mechanism could have equated to a $29 million finder's fee as Mr. Krimbill acknowledged. Furthermore, as provided in the December decision, he may also explain the unique nature of LCT's services, and opine why he believes those services warrant a greater fee than would be available in standard investment banking efforts. [21]

13. The Court recognizes that admitting evidence regarding the value that LCT brought to this transaction risks prejudicing NGL. Any admission by a party-

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[18] The Court will entertain further argument from the parties regarding the possible redaction of paragraph one from the letter because it references value creation *after* the purchase, or, in the alternative, it will consider an additional limiting instruction to mitigate jury confusion. It will also consider any requested redactions from the letter referencing Energy Minerals Group because it is not a party to the case.

[19] *LCT Capital*, 2022 WL 17851423 at *14–16.

[20] *Id.* at 15, 17.

[21] *Id.* at 16, 18.

opponent that damages could be as high as $29 million may cause NGL prejudice. Likewise, NGL's proposed expert testimony that a standard investment banker fee would be appropriate (as low as $1 million), may prejudice LCT. *Unfair* prejudice is the catchphrase, however. In this case, DRE 403 concerns do not substantially outweigh the relevance of either parties' proffers. Nevertheless, because the Court recognizes that there is a risk of jury confusion, and unfair prejudice to NGL based upon "value added" evidence, the Court will entertain a request by NGL for appropriate limiting instructions both during trial and in the final charge. Such instructions may include, but not be limited to, telling the jury that: (1) the evidence of value added to the acquisition is offered only for the limited purpose of showing the reasonable value of LCT's services to NGL; (2) the jury cannot consider such evidence to conclude that the two reached an agreement on compensation, because they did not as a matter of law; and (3) the jury may not consider the evidence for any purpose other than for the limited purpose for which it was offered.

WHEREFORE, the Court's decision of December 22, 2022, is modified as set forth above. All other aspects of the December decision will control the parties' presentations at trial.

IT IS SO ORDERED.

/s/ Jeffrey J Clark
Resident Judge

JJC:klc
Via File & Serve Express

EXHIBIT C

EFiled: Jan 30 2023 03:56PM EST
Transaction ID 69030642
Case No. N15C-08-109 JJC CCLD

SUPERIOR COURT
of the
STATE OF DELAWARE

Jeffrey J Clark
Resident Judge

Kent County Courthouse
38 The Green
Dover, DE 19901
Telephone (302)735-2111

MEMORANDUM ORDER

TO: Counsel of Record

FROM: Resident Judge Clark

DATE: January 30, 2023

RE: Continuance Request in *LCT CAPITAL, LLC V. NGL ENERGY PARTNERS LP and NGL ENERGY HOLDINGS, LLC.*
C.A. No. N15C-08-109 CCLD

The Court has considered NGL's motion for an immediate continuance of the trial scheduled to begin on February 6, 2023. NGL contends that the matter must be continued because the Court has "reversed" itself, and dramatically changed the scope of the upcoming trial. NGL filed its motion on Friday, without the benefit of the Court's written decision, issued earlier today. LCT opposes a continuance and counters that the Court's clarifications will neither materially alter the scope of the trial nor unfairly prejudice NGL.

After considering the parties' positions, the Court **DENIES** NGL's motion for a continuance. As evident in the written decision regarding evidence issued today, the scope of the trial has not been materially altered. Nearly every issue resolved by the December decision remains the law of the case. Moreover, both parties (1) had a full opportunity to address the October 14, 2014, letter and the value-added issue in discovery, and (2) the letter was a front and center piece of evidence in the first trial. As a result, NGL will not be unfairly prejudiced by the denial of its motion. Here, there is no good cause to continue the trial given the age of the case, the parties'

mastery of the facts and law, and the Court's need to control its docket and its own scheduling. Jury selection will proceed on February 2, 2023, as set.

As a separate matter, the assigned civil case manager is preparing the combined *voir dire*. After the parties have had the opportunity to review it, either party may request a meeting if further discussion on voir dire is necessary. If that is the case, please contact the Court by noon on Wednesday so the Court can set a zoom conference to address any outstanding issues regarding voir dire on the afternoon of Wednesday, February 1, 2023.

IT IS SO ORDERED.

/s/ Jeffrey J Clark
Resident Judge

JJC:klc
Via File & ServeXpress

EXHIBIT D

EFiled: Dec 22 2022 03:45PM EST
Transaction ID 68723185
Case No. N15C-08-109 MAA CCLD

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

LCT CAPITAL, LLC,	)	
	)	
Plaintiff,	)	C.A. No. N15C-08-109 MAA CCLD
	)	
v.	)	
	)	
NGL ENERGY PARTNERS LP and NGL ENERGY HOLDINGS LLC	)	
	)	
Defendants.	)	
	)	

Submitted: December 21, 2022
Decided: December 22, 2022

Upon Plaintiff's Motion to Exclude Opinions and Testimony of Defendants' Rebuttal Expert, Lori A. Lancaster:
DENIED.

Upon Defendants' Daubert Motion to Exclude the Opinions of Kevin D. McQuilkin:
GRANTED, in part.

Upon Plaintiff's Motion in Limine to Hold NGL to Judicial Admissions and Exclude Evidence Suggesting the Value of LCT's Services Was Less Than $29 Million:
DENIED.

Upon Plaintiff's Motion in Limine to Exclude Evidence of a "Typical" Investment Banker Fee as Irrelevant to Quantum Meruit Damages:
DENIED.

Upon Defendants' Motion in Limine to Preclude Evidence or Argument Regarding Any Alleged Agreement Between the Parties:
GRANTED.

Upon Defendants' Motion in Limine to Preclude Evidence or Argument Regarding Alleged Fraud and-or Fraudulent Statements:
GRANTED.

Upon Defendants' Motion in Limine to Preclude Evidence or Argument Regarding Value Creation:
GRANTED.

MEMORANDUM OPINION

John L. Reed, Esquire (Argued) and Daniel P. Klusman, Esquire, of DLA PIPER LLP, Wilmington, DE, Attorneys for Plaintiff.

Steven T. Margolin, Esquire (Argued) and Samuel L. Moultrie, Esquire, of GREENBERG TRAURIG, LLP, Wilmington, DE, and Hal S. Shaftel, Esquire (Argued) and Daniel Friedman of GREENBERG TRAURIG, LLP, New York, NY, Attorneys for Defendants.

Adams, J.

MEMORANDUM OPINION AND ORDER

INTRODUCTION

Before the Court are Plaintiff's *Daubert* motion to exclude the opinions of Defendants' rebuttal expert, Lori Lancaster ("Lancaster"), and Defendants' *Daubert* motion to exclude the opinions of Plaintiff's affirmative expert, Kevin D. McQuilkin ("McQuilkin"). The parties have also collectively filed five motions *in limine* to exclude or admit various evidence, testimony, and argument at trial. The Court heard oral argument on the motions on November 9th and 15th, 2022. The Court reserved decision on the motions except for a portion of Defendants' *Daubert* motion.[1] The Court assumes familiarity with the procedural history and facts of the case and recites them only as necessary to conduct its analysis.[2]

ANALYSIS

The admissibility of expert testimony is governed by Delaware Rule of Evidence 702. Rule 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[1] *See infra* n. 36.

[2] The Court received and reviewed two letters from Plaintiff's counsel dated December 16, 2022 and December 20, 2022, along with Defendants' response dated December 19, 2022 and December 21, 2022. (Transaction IDs 68604430, 68686763, 68666949, and 68716708). As indicated during the conference with counsel about the letters, held on December 21, 2022, the Court has reviewed and considered the letters prior to issuing this decision.

The Supreme Court of Delaware has adopted the United State Supreme Court's holding in *Daubert v. Merrell Dow Pharmaceuticals*[3] and its progeny when interpreting a challenge to an expert report under Rule 702. The Supreme Court of Delaware applies the five-part test to determine the admissibility of expert or scientific testimony, which requires the trial judge to decide whether:

(1) The witness is qualified as an expert by knowledge, skill, experience, training or education;

(2) The evidence is relevant and reliable;

(3) The expert's opinion is based upon information reasonably relied upon by experts in a particular field;

(4) The expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and

(5) The expert testimony will not create unfair prejudice or confuse or mislead the jury.[4]

Once expert testimony is challenged, the trial court must ensure that the proffered testimony is both relevant and reliable.[5] "For expert opinion testimony to be relevant under *Daubert*, it must relate to an 'issue in the case' and 'assist the trier

[3] *See Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787, 794 (Del. 2006) ("Though the United States Supreme Court's interpretations of F.R.E. 702 in *Daubert* and *Kumho* are only binding upon federal courts, this Court has expressly adopted their holdings as correct interpretations of D.R.E. 702.") (internal citations omitted).
[4] *Bowen*, 906 A.2d at 795; *Wong v. Broughton*, 204 A.3d 105 (Del. 2019).
[5] *Marydale Preservation Assocs., LLC v. Leon M. Weiner & Assocs., Inc.*, 2022 WL 4394375, at *2 (Del. Super. Sept. 23, 2022) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993)).

of fact to understand the evidence or to determine a fact issue."[6] Although the trial court's Rule 702 inquiry is flexible, the inquiry must be based solely on principles and methodology, not on the conclusions they generate.[7] The party seeking to introduce expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence.[8] There is a "strong preference" for admitting expert opinions "when they will assist the trier of fact in understanding the relevant facts or the evidence."[9]

I. Plaintiff's *Daubert* Motion to Exclude the Opinions of Lori Lancaster Is DENIED.

Plaintiff makes three main arguments in support of its motion to exclude Lancaster from testifying:

A. Lancaster exceeds her scope as a rebuttal expert by:

1. Rebutting Plaintiff's rebuttal expert, David Adler ("Adler");
2. Rehabilitating Defendants' affirmative expert, Peter Keller ("Keller"); and
3. Presenting new opinions and data to supplement Keller's opinions.

[6] *Tumilson v. Advanced Micro Devices, Inc.*, 81 A.3d 1264, 1269 (Del. 2013) (citing *Daubert*, 509 U.S. at 591).
[7] *Id.* (internal quotations and citations omitted).
[8] *Bowen*, 906 A.2d at795.
[9] *Norman v. All About Women, P.A.*, 193 A.3d 726, 730 (Del. 2018).

B. Lancaster's opinion is unreliable because:

1. It ignores and rejects: the October 2014 Letter written by NGL CEO Mike Krimbill ("Krimbill")[10] and Krimbill's trial testimony; and
2. Lancaster never discussed Krimbill's views on Plaintiff's services or compensation with Krimbill directly.

C. Lancaster makes a credibility determination of Krimbill and thereby impermissibly invades the jury's province to do so.[11]

A. Lancaster does not impermissibly exceed the scope of a rebuttal expert.

"Rebuttal evidence is generally defined as evidence that explains, repels, counteracts, or disproves testimony or facts introduced by the adverse party. But purity of effect is not required. The fact that rebuttal evidence also tends to corroborate the party's affirmative case does not require its exclusion."[12] A rebuttal expert is permitted to use new methodologies "for the purpose of rebutting or critiquing the opinions of the [opposing party's] expert witness."[13]

[10] Ex. B to Pl. Mot. *in limine* to hold NGL to its judicial admissions and exclude evidence suggesting that the value of LCT's services was less than $29 million [hereinafter "October 2014 Letter"].
[11] Pl. *Daubert* Mot. at 23-27.
[12] *In re Oxbow Carbon, LLC Unitholder Litigation*, 2017 WL 3207155, at *1 (Del. Ch. July 28, 2017).
[13] *Scott v. Chipotle Mexican Grille, Inc*., 315 F.R.D. 33, 44 (S.D.N.Y. 2016) (quoting *Park W. Radiology v. CareCore Nat'l, LLC*, 675 F.Supp.2d 314, 326 (S.D.N.Y.2009).

As an initial matter, the Court does not find that Lancaster rebuts Adler in any meaningful way. In footnote one of the Lancaster Report, she indicates that she would be responding to Adler's report to the extent Adler opines on the value of Plaintiff's services.[14] On pages 15-16 of the Lancaster Report, she states that McQuilkin opines that publicly available fee data is "highly variable" and states in a footnote that Adler makes a similar claim.[15] Lancaster clarified during her deposition that, although she was rebutting a portion of Adler's report that is similar to McQuilkin's, Adler and McQuilkin "gave fairly similar views on how they think fee runs are or are not used in determining market-level investment banking fees."[16] A review of McQuilkin's and Adler's reports show that they do in fact provide very similar opinions on this issue. The Court cannot contemplate how Lancaster would be able to rebut those opinions of McQuilkin that are similar to Adler's without also rebutting Adler's opinions. For these reasons, the Court does not find that the Lancaster Report or anticipated testimony amounts to an impermissible sur-rebuttal.

Plaintiff also claims Lancaster exceeds her scope as a rebuttal expert because her opinions are duplicativeof Keller's. A comprehensive review of the Lancaster

[14] Expert Report of Lori Lancaster, at 1[hereinafter "Lancaster Report"].
[15] *Id.* at 16, n. 47.
[16] Dep. of Lori Lancaster at 71-72. "So, I'm not rebutting only Mr. Adler's view versus Mr. McQuilkin's, 'cause they're basically the same – they're basically the same view in my reading. I am rebutting that idea, which is contained in both of their reports. . . . they both criticize investment banking fee precedence obtained via fee runs, as non-comprehensive. . . . There is not a separate section of my report that solely discusses Mr. Adler." *Id.* at 72-74.

Report shows that it rebuts McQuilkin's opinions with the following assertions: Plaintiff's services were customary investment banking services and were not unusually extensive; Plaintiff's services warranted a standard investment banking fee; and "investment banking services, unlike private equity investment, are not valued by or compensated through value-creation calculations".[17] The fact that Lancaster's rebuttal happens to corroborate Keller's affirmative opinions does not mandate its exclusion.[18]

The Court also does not find that Defendants are impermissibly stacking duplicative experts by their intention to present one affirmative and one rebuttal expert who share some opinions. The purpose of excluding duplicative experts is to prevent undue prejudice to the opposing party from having to depose and rebut several experts "on the same subject matter where one expert witness would be sufficient to make the point."[19] The Court does not find that Plaintiff would be unfairly prejudiced from the presentation of two experts, especially considering that Plaintiff has deposed Lancaster.

Finally, the Court does not find that Lancaster is categorically barred from analyzing "entirely new data" by virtue of her role as a rebuttal expert.[20] McQuilkin

[17] Lancaster Report at 1-2.
[18] *In re Oxbow Carbon LLC Unitholder Litigation*, 2017 WL 3207155, at *1 (Del. Ch. July 28, 2017).
[19] *Bingham v. Adobe Equipment Holdings, Ltd.*, 2008 WL 11379993, at *4 (D. Wyo. 2008).
[20] Pl. *Daubert* Mot. at 21.

asserts in his report that there is no typical investment banking fee in the industry.[21] Lancaster directly rebuts McQuilkin's claim by presenting publicly available fee run data showing a range of fees based on a percentage of the transaction price.[22] Nothing in Rule 702 or the *Daubert* standard prevents this method of rebuttal. If an affirmative expert claims that there is an absence of data, a rebuttal expert is permitted to attempt to rebut that claim by proving the existence and reliability of such data.

B. Lancaster's opinion is reliable.

Plaintiff argues that Lancaster's decision to not consider and assign greater weight to the October 2014 Letter and Krimbill's trial testimony equates to "cherry picking" evidence to support a foregone conclusion.[23] Even if it were true that Lancaster failed to account for this information, Plaintiff has not provided sufficient evidence that neglecting to do so makes her opinion unreliable. Plaintiff has provided no support that an expert must consider a rejected post-transaction fee proposal to properly opine on an investment banker's fee.

More importantly, Plaintiff's allegations that Lancaster failed to consider this information is demonstrably false. Lancaster dedicates a separate section of her report to McQuilkin's analysis of the parties' negotiations and references the

[21] Expert Report of Kevin D. McQuilkin at 5. [hereinafter "McQuilkin Report"].
[22] Lancaster Report at 17.
[23] Pl. *Daubert* Mot. at 23.

October 2014 Letter in 5 discrete instances.[24] Plaintiff also takes issue with the fact that Lancaster disregards the section of the October 2014 Letter in which Krimbill purports that "LCT was able to get [Morgan Stanley] to deal directly with Defendants outside of an auction process."[25] This portion of the October 2014 Letter is inconsistent with the Wall Street Journal Article on which it is based, which reported bids from Defendants and Buckeye Partners LP among others.[26] Lancaster's opinion is not unreliable for electing to not blindly adopt inaccuracies in the October 2014 Letter. To the contrary, Lancaster's decision is illustrative of her thorough review of the record and additional documents salient to the transaction.

Plaintiff's contention that the Lancaster Report is unreliable because she did not conduct a separate interview with Krimbill is without merit.[27] There is no requirement that an expert conduct a separate interview with relevant witnesses. The Court finds that Lancaster sufficiently familiarized herself with Krimbill's position by reviewing his 500-page deposition transcript.[28]

Finally, Plaintiff contends Lancaster's opinions on a proper damage award are unreliable because they are based on terms the parties never discussed, specifically

[24] Lancaster Report at 20-22, 26-27.
[25] *Id*. at 25.
[26] Justin Baer, Christian Berthelsen, & Ryan Dezember, *Morgan Stanley Moves Closer to Oil-Business Sale,* THE WALL STREET JOURNAL (May 23, 2014), https://www.wsj.com/articles/SB10001424052702303749904579580573288840450; *see* Lancaster Report at 15, n. 44.
[27] *See* Pl. *Daubert* Mot. at 23.
[28] Ex. B to Lancaster Report.

fee run data.[29] This argument is also without merit. The question is whether the bases for Lancaster's opinions are in line with the proper measure of *quantum meruit* damages, not whether they are in line with the parties' negotiations. *Quantum meruit* damages is the sole issue that remains in this case. The parties' motion practice makes evident that a discussion of the proper measure of *quantum meruit* damages is imperative.

Quantum meruit is a restitutionary theory of recovery available in a quasi-contractual relationship.[30] A quasi-contract is "one where the law will infer the existence of a contractual relationship without regard to the actual intention of the parties where circumstances are such that justice warrants a recovery as though there had been a promise or contract."[31] *Quantum meruit* damages are based on an objective reasonable valuation of the services provided by reference to the fair market value of those services.[32] A reasonable valuation is "the amount for which

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[29] Pl. *Daubert* Mot. at 3.

[30] *Middle States Drywall, Inc. v. DMS Properties-First, Inc.*, 1996 WL 453418, at *10 (Del. Super. May 28, 1996) (stating *quantum meruit* is a quasi-contractual remedy); *Caldera Properties-Lewis/Rehoboth VII, LLC, v. Ridings Development, LLC*, 2009 WL 2231716, at *31 ([Q]uantum *meruit* is a principle of restitution arising from a cause of action in quasi-contract.").

[31] *Caldera Properties-Lewis/Rehoboth VII, LLC*, 2009 WL 2231716, at *31; *United Health Alliance, LLC v. United Medical, LLC*, 2014 WL 6488659. at *7 (Del. Ch. Nov. 20, 2014) (internal citations omitted); *Bellanca Corp. v. Bellanca*, 169 A.2d 620, 623 (Del. 1961) ("Quasi-contractual relationships are imposed by law in order to work justice and without reference to the actual intention of the parties.").

[32] *Middle States Drywall, Inc.*, 1996 WL 453418, at *10-11 (*quantum meruit* damages is the "reasonable value of the material or services [Plaintiff] rendered. . . ." as measured by "the amount for which such services could have been purchased from one in the plaintiff's position at the time and place the services were rendered."); *Cheeseman v. Grover*, 490 A.2d 175, 177 (Del. Super. Feb. 1, 1985) (holding a party may recover under quantum meruit for the "reasonable value of the

such services could have been purchased from one in the plaintiff's position at the time and place the services were rendered."[33]

Lancaster is not required to base her opinions on the parties' negotiations, and her opinions are not unreliable because they rely more heavily on fee run data. Experts opining on *quantum meruit* damages are obligated to base their analysis on an objective valuation of the services provided by reference to data as well as their own specialized knowledge and experiences in the field. The Court also notes that there is evidence demonstrating the parties did consult fee run data during negotiations.[34] Plaintiff's claim that the parties never discussed fee run data is inconsistent with the record in this case.

C. Lancaster does not make a credibility determination of Krimbill.

Lancaster disagrees with some of Krimbill's characterizations and assertions in the October 2014 Letter. Lancaster disagrees with Krimbill's characterization of his proposed compensation as a "$29 million success fee," his characterization that Defendants purchased TransMontaigne outside of an auction process, and his

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services rendered, as opposed to the sum agreed to be paid therefor. . . . The alleged agreement for plaintiffs to receive the [decedent's] estate may be relied upon only to show that plaintiffs did not act gratuitously."); DAN B. DOBBS, LAW OF REMEDIES 388 (2d ed. 1993)("A recovery under *quantum meruit* usually appears to mean a recovery for the value of the services, measuring value in the labor market where the service itself was sought by the Defendants.").

[33] *Middle States Drywall, Inc.*, 1996 WL 453418, at *10. *See also Hynansky v. 1492 Hospitality Group, Inc.*, 2007 WL 2319191, at *1 (Del. Super. Aug. 15, 2007); *Caldera Properties-Lewis/Rehoboth VII, LLC*, 2009 WL 2231716, at *31.

[34] JX056; LCT002806.

assertion that Defendants would have never had the opportunity to purchase TransMontaigne at the price it did without Plaintiff.[35]

As an initial matter, Krimbill's assessment of Plaintiff's services is his subjective opinion and Lancaster is at liberty to disagree with it; it is not an assertion of fact to be proven true or false. In disagreeing with Krimbill's valuation of his services, Lancaster is not making an accusation that Krimbill is being untruthful. Rather, Lancaster is asserting that her analysis of Plaintiff's services, the context of the transaction, and publicly available fee data lead her to a contrary conclusion.

A thorough review of the Lancaster Report and deposition shows that she critically analyzed Plaintiff's services and assessed their value by a thorough application of sound principles and methods. Lancaster is well within her province as an expert to assess claims in the October 2014 Letter against other evidence on the nature and value of Plaintiff's services. The fact that Lancaster's perspective does not support Plaintiff's claim of damages is irrelevant to her qualifications under Rule 702 or the *Daubert* standard. Lancaster's contrary opinion also does not deprive the jury of its opportunity to weigh Krimbill's testimony. For these reasons, Plaintiff's *Daubert* motion to exclude Lancaster's opinions is DENIED.

[35] Pl. *Daubert* Mot. at 25.

II. Defendants' *Daubert* Motion to Exclude the Opinions of Kevin D. McQuilkin Is GRANTED IN PART and Defendants' Motion *in Limine* to Exclude Evidence of Value Creation Is GRANTED.

Defendants seek to exclude McQuilkin's testimony on the following grounds:

(1) McQuilkin does not use reliable methodology in forming his opinions because he impermissibly engages in *ipse dixit*.[36]

(2) McQuilkin's opinions violate the law of the case.

(3) McQuilkin impermissibly relies on the rejected "value creation" theory of damages.

Defendants have also filed a separate motion *in limine* to exclude evidence of value creation. Because this motion *in limine* overlaps with the section of Defendants' *Daubert* motion related to value creation evidence, the Court will address these value creation arguments together.

A. McQuilkin's opinions that amount to *ipse dixit* are excluded.

The Court finds that a portion of the McQuilkin Report is unreliable because it equates to *ipse dixit.* *Ipse dixit* is Latin for "he himself said it" and stands for the general prohibition of opinions supported only by the qualifications of the expert

[36] Defendants' *Daubert* motion also alleges that McQuilkin impermissibly relies on undisclosed information. Def. *Daubert* Mot. at 13. On November 9, 2022, after the parties presented argument on this motion, the Court ordered Plaintiff to disclose McQuilkin's undisclosed deal information to Defendants' attorneys only, and permitted Defendants to take McQuilkin's deposition to examine him about these transactions. *LCT Capital, LLC v. NGL Energy Partners LP*, Del. Super., C.A. No. N15C-08-109, Adams, J. (Nov. 9, 2022), Judicial Action Form. Information gathered from the deposition shall be for attorneys' eyes only as well. *Id.* As of the issuance of this order, the Court understands that the discovery is proceeding in compliance with the Court's ruling.

that cannot be reasonably traced to other authority or proof.[37] A court is under no obligation "to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."[38]

Defendants provide five examples of McQuilkin's opinions that Defendants argue are *ipse dixit*.[39] The Court addresses each in turn. In examples one and two, McQuilkin opines that 22-30% of the deal price, or a floor of $43.8 million, is a reasonable compensation for Plaintiff's services. The Court finds that these two examples qualify as *ipse dixit.* McQuilkin's deposition confirms that he could not tie this opinion to anything in his prior experience. The closest example McQuilkin could provide was a fee that was 10% of the deal price.[40] There is little doubt that McQuilkin's calculation of damages as shown in the above examples is derived from the proposed fee arrangement rather than his 35 years of experience as an investment banker.

The fact that McQuilkin's opinions, as contained in the first two examples of *ipse dixit,* are derived from the proposed fee arrangement in the October 2014 Letter provides a separate basis for their exclusion.[41] As shown in Section VII.B. of the

[37] Black's Law Dictionary 847 (8th ed. 2004).
[38] *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).
[39] Def. *Daubert* Mot. at 10-11.
[40] Dep. of McQuilkin at 98-99.
[41] McQuilkin Report at Section VII.B.3. In Section VII of the McQuilkin Report, titled "Value of LCT's Services Based on the Negotiations/Alleged Oral Agreement" McQuilkin calculates the

McQuilkin Report, the range of compensation of $43.8-$60 million is a direct derivation of the equity buy-in transaction proposed in the October 2014 Letter, based on McQuilkin's valuation of the NGL GP.[42] As the Court discusses in detail below, benefit-of-the bargain damages are an impermissible measure of *quantum meruit* damages. McQuilkin is not permitted to testify to damages based on Plaintiff's expectation interests in the agreement it purports to have reached with Defendants.

With respect to the third example in Defendants' motion, McQuilkin is permitted to testify to the general proposition that the nature and extent of services justifies higher compensation. The Court appreciates the inherent difficulties in distilling investment banker services into a purely mathematical calculation and understands that there is not a perfect linear relationship between the type, extent, and combination of services on the one hand, and compensation on the other. Both parties' experts appear to agree that there is a great degree of variability in investment banking advisory fees.[43] McQuilkin testified in his deposition that it is difficult to quantify how certain variables impact the fee—when the advisor generates the idea to the client, for example—in part because it is typically only one

value of the allegedly promised compensation (VII.B.) from the value of the NGL GP, which equates to 22%-30% of the $200 million transaction price.

[42] *Id.*

[43] *Id.*; Dep. of Kevin D. McQuilkin at 96-97; *see also* Lancaster Report at 17.

variable among a host of others.[44] The Court finds that McQuilkin has a reasonable basis for making this assertion based on his 35 years of experience in the field. The question of whether McQuilkin can testify to specific examples of particular services resulting in higher fees can be properly addressed on cross-examination.

The Court does not find that Defendants' fourth example, McQuilkin's statement in his report and deposition testimony that value creation is an important factor in negotiating fees, is *ipse dixit*, but limits the extent to which McQuilkin can testify about value creation.[45] McQuilkin, however, is permitted to testify about whether he or former colleagues discussed with clients speculative value created by a proposed transaction. McQuilkin is precluded from testifying to his mathematical calculation of the value created to NGL by the transaction or the cash equivalent of the proposed equity buy-in arrangement that is derived from that post-acquisition valuation.[46]

During McQuilkin's deposition, he provided sufficient testimony demonstrating that, in his experience, value creation is a relevant factor in fee negotiations.[47] Although McQuilkin could not quantify how value creation increased the fee or recall examples of when speculative value creation increased the

[44] Dep. of McQuilkin at 98-101.
[45] Def. *Daubert* Mot. at 11. *See infra* at Section II.B.-C. for the Court's discussion of applying value creation methodology to the proposed equity buy-in transaction as memorialized in the October 2014 Letter.
[46] McQuilkin Report at Section VII.
[47] Dep. of McQuilkin at 147-49.

fee, he testified at his deposition that there were multiple instances where the negotiation involved a discussion of the value the proposed transaction could create as one factor among many.[48] McQuilkin affirmed that, in his experience, clients were willing to pay higher fees based on speculative value creation.[49] McQuilkin testified to the practical difficulties in determining what proportion of a fee was a result of speculative value creation as opposed to other components.[50]

Plaintiff has shown by a preponderance of the evidence that McQuilkin is sufficiently qualified as an expert on investment banker fees to testify about discussing value creation with clients. The Court is not in a position to find that investment bankers do not discuss value creation with their clients or that valuation creation has no influence in fee negotiations. Whether McQuilkin can testify to concrete examples and provide a mathematical description of the relationship between value creation and an investment banker's fee should be determined through cross-examination.

With respect to the fifth example in Defendants' motion, to the extent McQuilkin was aware of other investment bankers in the field receiving equity compensation as financial advisory fees, he is permitted to testify to this.[51] The basis

[48] *Id.* at 148.
[49] *Id.* at 147-48.
[50] *Id.* at 148-49.
[51] Def. *Daubert* Mot. at 11.

for this opinion can be addressed through cross-examination. The Court reiterates that McQuilkin cannot base his opinion of *quantum meruit* damages on the proposed equity buy-in transaction contained in the October 2014 Letter.

B. McQuilkin's Reliance on the Parties' Alleged Promised Compensation as Contained in the October 2014 Letter Violates the Law of the Case and Case Law on *Quantum Meruit* Damages

In his report, McQuilkin provides opinions based on the parties' negotiations, alleged oral agreement, and the proposed fee agreement in the October 2014 Letter.[52] The extent to which McQuilkin's opinions, based on the proposed fee arrangement in the October 2014 Letter, are admissible at trial can be informed by a review of *quantum meruit* damages—the one issue remaining in the case—as well as those claims that are no longer in the case.[53] In the context of *quantum meruit*, evidence of an alleged agreement is only permitted to rebut an allegation that the plaintiff provided the services gratuitously.[54] Here, Defendants have conceded that Plaintiff provided services and that it was on notice that Plaintiff expected to be paid for those services.[55] This concession obviates Plaintiff's need to present evidence of an alleged agreement.

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[52] McQuilkin Report at Section VII-VIII.
[53] *See supra* Section I.B. n. 30-33 and accompanying text for the proper measure of *quantum meruit* damages.
[54] *Cheeseman v. Grover*, 490 A.2d 175, 177 (Del. Super. Feb. 1, 1985) ("The alleged agreement for plaintiffs to receive the [decedent's] estate may be relied upon only to show that plaintiffs did not act gratuitously").
[55] *See Hynansky v. 1492 Hospitality Group, Inc.*, 2007 WL 2319191, at *1 (Del. Super. Aug. 15, 2007) (holding to prevail on quasi-contract theory plaintiff must show he provided services with the expectation of payment and that Defendants was on notice of this expectation).

There is no longer a contract claim or fraud claim left in the case. In its breach of contract claim, Plaintiff "alleged that [Plaintiff] and [Defendants] formed an oral contract based on the fee that Krimbill purportedly offered to Louis C. Talarico, III, the principal of Plaintiff LCT Capital, LLC, in May 2014."[56] In July 2018, the Superior Court granted Defendants' motion for summary judgment and dismissed Plaintiff's breach of contract claim finding that "neither party manifested objective assent . . . ." and that "the essential terms were not sufficiently definite . . . . [s]pecifically [Plaintiff's] finder's fee."[57]

With respect to Plaintiff's fraud claim, the Supreme Court reasoned that Plaintiff "presented a unitary theory of damages" which "focused exclusively on the value of the services that it provided" and did not include evidence of damages independently caused by Defendants' alleged fraudulent conduct.[58] The Supreme Court held that "where the defendant's fraud did not induce the plaintiff to form a contract, out-of-pocket damages typically measure the full scope of plaintiff's injuries."[59] Because Plaintiff's contract claim was dismissed, the Supreme Court found that Plaintiff was limited to seeking out-of-pocket damages for the fair value of services that it provided, not benefit-of-the-bargain damages.[60] The Supreme

[56] *LCT Capital, LLC v. NGL Energy Partners LP*, 249 A.3d 77, 85 (Del. 2021); Compl. ¶ 152-160.
[57] *LCT Capital, LLC v. NGL Energy Partners LP*, Del. Super., C.A. No. N15C-08-109, at *21-22, Carpenter, J. (July 19, 2018) (Mem. Op.).
[58] *LCT Capital, LLC*, 249 A.3d at 95.
[59] *Id.* at 94.
[60] *Id.* at 98.

Court found that out-of-pocket damages were "identical to the compensation that LCT [was] entitled to receive for its *quantum meruit* claim."[61] The Supreme Court therefore held that the Superior Court abused its discretion in ordering another trial on fraud damages and struck the jury's fraud verdict because Plaintiff could not recover for the same loss twice.[62]

It appeared to the Supreme Court that Plaintiff sought "benefit-of-the-bargain damages solely to protect its expectation interests in the bargain that Krimbill proposed but the parties never formed because they could not agree on all of the material terms."[63] The Supreme Court held that this was a remedy Plaintiff could not receive and acknowledged the inherent challenges in fairly and accurately valuing the benefit of a bargain the parties never formed.[64] The Court noted that:

> "[e]ven if the details of Krimbill's offer are ascertainable, we do not know what terms the parties would have agreed to because the parties never agreed to all of the material terms of [Plaintiff's] fee . . . . This uncertainty also creates a risk that benefit-of-the-bargain damages would provide [Plaintiff] with a windfall by awarding [Plaintiff] with the benefit of a generous bargain to which [Defendants] would not have agreed. Such a windfall would be contrary to Delaware law."[65]

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[61] *Id.*
[62] *Id.* at 97-98. "[Plaintiff's] fraud claim failed because it was not supported by damages independent from the *quantum meruit* claim." *Id.* at 98.
[63] *Id.* at 95.
[64] *Id.* at 95-96.
[65] *Id.* (internal citations omitted).

The Supreme Court's decision makes clear that the benefit Plaintiff asserts it would have received from the unconsummated contract should not factor into *quantum meruit* damages. McQuilkin's opinions stemming from Sections VII-VIII of his report which value Plaintiff's services based on the parties' alleged promised compensation, and portions of Section IX that make reference to the October 2014 Letter, are therefore excluded.[66] McQuilkin is not permitted to testify to the estimated cash value of the equity buy-in proposal based on his calculation of the value created from the transaction of the NGL GP.[67]

With respect to Section VIII ("The October 24, 2014 Letter"), McQuilkin's opinions derived from those portions of the October 2014 Letter that relate to the fee proposal are excluded.[68] Opinions derived from those portions of the October 2014 Letter that speak only to the nature and quality of the services provided are permitted. For clarity, below are the excerpts from the October 2014 Letter that the parties' experts are precluded from testifying to:

- "We are proposing that LCT acquire 5% for our NGL General Partner for a $21 million purchase price. We would like to have the NGL General Partner purchase this 5% for $50 million so there is no dilution ($1 billion enterprise value), and then sell it to LCT. This equates to a $29 million success fee which appears 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. . . ."

[66] McQuilkin Report at Sections VII-IX.
[67] *Id.* at Section VII.
[68] *Id.* at Section VIII.

- Paragraphs 1, 3, and 7 of the October 2014 Letter are excluded, except for the following excerpt in paragraph 7: "we never would have had this opportunity at our price without LCT bringing it to us."[69]

McQuilkin is permitted to testify to his specialized knowledge and experience of how investment banker fees are determined (Section VI), with the exception that he is not permitted to testify based on the following sentence: "In my judgment, [Plaintiff's] approach of seeking equity as compensation rather than cash is the purest form of alignment of interests with a client."[70] McQuilkin is also permitted to testify to his assessment of the nature, quality, and scope of the services Plaintiff provided as indicated in the first four paragraphs of Section IX of his report.[71] McQuilkin is not permitted to testify to the remainder of Section IX that relates to his opinions on value created to Defendants from the transaction and its relation to Plaintiff's damages.[72]

C. McQuilkin's Mathematical Calculation of *Quantum Meruit* Damages Derived from a Value Creation Theory of Damages are excluded

Defendants contend that damages under *quantum meruit* are calculated without reference to the value created or benefit received from the services provided.[73] In addition to the reasons stated in the preceding section, McQuilkin is precluded from testifying to his calculations of damages that are based on value

[69] Ex. C to Def. *Daubert* Mot.
[70] McQuilkin Report at Section VI.
[71] *Id.* at Section IX.
[72] *Id.*
[73] Def. *Daubert* Mot. at 20.

created to Defendants from the transaction because this methodology is contrary to the law of the case and relevant case law.[74]

This Court has already ruled that Plaintiff was not permitted to introduce evidence or testimony based on a value creation theory of *quantum meruit* damages.[75] After Plaintiff made reference to the value created by the transaction during its opening argument at the first trial, the Court emphasized that it was not going to permit any expert to testify to calculations of *quantum meruit* damages based on value created to Defendants.[76] The jury instructions also stated that the value of services under *quantum meruit* "is not measured by reference to any value created after [Defendants'] acquisition of TransMontaigne."[77] Plaintiff did not object to this instruction and the Supreme Court found on appeal that Plaintiff had waived this issue.[78] In addition to the law of this case, as a general matter, Delaware case law holds that recovery under *quantum meruit* damages is the value of the services provided, not the value of the benefit received.[79] There has been no change in the facts of this case or relevant case law to merit a change in course now.

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[74] McQuilkin Report at Sections VII-IX.
[75] *See infra* n. 75-77 and accompanying text.
[76] *LCT Capital, LLC v. NGL Energy Partners LP*, C.A. No. N15C-08-109 (WCC) (July 24, 2018) (TRANSCRIPT at 17).
[77] *LCT Capital, LLC v. NGL Energy Partners LP*, 2018 WL 4600489 (2018) (Jury Instructions).
[78] *LCT Capital, LLC v. NGL Energy Partners LP*, 249 A.3d 77, 102 (Del. 2021).
[79] *Hynansky v. 1492 Hospitality Group, Inc.*, 2007 WL 2319191, at *1 (Del. Super. Aug. 15, 2007) (the value of services under quantum meruit is "not the value of the benefit received" but the "amount for which such services could have been purchased from one in the plaintiff's position at the time and place the services were rendered."); *Marta v. Nepa*, 385 A.2d 727, 730 (Del. 1978)

This Court also notes that admitting value creation evidence would likely confuse and mislead the jury. Admitting such evidence would require the parties to present a multitude of additional evidence and testimony for the jury to distinguish between the value created from Plaintiff's services and value created independent of its involvement. The value created by the acquisition was a result of the complex interplay of myriad factors beyond the control of Plaintiff. The introduction of such evidence would most likely present intractable causation issues for the jury which is likely to result in their confusion and a windfall for Plaintiff that *quantum meruit* damages does not permit.

III. Plaintiff's Motion *in Limine* to Hold Defendants to Judicial Admissions and Exclude Evidence Suggesting That the Value of Plaintiff's Services Was Less Than $29 Million is DENIED.

The Court's analysis of this motion begins with a brief review of the claims remaining in this case and the testimony provided by Krimbill at the first trial. The Superior Court dismissed Plaintiff's breach of contract claim in 2018.[80] On appeal, the Supreme Court struck the jury's fraud verdict and held that Plaintiff's fraud claim failed.[81] The one claim remaining in this case is *quantum meruit* damages.[82]

(holding that evidence on remand should include testimony by expert witnesses "as to the worth of the specific services rendered to [Defendant] by [Plaintiff] and the reasonable compensation which [plaintiff] deserves therefor."). *See also supra* n. 30-33 and accompanying text.

[80] *See supra* Section II.B., n. 56-57 and accompanying text.

[81] For a detailed discussion of the outcome of Plaintiff's fraud claim see *supra* Section II.B., n. 58-62 and accompanying text.

[82] *See supra* I.B., n. 30-33 and accompanying text for the proper measure of *quantum meruit* damages.

At trial, on direct examination, Krimbill testified that "we certainly had 5% for $21 million."[83] Again on direct, when examined about whether Krimbill's fee recommendation in the October 2014 Letter which "equates to a $29 million success fee," was an accurate statement when he wrote it, Krimbill responded "yes."[84] Krimbill confirmed through his testimony that the following statement in the October 2014 Letter was true: "I feel this is a fair arrangement, although seemingly expensive, as we would never have had this opportunity at our price without LCT bringing it to us."[85]

In this motion *in limine*, Plaintiff asserts that Krimbill's testimony regarding his views on Plaintiff's compensation is a judicial admission. In essence, Plaintiff asserts that $29 million should constitute the floor for *quantum meruit* damages and that Defendants should not be permitted to submit evidence or elicit testimony that anything less than that amount is an appropriate damage award.[86]

The Supreme Court of Delaware defines judicial admissions as "[v]oluntary and knowing concessions of fact made by a party during judicial proceedings" which include statements contained in testimony.[87] Judicial admissions, which "are

[83] *LCT Capital, LLC v. NGL Energy Partners LP*, C.A. No. N15C-08-109, (WCC) (July 27, 2018) (TRANSCRIPT at 55).
[84] *LCT Capital, LLC v. NGL Energy Partners LP*, C.A. No. N15C-08-109, (WCC) (July 26, 2018) (TRANSCRIPT at 30).
[85] *Id.*
[86] Pl. Mot. to Hold Defendants to its Judicial Admissions, at 6, 9.
[87] *Merritt v. United Parcel Service*, 956 A.2d 1196, 1201 (Del. 2008).

traditionally considered conclusive and binding both upon the party against whom they operate, and upon the court"[88] are distinct from evidentiary admissions, which may be controverted or explained by the adverse party.[89] The court may, in its sound discretion, relieve a party from the conclusiveness of its judicial admission.[90]

The definition of a judicial admission and the law of the case dictate that Plaintiff's motion be denied. The Court finds Krimbill's testimony that "we certainly had 5% for $21 million" and his testimony confirming the statements in the October 2014 Letter are not judicial admissions because they are *not concessions of fact* as to the minimal monetary value of Plaintiff's services.

The Court finds the testimony, "we certainly had 5% for $21 million," is a subjective perception regarding the parties' negotiations about an appropriate fee and nothing more. Krimbill's testimony confirming the statement in the Letter that "*I feel* this is a fair arrangement . . ."[91] is evidence of the subjective nature of his views. While it may be a fact that Krimbill *believed* the parties had reached such an agreement and that he *believed* the arrangement was fair, it does not necessarily follow that the parties did reach an agreement or that the alleged agreement is in fact fair. Plaintiff here conflates beliefs and facts. A belief may or may not be an

[88] *Id.* at 1201-02.
[89] *Keller v. United States*, 58 F.3d 1194, 1198 n. 8 (7th Cir. 1995).
[90] *Merritt*, 956 A.2d at 1202.
[91] October 2014 Letter. (emphasis added).

expression of fact. The very purpose of this trial is for the jury to determine the fair monetary value of Plaintiff's services based on competing expert testimony and the parties' conflicting beliefs and opinions. The Court declines Plaintiff's request to end this trial before it begins.[92]

Through this motion, Plaintiff essentially seeks to controvert this Court's dismissal of its breach of contract claim by asking this Court to enter as a judicial admission an alleged agreement on Plaintiff's fee. The Court cannot allow this.

The Court also finds that qualifying Krimbill's testimony as a judicial admission would directly conflict with the Supreme Court's holding in this case. If the Supreme Court intended to anchor the jury to a floor of $29 million, it would

[92] Even if the testimony that "we certainly had 5% for $21 million," was a concession of fact, entering this testimony as a judicial admission would convert it into at least a mixed finding of fact and law, and in so doing contradict the definition of a judicial admission. *Eagle Force Holdings, LLC v. Campbell,* 187 A.3d 1209, 1213 (Del. 2018) ("whether the contract's terms are sufficiently definite, is largely a question of law."); *AT&T Corp. v. Lillis*, 953 A.2d 241, 248 (Del. 2008) quoting *Lillis v. AT&T Corp*., 896 A.2d 871, 877 n. 10 (Del. Ch. 2005) ("judicial admissions apply only to admissions of fact, not to theories of law, such as contract interpretation"); *Twin Willows, LLC v. Pritzkur*, 2022 WL 3039775, at *6 (Del. Ch. 2022) ("Judicial admissions which are binding on the tendering party are limited to factual matters in issue and not to statements of legal theories or conceptions.") (internal citations omitted). Under Delaware law, whether terms are sufficiently definite to form a contract is largely a question of law. *Eagle Force Holdings, LLC v. Campbell,* 235 A.3d 727, 732 (Del. 2020) (affirming its reasoning in *Eagle Force Holdings, LLC v. Campbell,* 187 A.3d 1209, 1213 (Del. 2018) that "whether the contract's terms are sufficiently definite, is largely a question of law.") Converting Krimbill's testimony that "we certainly had 5% for $21 million" to a judicial admission would be converting it to a concession of a theory of law, namely that there was an express agreement regarding a particular term of compensation. Such a conversion would be in direct violation of the definition of a judicial admission. Admitting Krimbill's testimony as evidence of a definite agreement on minimum compensation would in effect reverse the settled law of the case: there was no contract. *LCT Capital, LLC v. NGL Energy Partners LP*, Del. Super., C.A. No. N15C-08-109, Carpenter, J. (July 19, 2018) (Mem. Op.). The law of the case dictates that Plaintiff's finder's fee was not sufficiently defined. *Id.*

have taken the opportunity to do so. To the contrary, the Supreme Court found that the jury may have determined $4 million was the fair value of Plaintiff's services under *quantum meruit*.[93] Binding the jury in the upcoming trial to $29 million would prohibit its ability to make a decision based on the evidence presented.[94]

IV. Plaintiff's Motion *in Limine* to Exclude Evidence of a "Typical" Investment Banker Fee As Irrelevant to Quantum Meruit Damages Is DENIED.

Plaintiff argues that evidence of a typical fee should be excluded because the parties never discussed typical investment banker fees during their negotiations over Plaintiff's compensation.[95] Plaintiff also argues that the inclusion of such evidence is contrary to case law on *quantum meruit* damages.[96]

Pursuant to the Delaware Rules of Evidence, evidence is admissible if it is relevant unless it is otherwise excluded by a statute, the rules of evidence, or other rules applicable to the courts in this state.[97] Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence.[98] Even if the evidence is relevant, the Court has discretion to exclude it if its probative value is

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[93] *LCT Capital, LLC v. NGL Energy Partners LP*, 249 A.3d 77, 101 (Del. 2021).
[94] The Court is not ruling that Krimbill's testimony from the prior trial is completely excluded. The Court only rules that the testimony is not a judicial admission.
[95] Pl. Mot. to Exclude Evidence of a Typical Investment Banker Fee as Irrelevant to Quantum Meruit Damages, at 2 [hereinafter "Pl. Mot. to Exclude Typical Fee Evidence"]. *See supra* Section I.B. for the Court's disposition of this argument.
[96] *Id.* at 6.
[97] D.R.E. 402.
[98] D.R.E. 401.

substantially outweighed by a danger of one or more of the factors listed in D.R.E. 403.[99] Considering the low evidentiary threshold for relevance and the proper measure of *quantum meruit* damages, the Court finds that expert testimony on typical investment banker fees is relevant to determining the reasonable value of the services Plaintiff provided in this case.[100]

The Court does not find that the risk of unfair prejudice to Plaintiff from presenting evidence of a typical fee will substantially outweigh the probative value of that evidence.[101] Although the Court recognizes the shortcoming of fee run data, the jury can assess the reliability of this evidence through Plaintiff's cross-examination of Defendants' experts. It is within the jury's province and ability to consider the differing valuations of Plaintiff's services as provided by the parties' experts. Excluding this evidence would do more to unfairly prejudice Defendants. Both parties will have ample opportunity to present evidence regarding the nature and extent of the specific services and the appropriate compensation for these services.

[99] "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." D.R.E. 403.
[100] *See supra* I.B., n. 30-33 and accompanying text for the proper measure of *quantum meruit* damages.
[101] D.R.E. 403.

The case law also does not require the exclusion of this evidence. Plaintiff relies heavily on *Marta v. Nepa*[102] in support of its argument that a standard commission is not relevant to *quantum meruit* damages. The Supreme Court in *Marta* reversed the Superior Court's award of a 4% commission to the plaintiff-real estate broker and remanded for an evidentiary hearing on the issue of damages.[103] The court reasoned that a standard commission was "neither equivalent to nor commensurate with the evidence required for determining a recovery based on *quantum meruit*" and "may or may not" reflect the value of the services provided.[104] The Supreme Court instructed that the evidence offered on remand "should include opinion testimony by expert witnesses, in response to hypothetical questions based upon the particular facts of this case, as to the worth of the specific services rendered. . . ."[105] The Supreme Court ordered the Superior Court to consider evidence in the form of expert testimony in addition to, not to the exclusion of, evidence of a standard commission.[106]

The Court here also finds that there is less of a risk that the jury here will make an erroneous decision from this type of evidence than in *Marta.* As indicated by the

[102] 385 A.2d 727 (Del. 1978).
[103] *Id.* at 730.
[104] *Id.*
[105] *Id.*
[106] *Id.* On remand, the Superior Court considered testimony from the plaintiff's and the Defendants' experts regarding standard commissions and the Supreme Court affirmed. *Nepa v. Marta,* 415 A.2d 470, 472 (Del. 1980).

Supreme Court in *Marta*, standard commissions for real estate brokers are prospective in that they are determined before the services are provided and, for this reason, may not be an accurate reflection of the work done.[107] In contrast, Defendants' experts opine in their reports that investment banking fees tend to be at least partially retrospective.[108] The experts on both sides in this action opine that investment banking fees tend to be agreed upon midstream when some of the services have already been provided and when the scope of future work is more ascertainable.[109] Typical investment banker fees are likely to be more closely aligned to *quantum meruit* damages, which is a retrospective remedy, than standard commissions for real estate brokers.[110]

Additionally, unlike real estate broker commissions that are selected from a single standard, the Lancaster Report reflects a broad range of fees that vary based on the level of services.[111] It appears to the Court that applying data on typical

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[107] *Marta*, 385 A.2d at 730.

[108] *See* Lancaster Report at 24 ("advisors are primarily involved in a transaction prior to signing of definitive agreements."); Def. Opp. To Pl. Mot. to Exclude Typical Fee Evidence at 6-7.

[109] *Id.* Dep. of McQuilkin at 45, 47 ("[Y]ou have to get an idea of what's going to happen before you have a reasonable view of what the fees should be. . . . It is typical in the industry, especially when working with financial sponsors, that they will say, we'll work it out later. And your leverage as a banker, in a very competitive business where you are trying to win and work with important clients that you just – you have to trust them.").

[110] *See Middle States Drywall, Inc. v. DMS Properties-First, Inc.*, 1996 WL 453418, at *11 (Del. Super. May 28, 1996) ("*Quantum meruit* is a retrospective remedy which looks at what was *actually* received by the defendant, rather than a prospective remedy which looks at what the defendant *expected* to receive.") (emphasis in original).

[111] *See* Lancaster Report at 17. The largest fee in Lancaster's data set is 71 times greater than the smallest fee. *Id.*

investment banker fees to this case has a greater potential to accurately value Plaintiff's services as compared to standard commissions in the real estate broker context.

The Court further notes that the expected presentation of such evidence is not novel to this case or within *quantum meruit* case law.[112] Plaintiff has provided no compelling reason why this Court should depart from prior evidentiary decisions in this case. For these reasons, Plaintiff's motion to exclude evidence of a typical fee is hereby DENIED.

V. Defendants' Motion *in Limine* to Preclude Evidence or Argument Regarding Any Alleged Agreement Between the Parties Is GRANTED.

In this motion, Defendants seek to preclude all evidence and testimony regarding an alleged agreement or contract between the parties regarding compensation for Plaintiff's services. As discussed, the Superior Court has already

[112] Plaintiff consulted fee run data during its negotiations with Defendants (JX056; *see* Dep. of McQuilkin at 92-93), Plaintiff's own expert at the first trial testified that investment banks regularly use fee run data to negotiate the value of their services (JX056), and evidence of a typical fee derived from fee run data was also presented at the first trial in this matter. For cases that have admitted evidence of standard or typical fees to support *quantum meruit* damages, *see Bellanca Corp. v. Bellanca*, 169 A.2d 620, 622 (1961); *Glissman v. Gross*, 2018 WL 3660357, at *6 (S.D. Ga. Aug. 2, 2018) (holding "typical charge for services is evidence of value conferred in a quantum meruit claim . . . ."); *Sanjiv Goel, M.D., Inc. v. Regal Med. Grp., Inc*. 11 Cal. App. 5th 1054, 1063 (Cal. Ct. App. 2017) (holding trial court properly considered Defendants expert's testimony concerning fees charged by other providers for similar services for plaintiff's *quantum meruit* claim); *Learning Annex Holdings v. Rich Global*, 2012 WL 2878124, at *5 (S.D.N.Y. July 13, 2012) (holding plaintiff provided sufficient evidence for jury to find that compensation for licensing agents is typically based on a percentage of royalty revenues).

dismissed Plaintiff's breach of contract claim.[113] The Supreme Court affirmed the Superior Court's holding that Plaintiff was not entitled to benefit-of-the-bargain damages because Defendants' alleged fraud did not induce Plaintiff to form a contract.[114] *Quantum meruit* damages is the one issue remaining in this case and is to be calculated independent of any alleged agreement."[115]

Plaintiff cites *Pike Creek Professional Center v. Eastern Elec. & Heating, Inc.*[116] and *Bellanca Corp. v. Bellanca*[117] to support its position that the parties' alleged agreement is admissible to show the value of its services. Neither *Pike Creek* nor *Bellanca* stand for the proposition Plaintiff asserts. In *Pike Creek*, there was a contract between the parties and the plaintiff was permitted to submit the contract price as an admission of value.[118] Similarly, in *Bellanca,* the plaintiff alleged a breach of an express contract and, after presenting his case in chief, amended his complaint to include recovery on a *quantum meruit* basis.[119] Because the plaintiff in

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[113] *LCT Capital, LLC v. Defendants Energy Partners LP*, Del. Super., C.A. No. N15C-08-109, at *21-22, Carpenter, J. (July 19, 2018) (Mem. Op.).
[114] *LCT Capital, LLC v. Defendants Energy Partners LP*, 249 A.3d 77, 92-95 (Del. 2021).
[115] *See supra* Section I.B., n. 30-33 and accompanying text for the definition of *quantum meruit* damages. *See also Pike Creek Professional Center v. Eastern Elec. & Heating, Inc.*, 540 A.2d 1088 (TABLE),1998 WL 32028, at *2 (Del. 1988) (affirming trial court's *quantum meruit* award that excluded plaintiff's bargained-for profits).
[116]1987 WL 9610 (Apr. 7, 1987), *aff'd* 540 A.2d 1088.
[117] 169 A.2d 620 (Del. 1961).
[118] 1988 WL 32028, at *2 ("In meeting its burden of establishing the reasonable value of the benefit conferred, [Plaintiff] was properly permitted to introduce the contract price 'as evidence of an admission by the parties of [the] value of Plaintiff's services'") (quoting *Emerson v. Universal Products Co*., 162 A.2d 779, 881 (Del. Super. Oct. 17, 1932).
[119] *Bellanca*, 169 A.2d at 621-22.

Bellanca claimed the defendant breached an express contract, the plaintiff was permitted to testify to the compensation allegedly agreed upon as evidence of the value of his services.[120] Unlike in *Pike Creek* and *Bellanca*, in the present case there is no contract and thus no basis to submit evidence of compensation to which the parties allegedly agreed.

For these reasons, the following terminology, or any substantially similar word or phrase that a reasonable juror would equate with these terms, is EXCLUDED:

- "an oral contract"
- "verbal contract"
- "agreement"
- "verbal agreement"
- "agreed to"
- "the fee agreement"
- "our deal"
- "the contract"
- "the amount promised"

Neither party is permitted to frame, characterize or qualify any negotiations, discussions, or proposals as culminating in a shared agreement, contract, promise or resolution of the issue of compensation. The Court acknowledges the inherent challenges in applying this ruling at trial. Considering the unique facts of this case, the Court anticipates that the distinction between negotiations and an alleged agreement may at times be difficult to discern. This concern should be adequately

[120] *Id.*

addressed through timely objections and sidebar discussions between the Court and counsel.

Although the Court is prohibiting any evidence of an alleged agreement regarding compensation, this does not bar the parties from submitting evidence or eliciting testimony of fee negotiations, to the extent that they make no reference to value created by the transaction or the equity buy-in proposal. Some or perhaps most evidence relating to the parties' fee negotiations is subjective in nature insofar as it conveys the parties' perceptions of value, as opposed to publicly available fee run data on investment banker fees. The Court acknowledges that admitting evidence of subjective perceptions of value is contrary to case law stating that *quantum meruit* damages are to be based solely on objective measures of a plaintiff's services.[121] Considering, however, that the publicly available fee run data includes as little as 5% of all merger and acquisition transactions,[122] the Court finds that the jury should

[121] *See supra* Section I.B., n. 30-33 and accompanying text for a discussion of the measure of *quantum meruit* damages.

[122] *See* McQuilkin Report at Section VI (publicly available fee data "only includes a very small subset of actual negotiated fees because only publicly disclosed fees are used. Public fee disclosure generally only results from the filing of a proxy statement (or other public disclosure) on a deal, which happens infrequently to begin with and, when focused on buy-side fees [. . .] few proxies (for example) will include such information as the audience tends to be the seller's shareholders, not the buyer's."); When explaining the sample size in the Refinitiv Eikon data Lancaster analyzed in the Report, which had a sample size of 50 deals between 2000-2016 with a transaction price of $100million-$1 billion, she testified, "Does it represent a material portion of the deals in that time period? No, for the reason we've talked about: These are publicly available fees." Dep. of Lancaster at 160, Lancaster Report at 17; Adler Report at 5 ("[I]n the United States, there are thousands of M&A transactions each year as reported in publicly-available [sic] sources such as the Wall Street Journal. Only a very small fraction of these transaction involved public companies (typically less than 5% of all M&A transactions). As a result, the fees paid on the overwhelming

not be solely confined to hearing this evidence, but should have the opportunity to weigh this evidence against the parties' discussions of the appropriate fee for Plaintiff's services. The Court finds that permitting the jury to consider testimony and evidence on typical investment banker fees together with the parties' fee negotiations (excluding discussions of value creation and the equity buy-in proposal) will increase the likelihood of an appropriate damage award.

The Court notes that it is not breaking new ground in this case by permitting evidence of the parties' fee negotiations. As stated in the Superior Court's 2018 Memorandum Opinion on Defendants' motion for summary judgement, this evidence remains relevant to the parties' perceptions of the value of the services provided.[123] The Superior Court held that Plaintiff could submit this evidence as probative of the appropriate damage award.[124] It also appears to the Court that the Supreme Court agreed that this evidence could support a *quantum meruit* damages award.[125] For the reasons discussed, while the parties may submit evidence and elicit

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majority of M&A transactions are not publicly-available [sic]. Moreover, anyone who bases an advisory fee solely on a fee run, is missing more than 95% of the market.").

[123] *LCT Capital, LLC v. NGL Energy Partners LP*, Del. Super., C.A. No. N15C-08-109, at *23-24, Carpenter, J. (July 19, 2018) (Mem. Op.) ("[T]he Court wants to be clear that it is in no way implying conversations, discussions, communications and emails between the parties and their representatives are no longer relevant. They are. If the CEO of NGL made representations that he believed the compensation package suggested by LCT was fair and appropriate and was working toward accomplishing it, those comments are relevant to the quantum meruit [sic] claim.").

[124] *Id.*

[125] *LCT Capital, LLC v. NGL Energy Partners LP*, 249 A.3d 77, 100-101 (Del. 2021). The Supreme Court posited that the jury may have intended to award Plaintiff with more than $4 million in *quantum meruit* damages and split its award between the two damages lines for *quantum*

testimony on the parties' fee negotiations and discussions, Plaintiff is precluded from submitting evidence or argument regarding an alleged agreement. Defendants' motion *in limine* to exclude evidence or argument on an alleged agreement is GRANTED.

VI. Defendants' Motion *in Limine* to Preclude Evidence or Argument Regarding Alleged Fraud And-Or Fraudulent Statements Is GRANTED.

Plaintiff alleged fraudulent misrepresentation in Count III of its amended complaint.[126] On appeal, the Supreme Court struck the jury's fraud verdict and held that Plaintiff's fraud claim failed.[127] Evidence or argument of fraud is not probative of the reasonable fair market value of the services. Whether Defendants were dishonest toward Plaintiff during negotiations about compensation is distinct from the nature and quality of the services Plaintiff provided. There is no evidentiary basis to submit evidence of fraud, thus Defendants' motion to exclude this evidence is granted.[128] In an effort to provide the parties with concrete guidance and minimize

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meruit and fraud. The Court reasoned that this was a possibility in light of the evidence the jury received suggesting Plaintiff provided "unusually valuable services" and then discussed the equity buy-in proposal and description of services in the October 2014 Letter. *Id.*

[126] Compl. ¶ 168-73. Plaintiff alleged Defendants fraudulently misrepresented that as a fee for Plaintiff's services, it would receive a 2% ownership interest in NGL Holdings with an option to purchase an additional 3% at a $700 million valuation, and with the taxes to be paid by Defendants. *Id.* This claim as well as Plaintiff's *quantum meruit* claim proceeded to trial and the jury awarded Plaintiff $29 million in damages for the fraud claim. *LCT Capital, LLC v. NGL Energy Partners LP*, Del. Super., C.A. No. N15C-08-109, Carpenter, J. (Aug. 1, 2018) (TRANSCRIPT OF VERDICT at 4).

[127] For a detailed discussion of the outcome of Plaintiff's fraud claim see *supra* Section II.B., n. 58-62 and accompanying text.

[128] The Court also finds that, considering the minimal probative value of this evidence, the risk of unfair prejudice substantially outweighs its probative value. D.R.E. 403. There is a significant likelihood that if the jury is presented with evidence suggesting that Defendants misled, falsely

any ambiguity that may result from this order, the Court is providing a list of terms and phrases that are excluded as fraud evidence. Plaintiff is not permitted to submit evidence or argument that includes the following terminology or any substantially similar word or phrase that a reasonable juror would equate with these terms:

Evidence or argument:

1. Of "promises" or "representations" by Defendants
2. That Defendants allowed or induced Plaintiff to believe a fee agreement had been reached
3. Of false representations made by Defendants
4. Of allegations that Defendants "strung Plaintiff along"
5. Of a "verbal agreement" or "verbal contract"
6. That Defendants "backed away from their commitment"
7. That Defendants engaged in negligent conduct or were negligent in its communications with Plaintiff
8. That Defendants concealed material facts from Plaintiff
9. Of justifiable or reasonable reliance by Plaintiff resulting from Defendants' conduct or statements.

This list is not meant to be exhaustive. As the parties are in a greater command of the evidence they intend to present, the Court expects that they are in a better position to identify which evidence falls under the category of fraud.

represented or fraudulently induced Plaintiff into believing that a certain compensation arrangement would result, that it will inflame the jurors' emotions and cause them to select a damage amount predominantly on that basis instead of the value of Plaintiff's services. Plaintiff should not be awarded any damages on this basis because there is no longer a fraud claim.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Exclude Opinions and Testimony of Defendants' Rebuttal Expert, Lori A. Lancaster is DENIED; Defendants' *Daubert* Motion to Exclude the Opinions of Kevin D. McQuilkin is GRANTED, in part; Plaintiff's Motion *in Limine* to Hold NGL to Judicial Admissions and Exclude Evidence Suggesting the Value of LCT's Services Was Less Than $29 Million is DENIED; Plaintiff's Motion *in Limine* to Exclude Evidence of a "Typical" Investment Banker Fee as Irrelevant to Quantum Meruit Damages is DENIED; Defendants' Motion *in Limine* to Preclude Evidence or Argument Regarding Any Alleged Agreement Between the Parties is GRANTED; Defendants' Motion *in Limine* to Preclude Evidence or Argument Regarding Alleged Fraud and-or Fraudulent Statements is GRANTED; and Defendants' Motion *in Limine* to Preclude Evidence or Argument Regarding Value Creation is GRANTED.

IT IS SO ORDERED.

/s/ Meghan A. Adams

Meghan A. Adams, Judge

EXHIBIT E

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

LCT CAPITAL, LLC,	)	
	)	
	)	
	)	
Plaintiff,	)	
v.	)	C.A. No. N15C-08-109 WCC CCLD
	)	**FILED UNDER SEAL**
NGL ENERGY PARTNERS LP and NGL ENERGY HOLDINGS LLC,	)	
	)	
Defendants.	)	
	)	

Submitted: July 10, 2018
Decided: July 19, 2018

Defendants' Motion for Partial Summary Judgment Granted in Part and Denied in Part

MEMORANDUM OPINION

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CARPENTER, J.

Before the Court is NGL Energy Partners LP's and NGL Energy Holdings LLC's (collectively, "NGL" or "Defendants") Motion for Partial Summary Judgment of LCT Capital, LLC's ("LCT" or "Plaintiff") Amended Complaint. For the reasons set forth below, Defendants' Motion is partially granted and partially denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

This action stems from the acquisition of the ownership of TransMontaigne Inc. ("TransMontaigne") by NGL. LCT alleges that it played a pivotal role in the acquisition of TransMontaigne and NGL breached its contractual obligation to pay a significant finder's fee to LCT for its services. LCT is a Texas-based investment and banking firm, which specializes in advising energy companies and private equity firms.[1] NGL is headquartered in Oklahoma and is in the business of transporting, storing, and marketing energy commodities.[2]

A. THE TRANSMONTAIGNE ACQUISITION

In December 2013, LCT learned that Morgan Stanley planned to sell its ownership of TransMontaigne, a refined petroleum products distributor.[3] LCT's founder and President, Louis C. Talarico, III ("Talarico"), believed TransMontaigne

[1] Pl.'s Am. Compl. ¶2.
[2] *Id.* ¶¶23–24.
[3] *Id.* ¶29.

would be an attractive investment and sought potential partners to participate in the sales process.[4]

LCT identified non-party The Energy and Minerals Group ("EMG") as a possible candidate and discussed a potential acquisition with them.[5] After learning of EMG's interest, LCT engaged in several discussions with Morgan Stanley "in an effort to get EMG invited to participate as a potential buyer in the sales process."[6] On March 19, 2014, Morgan Stanley emailed LCT inviting EMG to participate in the TransMontaigne sale, which was code named "Project Titanium."[7] Over the next two months, LCT continued to advise EMG on the merits of acquiring TransMontaigne and negotiated with Morgan Stanley on their behalf.

B. NGL ENTERS TRANSMONTAIGNE ACQUISITION

While working with EMG on Project Titanium, LCT continued to consider other potential strategic partnerships for the transaction.[8] LCT believed NGL could be a "good fit" because, among other reasons, TransMontaigne could provide NGL an opportunity to build its fuel business. In addition, there were already close ties between EMG and NGL: EMG owned 12.1% of NGL Holdings at that time and Raymond, EMG's CEO, among other EMG representatives, served on NGL

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[4] *Id.* ¶¶3, 30–32.
[5] *Id.* ¶33. On March 6, 2014, Talarico expressed its interest in partnering with EMG to John Raymond ("Raymond"), EMG's Chief Executive Officer.
[6] *Id.*
[7] Pl.'s Am. Compl. ¶¶33–35.
[8] *Id.* ¶¶40–41.

Holding's Board of Directors.[9] Talarico raised the idea with EMG, and EMG agreed to consider NGL's involvement in the transaction.[10] LCT, EMG, and NGL met on April 22, 2014, at EMG's offices in Houston. Following LCT's Project Titanium presentation, NGL's CEO, H. Michael Krimbill ("Krimbill") indicated that NGL was interested in participating in the sales process.[11] NGL made clear early on, however, that it desired "to purchase as much of the transaction as possible...."[12]

After weeks of communication among the parties and EMG, it was ultimately decided on May 15, 2014, that NGL would bid for 100% of the TransMontaigne acquisition, with EMG participating indirectly by virtue of its ownership interest in NGL.[13] The next day, NGL formally proposed buying TransMontaigne.

C. CLOSING THE TRANSMONTAIGNE ACQUISITION

On June 5, 2014, NGL's Board of Directors approved the transaction. Krimbill introduced Talarico at the Board meeting and highlighted LCT's ongoing contributions to consummating the deal.[14] From June 6 to June 8, LCT worked closely with Morgan Stanley and NGL to resolve any remaining contract issues. Finally, on June 8, 2014, NGL Energy Partners and Morgan Stanley signed the

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[9] *Id.* ¶¶41–44.
[10] *Id.* ¶44.
[11] *Id.* ¶47.
[12] *Id.* ¶48.
[13] Pl.'s Am. Compl. ¶¶48–51.
[14] LCT continued to take the lead on all negotiations and communications with Morgan Stanley.

TransMontaigne Purchase Agreement ("Purchase Agreement").[15] In the weeks that followed until closing, LCT continued to assist NGL and advice the company on operational issues and financing options until the transaction officially closed on July 1, 2014.[16]

The final purchase price for TransMontaigne was $200 million, an alleged "incredible bargain" given that NGL was not the only investor interested in TransMontaigne.[17] According to LCT, it was the LCT's and NGL's ability to complete a "full perimeter" transaction that made NGL's offer more attractive and also enabled "LCT to successfully negotiate and execute the transaction on favorable terms for NGL."[18] The TransMontaigne acquisition has "been an enormous success" for NGL, "creat[ing] hundreds of millions of dollars of value for NGL and its owners, including Mr. Krimbill."[19]

D. LCT'S FINDER'S FEE

As the TransMontaigne transaction progressed, LCT began to negotiate a fee for its services with NGL. On or around May 9, 2014, Talarico requested LCT's fee

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[15] *Id.* ¶56.
[16] *Id.* ¶¶58–59.
[17] Allegedly other interested investors were estimated to have offered Morgan Stanley over twice that amount to acquire the assets. *Id.* ¶60 ("Media outlets estimated that other potential buyers were offering Morgan Stanley as much as $450 million—more than twice the amount paid by NGL—for certain TransMontaigne assets.").
[18] *Id.* (alleging "LCT also persuaded Morgan Stanley to accept favorable working capital calculations that resulted in an additional $140 million in net working capital for NGL").
[19] *Id.* ¶61.

take the form of a 15% ownership interest in TransMontaigne, plus the right to purchase an additional 10% as a co-investment.[20] NGL countered with a proposal that LCT receive a 2% ownership interest in NGL Holdings. At the time the parties used a company valuation of $700 million in determining the value of any ownership interest.[21]

LCT asserts that on May 17, 2014, Krimbill agreed on behalf of NGL that LCT's fee would consist of: (i) a 2% ownership interest in NGL Holdings at a $700 million valuation; (ii) NGL's payment of LCT's taxes on its ownership interest; and (iii) an option to purchase an additional 3% ownership interest in NGL Holdings.[22] On May 22, 2014, Krimbill communicated to Talarico that NGL wanted to structure LCT's 2% ownership interest in a way that deferred NGL's tax liability over 10–15 years. Talarico responded that LCT was open to alternative arrangements, so long as the underlying economic terms of their agreement remained intact.[23] The parties again verbally confirmed LCT's fee agreement terms on May 30, 2014.[24]

On June 4, 2014, as the parties were meeting to finalize the purchase of TransMontaigne, Talarico met with Krimbill and Bruce Toth ("Toth"), NGL's legal counsel, in Denver, Colorado, to discuss drafting the parties' agreement with respect

[20] Pl.'s Am. Compl. ¶63.
[21] *Id.* ¶65.
[22] *Id.* ¶68.
[23] *Id.* ¶70.
[24] *Id.* ¶73.

to LCT's fee. At the meeting, Krimbill dictated the terms of the parties' agreement to Toth.

Per Toth's request, LCT confirmed the terms of its fee via email the following day: "[LCT] will receive 2% of [NGL Holdings] at $700 million valuation; NGL to pay taxes[.] We will have the opportunity to purchase up to 3% of the [NGL Holdings] at a $700 million valuation."[25] Toth did not question or challenge the accuracy of the terms reflected in Talarico's email.[26]

On June 8, 2014, NGL signed the Purchase Agreement, which explicitly provided LCT's "[f]ees and expenses will be paid by [NGL]."[27] The terms of the fees and expenses of LCT, however, were not included in the Purchase Agreement and no formal contract for those fees was ever created. On June 16, 2014, Raymond emailed Talarico to ensure NGL was honoring its obligations under the Purchase Agreement.[28] On June 23, 2014, Talarico sent Toth a draft engagement letter for LCT.[29] Talarico and Toth discussed the engagement letter further over the phone that day.[30] On July 1, 2014, after the TransMontaigne transaction closed, Toth

[25] *Id.* ¶76.
[26] Pl.'s Am. Compl. ¶76.
[27] *Id.* ¶78.
[28] *Id.* ¶81.
[29] *Id.* ¶82.
[30] *Id.*

contacted Talarico and insisted LCT had not been forgotten.[31] Toth assured Talarico the process should move more quickly now that the acquisition had closed.[32]

In July and August 2014, NGL allegedly became too distracted by the TransMontaigne acquisition to finalize LCT's fee agreement.[33] At this time, NGL was also in the midst of a Board dispute with SemGroup, an entity which had placed two directors on NGL's Board.[34] As a result, on July 24, 2014, Krimbill informed Talarico that NGL would have to reach a resolution with SemGroup before it could address LCT's fee agreement.[35] On August 4, 2014, Krimbill told Talarico that Toth "was going to start working on the process for LCT to receive its agreed-upon ownership interests in NGL Holdings."[36]

With no progress being made and the dispute with SemGroup ongoing, Talarico requested a specific timeline for NGL's payment of LCT's fee.[37] In order to sell the 2% interest to LCT, Krimbill would have to ask that other NGL Holdings owners dilute their own interests.[38] Krimbill told Talarico the process would take

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[31] Pl.'s Am. Compl. ¶ 83.
[32] *Id.*
[33] *Id.* ¶¶85–91.
[34] *Id.* ¶¶93–96.
[35] Krimbill reassured LCT that he was in support of LCT receiving interest in NGL Holdings because LCT's services throughout the TransMontaigne acquisition were quite valuable. *Id.* ¶ 97. The SemGroup dispute would persist through October 2014. *Id.* ¶¶ 99–105.
[36] Pl.'s Am. Compl. ¶98.
[37] *Id.* ¶106.
[38] *Id.*

approximately two weeks.[39] On October 24, 2014, more than four months after closing the TransMontaigne deal, Krimbill again informed Talarico that Toth would draft a purchase agreement for LCT's fee.[40] Krimbill also represented that he sent a letter to the other NGL Holdings owners regarding LCT's interests, but declined to share the letter with Talarico.[41] The letter purportedly reflected that LCT would be paying $21 million for a 5% ownership interest in NGL Holdings.[42] These terms quite clearly differed from the terms to which LCT and NGL had already purportedly agreed, namely that LCT was to receive a 2% ownership at a $700 million valuation with the option to purchase an additional 3% interest.[43]

Over the next month, Talarico was unable to discuss the fee transaction and its tax consequences with anyone at NGL.[44] Finally, on November 25, 2014, Krimbill told Talarico that he intended to alter the agreement's terms, and admitted it was contrary to what they had originally discussed.[45] Talarico reiterated LCT's willingness to consider an alternative fee structure, so long as the fee agreement's core economics remained the same.[46]

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[39] *Id.*
[40] *Id.* ¶108.
[41] *Id.* ¶109.
[42] Pl.'s Am. Compl. ¶110.
[43] *Id.*
[44] *Id.* ¶116.
[45] *Id.*
[46] *Id.*

In January 2015, Talarico told Krimbill that LCT wanted NGL to honor the fee agreement's terms.[47] Krimbill responded that while NGL could provide a tax indemnification to LCT, it would not explicitly pay LCT's taxes directly.[48] On January 20, 2015, Krimbill proposed a new fee agreement: LCT would receive a 2% interest in NGL at a $700 million valuation, sign a services contract allowing it to recognize its income over 10-15 years, and have the option to purchase an additional 3% interest.[49] Under this framework, the 2% interest was a profits interest, not equity.[50] In March 2015, Talarico told Krimbill:

> [W]e should close this . . . fee . . . we agreed to last year. There is no reason why the fee should have changed in any way. [LCT] has been patient and supportive of discussing new structures. However, we need to be made whole on what we agreed to.[51]

It was at this time that Krimbill replied that NGL never agreed to LCT's proposed fee.[52] Throughout the remainder of March and into April of 2015, the parties exchanged proposals on the fee structure.[53] By the end of April 2015, the parties were "generally in agreement,"[54] but Krimbill advised that he wanted to redistribute

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[47] *Id.* ¶119.
[48] Pl.'s Am. Compl. ¶119.
[49] *Id.* ¶121.
[50] *Id.* ¶¶122–25.
[51] *Id.* ¶129.
[52] *Id.* ¶¶129–31.
[53] *Id.* ¶¶133–34.
[54] Pl.'s Am. Compl. ¶135.

some of LCT's $21.0 million investment to the other NGL Holdings owners,[55] and told Talarico to "take it or leave it."[56] On May 18, 2015, Krimbill asked Talarico if LCT was going to accept NGL's offer.[57] Talarico called Krimbill back the next day, again requesting NGL pay LCT the originally agreed-upon fee.[58] Krimbill declined.[59]

E. THE INSTANT LITIGATION

These events led LCT to initiate the instant litigation in August 2015. LCT filed its Amended Complaint on September 29, 2015. Count I alleges NGL breached its contract by failing to pay LCT's finder's fee.[60] Count II alleges NGL was unjustly enriched by its conduct, depriving LCT of the reasonable expectation of being compensated for its services.[61] LCT seeks recovery for both unjust enrichment and quantum meruit. Count III alleges Krimbill, acting as NGL's CEO, fraudulently represented to LCT that it would receive a 2% ownership interest, plus the option to purchase an additional 3% valuation, and that NGL would pay LCT's taxes with regard to LCT's interest.[62] In response, NGL moved to dismiss the Amended

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[55] *Id.* ¶139.
[56] *Id.* ¶140.
[57] *Id.* ¶143.
[58] *Id.* ¶144.
[59] Pl.'s Am. Compl. ¶144.
[60] *Id.* ¶¶152–60.
[61] *Id.* ¶¶161–67.
[62] *Id.* ¶¶168–73.

Complaint on November 20, 2015, which LCT opposed.[63] The Court denied NGL's motion on October 3, 2016, and the parties then engaged in discovery for almost a year. After discovery, NGL moved for partial summary judgment arguing "[d]espite discovery encompassing over 15,000 documents, and 13 depositions, there is no evidence of contract formation between the parties or any misrepresentations – just protracted, failed negotiations."[64]

II. STANDARD OF REVIEW

In reviewing a motion for summary judgment pursuant to Superior Court Civil Rule 56, the Court must determine whether any genuine issues of material fact exist.[65] The moving party bears the burden of showing that there are no genuine issues of material fact, such that he or she is entitled to judgment as a matter of law.[66] In reviewing a motion for summary judgment, the Court must view all factual inferences in a light most favorable to the non-moving party.[67] Where it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate, summary judgment will not be granted.[68]

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[63] NGL filed its reply on February 8, 2016.
[64] Defs.' Mot. Partial Summ. J. at 16.
[65] Super. Ct. Civ. R. 56(c); *see also Wilm. Trust Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).
[66] *See Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).
[67] *See Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).
[68] *See Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. Ct. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).

III. DISCUSSION

A. CHOICE OF LAW

At all times since this litigation began, the Court has applied Delaware law to the disputes that have arisen. This has not been an issue until now since there has been no significant conflict in the laws of Delaware and New York as to those disputes. However, NGL now asserts New York law should apply since its Statute of Frauds requirements are more favorable to its arguments. As set forth below, the Court holds that Delaware law applies in this action.

The first step in a choice-of-law analysis is to decide whether a conflict truly exists. The Court must compare the competing jurisdictions to determine whether the laws actually conflict on a relevant point.[69] To do so, the Court must determine if the application of competing laws yield[s] the same result.[70] If the laws yield the same result, a choice-of-law analysis is not required.[71] However, if the laws yield different results, the Court must proceed with the analysis.

As the forum state, Delaware applies its own choice-of-law rules.[72] Delaware law employs the *Restatement (Second) of Conflict of Laws*,[73] which identifies five main factors for deciding what law governs a contract that is silent on that issue:

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[69] *Vichi v. Koninklijke Philips Elec., N.V.*, 85 A.3d 725, 773 (Del. Ch. 2014).
[70] *Laugell v. Bell Helicopter Textron, Inc.*, 2013 WL 5460164, at *2 (Del. Super. Ct. Oct. 1, 2013).
[71] *Id.*
[72] *Arch Ins. Co. v. Murdock*, 2018 WL 1129110, at *8 (Del. Super. Ct. Mar. 1, 2018).
[73] Restatement (Second) of Conflicts of Laws § 188 (1971).

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.[74]

Each case must be decided on its particular facts and circumstances using these guidelines, and the Court should not simply sum up all of the factors and automatically apply the jurisdiction with the highest number of contacts.[75]

NGL believes that New York law governs the instant dispute because both LCT's draft engagement letter and the Purchase Agreement between NGL and Morgan Stanley contain a New York choice of law clause.[76] NGL does acknowledge that both New York and Delaware have significant connections to this case.[77] But NGL believes the law of New York would likewise apply under Delaware's "most significant relationship" test because the TransMontaigne deal closed in New York, Morgan Stanley is located in New York, and the purchase money was wired to a bank in New York.[78] LCT argues in response that Delaware, the home state for each entity, or Texas, Oklahoma, and Colorado where the fee negotiations occurred, should take precedence over New York. As there appears to be no difference

[74] *See Viking Pump, Inc., v. Century Indemnity Co., et al.*, 2009 WL 3297559, at *6 (Del. Ch. Oct. 14, 2009) (citing Restatement (Second) of Conflicts of Laws § 188 (1971)).
[75] *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 48 (Del. 1991).
[76] Defs.' Reply Br. in Supp. of Mot. Partial Summ. J. at 4–5 [hereinafter Defs.' Reply Br.].
[77] Defs.' Mot. Partial Summ. J. at 16 n.10.
[78] *See* Defs.' Reply Br. at 2–4.

between the relevant laws of Delaware, Texas, Oklahoma, and Colorado,[79] the conflict revolves around the laws of Delaware and New York. NGL contends that while much of the relevant Delaware and New York law are consistent with one another, a choice of law analysis is required as there is a conflict with the Statute of Frauds and oral finder's fees.[80]

The Court agrees in the instant case, that there is one material difference between the relevant laws of New York and Delaware. New York's Statute of Frauds differs from Delaware's as it requires an alleged agreement for "procuring an introduction to a party to the transaction"[81] and "assisting in the negotiating or consummation of the transaction"[82] to be in writing with all material terms.[83] Delaware's Statute of Frauds imposes no such requirement.[84]

Due to a lack of a final written agreement, there is no choice of law provision agreed to by the parties. As such, the Court must review the Restatement factors to determine which jurisdiction is proper. First, the parties do not dispute that much of the contracting and negotiations "took place by phone, e-mail, and meetings between Talarico (in Texas, where LCT is located) and Krimbill in Oklahoma, Texas and Colorado (where NGL has offices), with the June 4 meeting in Colorado (where

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[79] Pl.'s Answ. Br. in Opp'n to Defs.' Mot. for Partial Summ. J. at 20.
[80] Defs.' Mot. Partial Summ. J. at 16 n.10.
[81] NY Gen. Oblig. Law §5-701(a).
[82] *Id.* at §5-701(a)(10).
[83] *Id.* at §5-701(a).
[84] 6 Del. C. § 2714.

TransMontaigne and NGL had offices)."[85] However, NGL argues that it is more significant that the TransMontaigne deal was closed in New York and the acquisition funds were wired to a bank in New York.[86] While this may be true, all the named parties are registered Delaware entities with headquarters not in New York. In fact, only Morgan Stanley a non-party is headquartered in New York.[87] Moreover what is lost in NGL's arguments is that the "agreement" in question is not the TransMontaigne deal but the negotiations regarding LCT's finder's fees. It is to these discussions that the Court must apply the Restatement factors. When it does, Delaware and not New York has the more significant interest and Delaware law will apply in this action.

B. BREACH OF ORAL CONTRACT

In Count I, LCT alleges the parties had an oral contract where LCT agreed to serve as a financial advisor to NGL in connection with the TransMontaigne acquisition in exchange for a finder's fee "consisting of (i) a 2% ownership interest in NGL Holdings at a $700 million valuation, with LCT's taxes to be paid by NGL; and (ii) the option to purchase an additional 3% ownership interest in NGL Holdings at a $700 million valuation."[88] The alleged contract was agreed to on May 17, 2014,

[85] Pl.'s Answ. Br. in Opp'n to Defs.' Mot. for Partial Summ. J. at 20.
[86] Def.'s Reply Br. in Supp. Br. Defs.' Mot. to Dismiss at 3.
[87] *Id.*
[88] Pl.'s Am. Compl. ¶154.

via telephone, but the initial terms created on that May 17th call were further discussed and eventually set forth in a confirmation email on June 5, 2014.[89] Despite LCT's acknowledgment that details of the agreement still need to be worked out in that same email,[90] LCT alleges that it fully performed within the obligations of their agreement and that NGL breached when it failed to pay LCT's finder's fee.[91]

NGL urges the Court to find that summary judgment is proper for Count I because the cherry-picked evidence relied on by LCT demonstrates a series of prolonged unsuccessful negotiations and nothing more.[92] In fact, in support of its Motion, NGL presents four main arguments. First, NGL argues that under Delaware law an oral contract must be clear and precise to avoid the parties "being trapped into surprise contractual obligations that they never intended."[93] NGL contends that there is insufficient evidence to meet this clear and precise standard as LCT relies on "brief and punchy" conversations for support and has even wavered on when the date of the oral contract was formed.[94] Second, NGL argues that even if the Court finds there is an oral contract, it is unenforceable because seven material terms remain unresolved.[95] For example, NGL asserts that "the counterparties to the

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[89] *Id.* ¶11.
[90] Defs.' Mot. Partial Summ. J. at 12.
[91] Pl.'s Am. Compl. ¶¶158–59.
[92] Defs.' Mot. Partial Summ. J. at 16.
[93] Defs.' Mot. Partial Summ. J. at 17.
[94] *Id.* at 17–18.
[95] *Id.* 20–26. at Specifically, NGL argues that the parties never agreed upon the use of proceeds restriction, future services, the nature of NGL Holdings interest and timing, option components,

potential agreements were not identified" and there is no evidence that an agreement was reached regarding taxes.[96] NGL next argues that if the Court looks past the clear and precise standard and finds that all material terms are defined, LCT cannot meet its burden to prove that Krimbill acted with authority.[97] NGL contends that Krimbill's actions were done without actual or apparent authority, and any assertions by LCT that Krimbill could grant or issue NGL Holdings interests without the Board's approval are unsupported by the factual record.[98] In fact, NGL asserts that "Talarico knew of Krimbill's lack of authority[] [and] []…he acknowledged multiple times that Board and/or owner approval was necessary; and he expressed no surprise when he read Krimbill's letter 'asking' [][NGL Holdings] owners to consider proposed terms (consisting of 5% without tax payment)."[99]

LCT responds to NGL's assertions arguing that the parties agreed to all material terms of the agreement and there is a dispute of material fact as to Krimbill's authority, therefore summary judgment is not proper. Specifically, LCT contends that there are numerous documents and conversations between the parties where the material terms of LCT's fee agreement were discussed and agreed upon. LCT alleges that on May 17, 2014, a day after NGL submitted its bid to Morgan Stanley, LCT

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whether the 3% was a mandatory "buy-in," who the counterparties were, and how the taxes would be handled.

[96] *Id.* at 20–21.

[97] *Id.* at 26.

[98] *Id.* at 27.

[99] Defs.' Mot. Partial Summ. J. at 28.

and NGL entered into an oral contract.[100] The oral contract allegedly promised that "LCT would receive (a) 2% of [][NGL Holdings] net of taxes at a $700 million valuation, and (b) an option to purchase 3% of [][NGL Holdings] at that same valuation."[101] In support, LCT points to a text message Talarico sent to Karl Kurz ("Kurz"), LCT's partner, outlining the conversation he had with Krimbill.[102] Subsequent to the May 17th phone call, LCT engaged in several discussions with NGL,[103] specifically Krimbill and Toth, to further discuss the terms and status of the fee agreement. During the critical June 4, 2014 meeting, LCT alleges that Talarico, Toth, and Krimbill met and discussed the terms of LCT's compensation. "Krimbill told Toth to prepare two documents which would transfer to LCT a 2% interest in [][NGL Holdings] net of taxes, with an option to purchase another 3% interest in [] [NGL Holdings] at a $700 million valuation."[104] Pursuant to this discussion, Talarico sent a confirmation email of the terms of the discussed transactions, and acknowledged in this email that details still need to be worked out.[105] Subsequently LCT alleges that Krimbill assured Talarico that the legal documents were being

[100] Pl.'s Answ. Br. in Opp'n to Defs.' Mot. for Partial Summ. J. at 24.
[101] *Id.* at 9.
[102] *Id.* at 12. "Spoke to Krimbill. Said he'd love to have [u]s get 2% in fee and buy in for another 3%. So that's $21 million." Defs.' Mot. for Partial Summ. J. at 9.
[103] Pl.'s Answ. Br. in Opp'n to Defs.' Mot. for Partial Summ. J. at 9. The parties spoke on May 23rd and LCT followed up via email the next day. On May 30, 2014, the parties spoke again and LTC rehashed the call via email to Kurz. After the June 4th meetings there were follow up emails discussed above.
[104] *Id.* at 11.
[105] *Id.* at 11–12.

"worked on" and this was confirmed by the assurances provided by Toth on June 23rd.[106] LCT also claims that over the next few months, Krimbill continued to support LCT's fee agreement but needed "to go to the NGL Holdings owners."[107]

Additionally, LCT refutes all of NGL's undefined material terms argument. LCT asserts that the parties reached a valid "preliminary agreement," and the material terms were certain.[108] LCT contends that NGL ignores the evidence for many of these lingering terms, and that the parties chose to not address these terms immediately or such terms were already resolved. In any event, LCT argues that a jury must decide if these 'missing' terms were in fact material and should have been included.

Before the Court decides if there is a valid contract and if NGL breached that contract, the Court would like to address a few preliminary matters. First, the Court need not discuss NGL's final two arguments regarding Krimbill's authority and New York's Statute of Frauds. The Court has concluded in detail below that the material terms of this alleged fee agreement are not present or sufficiently defined, therefore a discussion of Krimbill's apparent or actual authority is unnecessary. Similarly, because the Court has held that Delaware law applies to this case, an analysis of New York's Statute of Frauds requirements is irrelevant. Next, the Court agrees with LCT

[106] *Id.* at 12.
[107] *Id.* at 24.
[108] *Id.* at 25.

that an oral contract need not meet the "clear and precise" standard asserted by NGL, instead the material terms of an oral contract must be "reasonably defined and certain...."[109] With this background, the Court will turn to whether a valid contract exists and if there has been a breach of that contract.

The Delaware Supreme Court in *Osborn ex rel. Osborn v. Kemp*, set forth a three-part test to determine if a valid and enforceable contract exists. [110] "In Osborn, a valid contract exists when (1) the parties intended that the instrument would bind them, demonstrated at least in part by its inclusion of all material terms; (2) these terms are sufficiently definite; and (3) the putative agreement is supported by legal consideration."[111]

The first element of intent requires the Court to look at the contract as a whole,[112] and consider overt manifestations of assent rather than the subjective intent of the parties to determine if the parties intended to be bound to the contract at issue.[113] The parties' failure to create a written contract makes such a finding difficult. But the Court is confident in finding that not all material terms are included or sufficiently defined. Even viewing the facts most favorable to Plaintiff, this is an agreement in flux with its terms fluctuating as negotiations progressed. Equally

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[109] *Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1186 (Del. Ch. 2009).
[110] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).
[111] *Eagle Force Holdings, LLC v. Campbell*, 2018 WL 2351326, at *15 (Del. 2018) (citing *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010)).
[112] *Id.* at *15.
[113] *Id.*

important is that the *Osborn* decision ruled that whether the material terms of the contract are sufficiently defined is a question of law for the Court to decide.[114] In *Eagle Force Holdings, LLC v. Campbell*, the Delaware Supreme Court provided guidance on how to determine if such terms are sufficiently definite when it adopted the Restatement (Second) of Contracts § 33(2) standard, "which suggests that terms are sufficiently definite if they "provide a basis for determining the existence of a breach and for giving an appropriate remedy."[115]

In the instant case, the record demonstrates that neither party manifested objective assent regarding the alleged oral contract. LCT and Talarico himself failed to show intent to be bound to the May 17th contract when Talarico admitted, in the June 5th confirmation email, that the terms of the agreement still needed to be worked out.[116] Similarly, Krimbill's responses throughout the parties' negotiations demonstrate that the parties never reached a complete meeting of the minds on all material terms and were still disputing critical terms such as "…taxes and Class B units, LCT's ability to fund, and restrictions on proceeds use…."[117]

Even assuming, *arguendo*, that there was clear intent to be bound, this Court would still find that a valid contract does not exist because the essential terms were

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[114] *Id.* at *17.
[115] *Id.*
[116] Defs.' Mot. Partial Summ. J. at 12.
[117] *Id.* at 15.

not sufficiently definite to determine a breach and an appropriate remedy. Specifically, LCT's finder's fee was never fully defined nor were the obligations Plaintiff was required to meet to be entitled to the fee. As of May 2015, eleven months after LCT's alleged confirmation email of the contract, the parties still had not executed a written agreement nor agreed on restrictions related to the $21 million purchase price if LCT exercised the 3% option,[118] whether or not NGL would pay LCT's taxes and, among other things, whether NGL could ever fund the alleged agreement.[119] Thus, because the parties never formed a contract, LCT has no basis for recovery under a claim for breach of contract.

While the Court believes there was some agreement that LCT would be compensated for its services during the TransMontaigne acquisition; the material terms and conditions of that compensation remained unclear. The detailed record presented to the Court at best demonstrates drawn-out discussions and negotiations for payment.[120] Talarico and LCT may have believed that these discussions represented a final agreement based on certain assurances from NGL, and that some matters were purposefully left for future negotiation—that belief is not sufficient for

[118] The $21 million was the purchase price for LCT to acquire 5% of NGL General Partner. Pl.'s Answ. Br. in Opp'n to Defs.' Mot. for Partial Summ. J. at 15.
[119] Defs.' Mot. Partial Summ. J. at 15.
[120] The Defendants present evidence to suggest that as of May 2015 the parties were in disagreement about many terms. In October 2014, LCT refused a deal of "$21 million for 5% transaction, without tax payment" and this same issue was unresolved in May 2015. Defs.' Reply Br. at 7.

the Court to find a binding contractual obligation existed. Too many critical terms were being disputed and even more importantly the NGL board had yet to approve any of the terms.[121]

Even viewing the facts in a light most favorable to LCT as the non-moving party, this Court finds the terms of the agreement are not adequately defined to be enforceable. LCT is asking this Court to ignore the lack of discussions regarding many key details of the alleged fee agreement and to supply many undefined key terms with something that is "reasonable in the circumstances."[122] The Court is unwilling to do so and holds that these negotiations never evolved into anything more. To the Court the answer here is simple. If the parties believed they had reached an agreement, it would not take a year to create a legal document to memorialize that agreement. This is true even if the mechanics of how it would be accomplished were left to a later date. That did not occur here, and the only reasonable conclusion from the conduct of the parties is no final agreement had been reached or at least one that could be accomplished. As such, NGL's Motion as to the breach of contract claim is **granted**.

By ruling that the contract claim is not supported, the Court wants to be clear that it is in no way implying that the conversations, discussions, communications

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[121] Defs.' Mot. Partial Summ. J. at 15.
[122] Pl.'s Answ. Br. in Opp'n to Defs.' Mot. for Partial Summ. J. at 24 (citing *Stone Creek Custom Kitchens & Design v. Vincent*, 2016 WL 7048784, at *4 (Del. Super. Ct. Dec. 2, 2016)).

and emails between the parties and their representatives are no longer relevant. They are. If the CEO of NGL made representations that he believed the compensation package suggested by LCT was fair and appropriate and was working toward accomplishing it, those comments are relevant to the quantum meruit claim. If there are discussions with NGL's counsel regarding the alleged terms, those discussions and correspondence are relevant. As such, the Court does not intend to prevent Plaintiff from presenting this information to the jury as evidence suggesting the appropriate damage award. While the jury may disagree with the CEO's assessment or find the emails or other discussions not credible, it remains an appropriate factor for the jury to consider in deciding the compensation that should be awarded to LCT.

C. UNJUST ENRICHMENT

As an alternative to its breach of contract claim, LCT asserts in Count II an unjust enrichment/quantum meruit claim. Plaintiff's original counsel drafted the Complaint and the Amended Complaint to encompass the two legal claims under one count.[123] LCT's current counsel asserts that while the unjust enrichment and quantum meruit are pled together, they should be considered valid separate claims with both proceeding forward.[124]

[123] Pl.'s Am. Compl. ¶ 167.
[124] Pl.'s Answ. Br. in Opp'n to Defs.' Mot. for Partial Summ. J. at 34–36.

Although Plaintiff's current counsel did not draft the initial filings, the Court finds allowing both claims to proceed separately at this juncture would be unfair and would inappropriately add a new claim to the litigation on the eve of trial. As NGL has argued in its briefings and at oral arguments, Delaware case law has carefully distinguished the two legal actions.[125] Quantum meruit is a quasi-contract action that provides recovery for the value of the services provided;[126] while unjust enrichment is a "cause of action, usually but not always equitable, based on an unjustified enrichment of one party and resulting impoverishment of another party, in the absence of a remedy at law."[127] The elements of unjust enrichment are (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and impoverishment; (4) the absence of justification, and (5) the absence of a remedy at law.[128]

As such, unjust enrichment is intended to address the retention of money or property of another "against the fundamental principles of justice or equity and good conscience."[129] In this litigation Plaintiff has an adequate remedy at law which will satisfy those principals, that is the quantum meruit claim.

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[125] *See* Defs.' Reply Br. at 22; *see also* Mot. Summ. J. Tr. 32–34, Feb 22, 2018.
[126] *Caldera Properties-Lewes/Rehoboth VII, LLC v. Ridings Dev., LLC*, 2009 WL 2231716, at *32 (Del. Super. Ct. May 29, 2009).
[127] *Id.* at 31.
[128] *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010).
[129] *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 891 (Del. Ch. 2009).

Frankly, in spite of the parties' best efforts to personalize the litigation as some personal affront to one's integrity, this case is simply one to determine the fair compensation for Plaintiff's significant assistance in bringing this deal to flourish. The only "enrichment" that perhaps NGL is unjustly keeping is the compensation that is appropriate and fair for the work performed by LCT. While NGL acknowledges that some compensation is owed, the lack of a clear and precise written fee document provides an avenue for Defendants to justifiably withhold payment until the dispute is resolved. As such, Plaintiff is unable to meet the requirements of factors four and five even if the Court was willing to find that Defendants have been enriched in some manner. As a result, Count II will proceed under the quantum meruit claim only.

D. QUANTUM MERUIT

Quantum meruit literally means, "as much as he deserves," [and has been held as][] a basis for recovery to prevent unjust enrichment.[130] To prevail on a quantum meruit claim, "a plaintiff must show that it performed services with an expectation that the defendant would pay for them, and that the services were performed under circumstances which should have put the defendant on notice that the performing

[130] *Avantix Labs., Inc. v. Pharmion, LLC*, 2012 WL 2309981, at *10 (Del. Super. Ct. June 18, 2012).

party expected to be paid by the defendant."[131] The parties do not dispute that Plaintiff has a valid claim for quantum meruit, instead, the parties disagree to what degree Plaintiff may recover. Defendants argue that "[w]hile LCT may be able to present a quantum meruit claim for the fair value of services LCT provided to NGL, it cannot recover for: (1) services LCT provided to EMG (not NGL); and (2) services provided by two nonparties [Kurz and Refvik] that provided assistance to Talarico in bringing about the deal."[132]

LCT refutes Defendants' attempts to limit its quantum meruit recovery and argues that NGL willingly reaped the benefits of LCT's labor throughout the entire TransMontaigne acquisition. LCT argues that even Krimbill admitted that LCT played a key role in getting Morgan Stanley to engage in negotiations,[133] and "LCT was able to get [Morgan Stanley] to deal directly with NGL outside of an auction process which may have saved [] tens of millions of dollars."[134] These admissions by Krimbill, LCT argues, create factual disputes that prevent summary judgment. Similarly, LCT argues that NGL's attempt to limit recovery for "the value created by the work of Kurz and Refvik is equally meritless."[135] NGL tries to create

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[131] *Patterson-Woods & Assoc., LLC v. Realty Enter., LLC*, 2008 WL 2231511, at *5 (Del. Super. Ct. May 21, 2008) (quoting *State ex rel. Structa-bond, Inc. v. Mumford & Miller Concrete*, 2002 WL 31101938, at *3 (Del. Super. Ct. Sept. 17, 2002)).
[132] *See* Defs.' Reply Br. at 19.
[133] Pl.'s Answ. Br. in Opp'n to Defs.' Mot. for Partial Summ. J. at 34.
[134] *Id.* at 34–35.
[135] *Id.* at 35.

confusion by focusing on the fact that Kurz and Refvik were not employees of LCT.[136] However, there is no case law to support this "employee" distinction, and thus a jury should resolve this issue as well.[137]

As previously indicated, the Court finds that LCT has presented a valid quantum meruit claim for the fair value of services LCT provided to NGL. Whether or not LCT may be able to recover for services it provided only when EMG was an active participant and/or for services provided by Kurz and Refvik will depend on the evidence presented to the jury. The Plaintiff argues that LCT provided services for EMG when it engaged in negotiations with Morgan Stanley and these services ultimately benefitted NGL because that work led to the successful acquisition of TransMontaigne by NGL. To what extent this benefited or led to the acquisition by NGL are questions for the jury. As a result, Defendants' Motion as to the quantum meruit claim is **denied**.

E. FRAUDULENT MISREPRESENTATION

To prevail on a claim for fraudulent misrepresentation, a plaintiff must demonstrate:

> 1) ... the existence of a false representation, usually one of fact, made by the defendant; 2) [that] the defendant had knowledge or belief that the representation was false, or made the representation with requisite indifference to the truth; 3) [that] the defendant had the intent to induce the plaintiff to act or refrain from acting; 4) [that] the plaintiff acted or

[136] *Id.*
[137] *Id.*

> did not act in justifiable reliance on the representation; and 5) [that] the plaintiff suffered damages as a result of such reliance.[138]

The defendant's representation does not need to be overt.[139] Rather, a defendant's deliberate concealment of a material fact or silence in the face of a duty to speak is sufficient for a claim of intentional misrepresentation.[140] Moreover, the term "misrepresentation" is sufficiently broad to encompass fraudulent, negligent, or even innocent statements.[141]

NGL contends that LCT has not satisfied any of the elements of fraudulent misrepresentation. Specifically, NGL contends that there were no false representations made by Krimbill.[142] If anything, Krimbill's statements reflect his personal desire to negotiate a deal for LCT's finder's fees and nothing more.[143] NGL also contends that Krimbill's yearlong effort to reach an agreement with LCT, "belies any intent to defraud."[144] Moreover, NGL argues that LCT lacked actual reliance because the alleged misrepresentations made on May 17 were after LCT's work for TransMontaigne acquisition was completed.[145] NGL asserts that reasonable reliance does not fare any better as LCT was aware of the terms of "the LLC

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[138] *Williams v. White Oak Builders, Inc.*, 2006 WL 1668348, at *6 (Del. Ch. Jun. 6, 2006).
[139] *See id.*
[140] *See Vichi v. Koninklijke Philips Electronics, N.V.*, 85 A.3d 725,773–74 (Del. Ch. 2014).
[141] *Id.* at 774.
[142] Defs.' Mot. Partial Summ. J. at 32.
[143] *Id.* at 33.
[144] *Id.*
[145] *Id.*

Agreement… [and] LCT had no reasonable basis to rely on mere conversations regarding terms for a complicated and unusual equity arrangement."[146]

LCT refutes NGL's assertions and argues there is evidence to support each factor. First, Krimbill never qualified his statements and representations as his personal view.[147] In fact, "Krimbill confirmed the agreement with Kurz and dictated the terms of the deal to Toth, also on behalf of NGL."[148] LCT also contradicts NGL's contention that it was no longer needed by the time any misrepresentations were made to Talarico and LCT.[149] NGL needed LCT to close the transaction because after NGL submitted its bid there was still significant work to be done to ensure the acquisition was executed.[150] LCT reiterates that there is evidence of intent to defraud as Krimbill told LCT that he had spoken to most of the board and received approval, but now it appears he never presented the fee arrangement to the NGL Holdings board.[151] LCT also argues its reliance was both actual and reasonable despite NGL's best arguments because there was significant work to be done after NGL submitted its bid and LCT did not know Krimbill lacked authority.[152]

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[146] *Id.* at 34.
[147] Pl.'s Answ. Br. in Opp'n to Defs.' Mot. for Partial Summ. J. at 38.
[148] *Id.*
[149] *Id.* at 39.
[150] *Id.*
[151] *Id.*
[152] *Id.* at 38–39.

The Court finds that LCT has sufficiently pled a claim of fraudulent misrepresentation. Specifically, LCT has alleged (1) that Krimbill acting as NGL's CEO, fraudulently represented to LCT that it would receive a 2% ownership interest, plus the option to purchase an additional 3% valuation, and that NGL would pay LCT's taxes with regard to LCT's interest;[153] (2) that Krimbill knew these representations were false when made or acted with reckless indifference; (3) that Krimbill, through his delays, reassurances, and attempts to alter the terms of LCT's promised fee, intended to never pay LCT the fees it was promised; (4) that LCT actually and reasonably relied on Krimbill's representation and continued to aid in the TransMontaigne acquisition with expectation that NGL would pay the promised fee; and (5) that LCT has suffered economic loss and damages as a result of its reliance. If proven, these claims would support the fraudulent misrepresentation claim.

LCT also includes text messages and emails as well as circumstantial evidence to demonstrate that NGL, specifically Krimbill, made false statements that NGL was "working on" and trying to "work out" LCT's fee arrangement.[154] Despite NGL's assertions, the Court believes that dismissal of Count III is inappropriate. The Plaintiff has produced evidence to show that Krimbill made representations to

[153] Pl.'s Am. Compl. ¶¶168–73.
[154] Pl.'s Answ. Br. in Opp'n to Defs.' Mot. for Partial Summ. J. at 39.

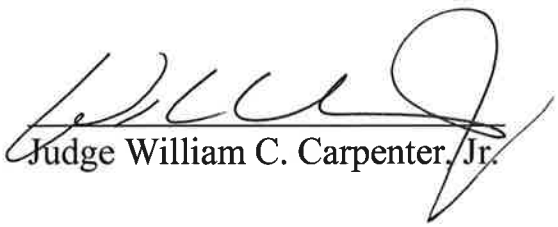
Talarico about reaching a deal for LCT's fee arrangement. While there may not be overt fraud, the Court believes that Krimbill's actions fall into the broad definition of misrepresentations. Krimbill dragged out discussions with Talarico about the fee arrangement for over a year and when Talarico became uneasy Krimbill made reassurances about NGL compensating LCT. Whether this conduct was fraudulent or simply a CEO buying time to complete the compensation deal he allegedly "supported" is one left for the jury to decide. Thus, Defendants' Motion is **denied** for Count III.

IV. CONCLUSION

Based on the above decisions, the case will proceed on quantum meruit and fraudulent misrepresentation. In the end, this is what this case should have been all along and fairly allows the dispute to be litigated. By not resolving this dispute, the parties have both significantly gambled on the jury's verdict. The conduct of Krimbill will be viewed as suspect at best and Talarico's unwavering insistence on compensation that is perhaps inconsistent with the work performed in the real world outside of Wall Street may lead to an unfavorable result. The parties will get their day in court but should carefully consider whether their litigation is over fair compensation or simply to make a point. If it is the latter, the point has been made.

Defendants' Motion for Partial Summary Judgment is Granted in Part and Denied in Part.

IT IS SO ORDERED.



Judge William C. Carpenter, Jr.