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Case Number 265,2023D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CORRECTED APPELLANTS' REPLY BRIEF ON APPEAL AND CROSS-APPELLEES' ANSWERING BRIEF ON CROSS-APPEAL

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INTRODUCTION

LCT's answering brief ("AB") spends most of its effort on evading the key issues presented in NGL's opening brief ("OB").[1] LCT instead relies on *ad hominem* attacks and editorials that serve no proper analytical purpose. Those tactics, however, cannot change what this appeal is actually about: the rules for proving *quantum meruit* damages.

Although it is frustrating to all parties that a new trial is called for again, the situation is of LCT's own making. Among other things: (a) the original trial was nullified because of LCT's chosen damages model and the resulting jury confusion; (b) the remand trial was limited to a standalone claim for *quantum meruit,* which has no connection to that model or LCT's now-defunct fraud claim; but (c) LCT recycled that same approach and created the same confusion anyway, disregarding black-letter *quantum meruit* law that renders value-created and benefit-of-the-bargain evidence inadmissible.

LCT seeks to bolster its position by arguing that two juries returned similar awards, which is hardly surprising since both were bombarded with an improper value-created/benefit-of-the-bargain damages model. LCT's argument is nothing more than misdirection because it remains undisputed that LCT twice failed to present at trial what the law requires for assessing *quantum meruit*: objective market

[1] Capitalized terms herein were defined in NGL's opening brief.

evidence about the cost of obtaining such services from an industry provider. *See* OB at 15 ("Critically, however, LCT did nothing to carry its burden of establishing the objective market value for similar services in the banker community..."). LCT instead presented exaggerated figures that were taken out of context from discussions unrelated to the narrow *quantum meruit* question.

It is axiomatic that the purpose of answering briefs is to address the law and arguments raised in opening briefs. That purpose is reflected in Rule 14's related requirements/prohibitions and is confirmed by the long line of cases holding that a litigant waives any point it fails to address. *E.g.*, *Emerald P'rs v. Berlin,* 726 A.2d 1215 (Del. 1999) ("Issues not briefed are deemed waived"); *Roca v. E.I. duPont de Nemours & Co.*, 842 A.2d 1238, 1243 n.12 (Del. 2004) ("[I]ssues adverted to in a perfunctory manner" are waived.)

LCT's answering brief flouted these precepts because it was unable to confront either of the legal questions on appeal. Indeed, most of LCT's advocacy concerns matters outside the narrow issues presented – an obvious example being arguments that the remand verdict was "supported" by LCT's inadmissible benefit-of-the-bargain/value-created evidence (AB at 3) which is not an issue on appeal and actually assumes away the very questions that are before this Court.

As further distractions, LCT resorts to revisionism on a number of topics – including the factual history of this case. Because it so dislikes the Opinion that

rejected key evidence on which LCT ultimately relied at trial, LCT distorts or ignores the particulars of its recusal/disqualification gambit in reaction to that Opinion and the sea-change Countermand it spawned on the eve of trial. As detailed in NGL's opening brief, those facts are not open to debate and are central to this appeal. *See* OB at 9-15, 21-26, 31-32, 38-48. They also go a long way toward explaining the fundamental legal errors that cry out for reversal by this Court, so LCT brushes past them without any principled response – instead suggesting those facts should be ignored because the president judge's administrative reassignment was not challenged on appeal. It is another red herring in a submission filled with them; the power to reassign cases is irrelevant to this appeal.

LCT's strategy cannot transform the specific issues raised by NGL's brief into something they are not. Nor can LCT ignore the authority that flatly defeats its position. To the limited extent LCT addressed NGL's actual analyses (as opposed to non-issues), this reply discusses matters in their proper legal and factual context.

LCT's tactics left very little room for a cross-appeal, which advances just two arguments raised in its laundry-list Notice (Supr. Ct. Dkt. 7) and does so in cursory fashion. Indeed, the entire cross-appeal section of LCT's brief is barely longer than its Notice. Those abbreviated arguments should be rejected, as explained herein.

ARGUMENT ON REPLY

Based on well-established precedent, the Opinion correctly provided the roadmap for what LCT needed to prove through experts at trial: "*Quantum meruit* damages are based on an ***objective*** reasonable valuation of the services provided by reference to the fair market value of those services." OB, Ex. D at 11; *accord Morris v. Tatum*, 388 F. Supp. 2d 689, 715 (W.D. Va. 2005) ("It is clear that … the focus is on the objective value of the services rendered[.]").[2] And NGL's opening brief explained the fact that LCT never adduced a single piece of that evidence, a failure which is alone grounds for reversal. OB at 36.

Resorting to distractions in lieu of analysis, LCT ignores that failure by: (a) arguing at length about the denial of its motion to preclude NGL's presentation of market evidence, which is a non-issue because LCT did not appeal it; and (b) chiding NGL's use of the word "objective," suggesting it is made-up even though the Opinion expressly used that term.

As LCT knows, the objective/subjective distinction comes from numerous cases discussed in NGL's opening brief and submissions below. OB at 32-38. Those cases instruct that, while subjective evidence about what litigants allegedly said/did/intended is generally admissible on fraud claims (which don't exist here), the distinct *quantum meruit* analysis is an objective assessment based on market

[2] Emphasis in quoted material has been added.

evidence about the cost of obtaining similar services from someone in plaintiff's position. That distinction is further reflected in the requirement (likewise ignored by LCT) that such testimony come from experts rather than plaintiffs. *Id.*

Furthermore, the Opinion explained how LCT misapprehended *Marta* in the same way it does now when making the argument about NGL's experts using objective market data to confirm a *quantum meruit* fee range of 0.5–2%. OB, Ex. D at 31-33. Because LCT's argument on the issue is not properly before this Court, there is no reason to repeat that analysis.

I. VALUE-CREATED/BENEFIT-CONFERRED EVIDENCE IS INADMISSIBLE.

LCT's trial presentation inundated the jury with improper value-created/benefit-conferred evidence reflecting speculative (and disputed) forward-looking estimates ranging from tens of millions to over a billion dollars. OB at 40-46. As previously explained, LCT's strategy was predicated on the psychological effect known as anchoring – which recognizes that awards are strongly affected by the numbers a jury is exposed to at trial, irrespective of probative value. *See* OB at 45; A000603. And that strategy worked, resulting in an exaggerated award untethered from the *quantum meruit* value of LCT's services.

Unable to justify those tactics, LCT sidesteps NGL's discussion of the four grounds why such evidence is prohibited: (1) value-created/benefit-conferred evidence is irrelevant to the question of the value of services rendered and thus

inadmissible under D.R.E. 401/402; (2) such evidence causes incurable jury confusion and is thus inadmissible under D.R.E. 403; (3) the Countermand violated the law-of-the-case doctrine when allowing such evidence; and (4) affirming the resultant verdict would lead to untenable outcomes in future cases. OB at 16-26.

A. Black-Letter *Quantum Meruit* Law Prohibits Value-Created/Benefit-Conferred Evidence.

The Opinion crystalized an uncontroversial tenet reflected in decades of Delaware precedent: "recovery under *quantum meruit* damages is the value of the services provided, not the value of the benefit received." OB, Ex. D at 24 (citing *Hynansky v. 1492 Hospitality Group, Inc.*, 2007 WL 2319191, at *1 (Del. Super. Aug. 15, 2007); *Marta v. Nepa*, 385 A.2d 727, 730 (Del. 1978)). LCT's extensive reliance on such evidence was therefore legally impermissible. OB, Ex. D at 25 (value-created evidence would lead to a "windfall for Plaintiff that *quantum meruit* damages does not permit"). And the eleventh-hour Countermand committed reversible error when overruling the Opinion by opening the floodgates to such evidence.

LCT's contrived response is that it did not directly seek the $1 billion+ value-created figures to which it anchored the jury (or some other benefit-conferred figure), accusing NGL of a "bait-and-switch" for framing the issue as such. AB at 25. But NGL never made the argument about which LCT is grumbling. As the record confirms, NGL has consistently explained that value-creation/benefit-

conferred evidence is irrelevant under *quantum meruit* law because it does not measure the value of services rendered (instead conflating that value with speculation about potential financial gains to a recipient) even if a clever litigant introduces those estimates without claiming a direct percentage. *See* OB at 17-25; A000593-604.[3] The prejudice of exposing jurors to such irrelevant but huge figures is self-evident.

LCT fares no better with its attempt to sidestep the decades of precedent from Delaware (and sister jurisdictions) discussed in NGL's opening brief – cases LCT now asks this Court overturn/disregard because they universally confirm that value-creation evidence is not admissible in a case limited to *quantum meruit.* OB at 17-25.

Unable to address the governing law, LCT argues about an alternative reality where service-industry professionals are somehow exempt from this bright-line rule because they "add value" for clients. *See*, *e.g.*, AB at 28. LCT relied on the same ploy in multiple submissions/hearings below. But the record confirms that LCT has never been able to cite <u>any</u> authority for its supposed exemption. Not a single case.

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[3] *See also, e.g.*, A000593-604 ("LCT nevertheless directed its new expert (Kevin McQuilkin) to focus his report on a calculation of value creation as the purported basis for a fee – ignoring both the content and context of the October Letter and, more importantly, ***this Court's ruling that such evidence was precluded as a matter of established quantum meruit law***."); AR001436:8-14 (11/9/22) (arguing that LCT could not introduce "a value-created analysis, ***which is firmly at odds with...controlling Delaware law***.").

And "[t]he failure to cite *any* authority in support of a legal argument constitutes a waiver of the issue." *Flamer v. State*, 953 A.2d 130, 134 (Del. 2008) (emphasis original) (collecting cases). All of LCT's related arguments suffer from – and fail because of – this absence of legal foundation.

Nor can LCT's self-promotive "factual" arguments justify the creation of a novel rule that would excuse LCT's inability to support its damages model with market evidence. While it tries to portray itself as akin to merchant banks that financially participate in transactions, LCT admittedly made no investment. It provided advisory services, period. B003487:22-B003488:8; B003531:19-B003532:10 (2/14/23). And it did not act alone.

In December 2013, Talarico learned from public media that Morgan Stanley planned to sell TransMontaigne due to banking regulations generally affecting the sector. B002398:22-B002398:9 (2/9/23); AR001337. LCT then unsuccessfully sought to involve several possible clients in the publicized TransMontaigne process before NGL emerged through an intermediary investor as an acceptable bidder in late-April 2014. B002471:10- B002474:14 (2/9/23).

NGL assembled a large team of internal personnel and outside financial advisors (LCT and UBS), as well as legal and tax advisors, to negotiate its TransMontaigne bid. B003122:22-B003123:18 (2/13/23). NGL and UBS entered into a written agreement for UBS' financial advisory services, by which UBS earned

a standard fee of $1.5 million, or .75% of the acquisition price. B002572:4-19; B002656:16-B002657:15 (2/9/23). LCT itself also obtained standard "fee-run" data – *i.e.,* market evidence – in considering its advisory-services compensation. AR001344.

For the seven-week period of LCT's services through June 9, 2014, when the Transaction was announced, NGL divided responsibilities in a customary manner among its own management team and that large group of outside advisors outside advisors (including UBS, LCT, legal and tax advisors). Unlike merchant banks that make investments, LCT rendered advisory services falling within industry norms. B003487:22-B003488:8; B003531:19-B003532:10 (2/14/23). And thus the Transaction documents identified both LCT and UBS as financial advisors in the same way. AR001354.

NGL respectfully submits that no further analysis is needed to rule in its favor on this issue. Considering LCT's limited treatment of the caselaw identified by NGL is instructive, however, because it reveals that LCT: (a) waived any argument about the decisions it ignored or addressed only in footnotes; (b) failed to distinguish the remaining subset of decisions; and (c) mischaracterized this Court's Remand Opinion and other authority. *E.g.*, *Lum v. State,* 101 A.3d 970, 971-72 (Del. 2014) ("Arguments in footnotes do not constitute raising an issue in the 'body' of the opening brief" and are waived.); *Murphy v. State*, 632 A.2d 1150, 1152 n. 2 (Del.

1993) ("The rules of this Court provide that footnotes shall not be used for argument"); *Emerald P'rs*, 726 A.2d at 1215 ("Issues not briefed are deemed waived.").

1. Decisions LCT Ignored or Relegated to Footnotes.

Each of the decisions in this category highlights how LCT's position is contrary to longstanding *quantum meruit* law:

- *Morris L. Off., P.C. v. Tatum* stands for the irrefutable proposition that value-creation evidence is inadmissible because "an award of *quantum meruit* should be made independent of any benefit to the [defendant] and according to the objective and reasonable value of [plaintiff's] services." 388 F. Supp. 2d 689, 711 n.20 (W.D. Va. 2005).

- *Maglica v. Maglica* offers cogent analysis about the "benefit" element of *quantum meruit – i.e.,* the element necessary to establish standing/liability rather than damages – and holds that measuring *quantum meruit* based on the impact to defendant's business is improper. *See* 66 Cal.App.4th 442 at 450-51 ("[T]he threshold requirement that there be a benefit from the services can lead to confusion … The jury instruction given here [improperly] allows the value of services to depend on their *impact* on a defendant's business rather than their reasonable value.").

- *Baer v. Chase* rejected an analog of LCT's "but for" argument – *i.e.,* the defendant could not have reaped huge financial benefits from *The Sopranos* franchise without plaintiff's unique services – applying well-established principles when explaining that "the only relevant and competent evidence regarding the value of [plaintiff's] services is that which tends to show what others in the [relevant] industry would pay." 2007 WL 1237850, at *6.

There is nothing unclear about these principles, which also are found in *Caldera Properties-Lewes/Rehoboth VII, LLC v. Ridings Dev., LLC* and *McKenna*

v. Singer – two of the Delaware decisions from which LCT's brief runs away, even though both were thoroughly examined and relied upon by the Opinion when excluding LCT's value-creation evidence. Among other things:

- *Caldera* rejected LCT's position and endorsed *Hynansky v. 1492 Hospitality Group* when explaining that "[t]he standard for measuring the value of the performance under *quantum meruit* is 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"; and

- even when dealing with an unjust enrichment claim of the type that LCT now argues would provide a path for value-creation evidence, *McKenna* held that damages, "if there [were] any, [are] the fair market value of the [plaintiff's] services[.]"

LCT's tactical avoidance of these decisions speaks loudly about its position. *Roca,* 842 A.2d at 1243 ("[I]ssues adverted to in a perfunctory manner" are waived). And it remains undisputed that LCT never presented (a) any evidence about the objective market value of its services, as required; or (b) any testimony from about what those services could have been purchased for from a provider in LCT's position at the time of the Transaction. Rather, LCT predicated its case on inflaming the jury with value-created evidence in the hundreds of millions and billions of dollars. OB at 39-46.

2. Decisions LCT Failed to Distinguish.

LCT focuses its "analysis" on attempting to distinguish two Delaware cases relied on by the Opinion – *Hynansky* and *Middle States*. Neither attempt succeeds.

The Opinion analyzed and rejected LCT's argument that *Hynansky* is inapplicable because the plaintiff there "wanted the benefit of long-term value."[4] LCT now repeats that same argument but ignores the Opinion's related analysis. *See* AR001450:15-16 (11/9/22); *see also* AB at 28. And with good reason.

As previously explained, LCT's strategy hinged on bombarding the jury with long-term value figures unrelated to the objective market rate for banking services at the time of the Transaction. OB at 14. As important, LCT offered no expert testimony that those long-term value figures were somehow realized by NGL on the day the Transaction closed. That is why, despite its current protestations, the only thing LCT's brief can cite on the point is subjective and self-serving speculation from Talarico – who was not an expert in this case – that is disconnected from the contemporaneous record. *See* AB at 29 ("***Talarico*** testified that TransMontaigne and its assets were worth approximately $1.09 billion [as of the closing date] …").

These points were not lost on Judge Adams when LCT asserted the same argument and was similarly unable to cite anything other than Talarico's own litigation-made contentions. AR001443:21-23 (11/9/22) (trial court questioning LCT: "Where is that in the expert report, and where does it say that the value creation calculation was July 1, 2014 [the close of the Transaction]?") & AR001446:21-23

[4] Indeed, LCT has been re-packaging the same rejected arguments repeatedly since its *Daubert* and *in limine* briefing. A000525-556; Dkt. 552.

(11/9/22) (trial court re-iterating: "Were you able to find any [expert] opinion … where it talked about the value [as] of July 1, 2014?").

Moreover, even assuming *arguendo* that *Hynansky* could be factually distinguished in a meaningful way, LCT's argument still fails because its brief ignores both: (a) *Hynansky's* unrebutted recitation of the law; and (b) the Opinion's analysis of, and reliance on, that recitation as setting forth the correct legal standard. Specifically, that *quantum meruit* damages are "to be established by way of opinion testimony ***by expert witnesses*** in the same field of endeavor as Plaintiff, in response to hypothetical questions based on the facts of the case, as to the worth of the specific services rendered[.]" *Hynansky*, 2007 WL 2319191, at *1. LCT waived the ability to challenge these critical aspects of *Hynansky* by failing to address them.

LCT's attempt to distinguish *Middle States* is equally unavailing. It again ignores the Opinion's reliance on that case for the proper legal standard – *i.e.,* the holding that value creation is not relevant to *quantum meruit* damages, which instead must be "based on an objective reasonable valuation of the services provided by reference to the fair market value of those services." OB, Ex. D at 11 (citing *Middle States* and making clear that *quantum meruit* is "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.").

Nor could our law hold otherwise. *Quantum meruit* is a last-resort restitutionary principle designed to compensate plaintiffs at the market rate for similar services at the time/place those services were provided. That is why evidence is necessarily limited to the going rate for such services in the marketplace, not the value-creation model LCT now advocates without any legal support.

LCT's recasting of *Pike Creek* also falls flat. Rather than engage with the Opinion's careful analysis of that decision, LCT blindly reargues its previously rejected position. *See* AB at 27. LCT also continues to play semantic games with *Pike Creek's* use of the phrase "benefit conferred," contending that it referred to value/benefit created by the contractor in question. It plainly did not. Rather, the court was referencing the value of labor and materials provided by that contractor. The Opinion thus rejected LCT's contrary argument, explaining that LCT had misstated (or misunderstood) *Pike Creek*'s holding. *See* OB, Ex. D at 34-35. The same holds true now.

3. <u>This Court's Remand and Other Authority.</u>

LCT argues that value-creation evidence was allowable to prove the quality of LCT services, offering block quotes from two sources as claimed "support" for that proposition: *Farrell v. Whiteman*, a case discussed in NGL's opening brief, and this Court's Remand Opinion. OB at 25-26. LCT omitted critical aspects of those

decisions when selectively picking its quotes, however, and the omitted text belies LCT's arguments.

Farrell never held that value-creation evidence can be admitted to establish service quality. The quoted language simply observed that *quantum meruit* value is a range. 268 P.3d 458, 463 (Idaho 2012). There is nothing remarkable about that observation; Delaware courts have long recognized the same concept, and NGL's experts did likewise when testifying about a *quantum meruit* fee range of 0.5–2%. Thus, *Farrell* does not advance LCT's argument even as selectively quoted. And that becomes even more apparent in *Farrell's* recitation of the legal principles LCT chose to omit – which appears in the very next sentence of the same paragraph, and flatly contradicts LCT's position:

> 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 the work was performed***.

Id. It is telling that LCT would push the envelope so far in an attempt to claim otherwise. Moreover, LCT's argument ignores that: (1) value-creation evidence is inadmissible in *quantum meruit*; and (2) even if it were probative of the quality of the services (as LCT claims), the Opinion still correctly excluded it as unduly prejudicial.[5]

[5] NGL never argued that LCT was precluded from adducing evidence to demonstrate the scope and quality of its work, only that the particular value-creation (*con't)*

LCT also selectively quotes this Court's discussion of the original two-part fraud and *quantum meruit* verdict, interpreting the Remand Opinion as having "held" that all of the evidence which "formed the first jury's verdict for fraud" was automatically admissible to prove *quantum meruit* damages on remand. AB at 10 (quoting *LCT*, 249 A.3d 77 at 101 ("[I]t would be necessary to add both awards to capture the full value that the jury placed on LCT's uncompensated work")). That interpretation distorts the point of the statement LCT isolates and was neither a holding nor addressed to any specific evidence question – it was part of the Court's discussion about jury confusion.

Additionally, LCT again omits key context from the very same page as its truncated quote. Specifically, this Court continued:

> We do not mean to express certainty that the jury was so confused. ***It is also possible that the jury found that the fair value of LCT's services was $4 million, and the $29 million fraud award solely reflected impermissible benefit-of-the-bargain damages.*** Nonetheless, given the deferential standard of review, and the risk of confusion unique to this case, we do not think that the Superior Court abused its discretion by holding that providing the jury with dual damages lines for a unitary theory of damages was confusing and irreparably muddied the jury's *quantum meruit* award.

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evidence it extensively relied on was <u>both</u> irrelevant under D.R.E. 401/402 and unduly prejudicial under D.R.E. 403.

LCT, 249 A.3d 77 at 101. Thus, the Remand Opinion does not stand for the proposition LCT now asserts or resolve any of the issues now on appeal because, by definition, those issues were not before the Court at that time.

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LCT makes a smattering of arguments about other caselaw cited by NGL, but they are subordinate/derivate in nature and addressed elsewhere in this submission or NGL's opening brief. It is nevertheless instructive to consider LCT's flawed attempt at distinguishing *ConFold Pac., Inc. v. Polaris Indus., Inc.,* 433 F.3d 952, 958 (7th Cir. 2006).

ConFold was featured in NGL's discussion of the widely accepted principles that LCT seeks to have this Court disregard/overturn, including that *quantum meruit* is measured by objective market evidence of what similar services would cost in the marketplace:

> ***[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.

433 F.3d 958. It was also discussed for the Seventh Circuit's apt use of a hypothetical that helped demonstrate the inherent problems with LCT's contrary position, since <u>every</u> service-industry professional's task is to add value for their clients. OB at 26-28.

Those discussions focused on key issues in this appeal. But LCT ignored the black-letter law involved, waiving any counterargument. And LCT summarily brushed-off *ConFold's* helpful hypothetical as somehow being "out-of-context" but, once again, provided no supporting explanation. That avoidance speaks for itself.

B. <u>The Countermand Caused Incurable Jury Confusion</u>.

NGL also explained the inevitable jury confusion that came with admitting value-creation/benefit-conferred evidence in a standalone *quantum meruit* case. OB at 23-25, 38-44. Specifically, NGL focused on two distinct points under D.R.E. 403: (1) LCT's enormous "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 (2) even if admissible, the prejudice of such evidence substantially outweighed any purported relevance because it would require mini-trials about attribution of the claimed value/benefits. NGL further explained that the Opinion reached this same conclusion after rejecting LCT's arguments, holding that "[t]he introduction of [value-created] 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." OB, Ex. D at 25. Finally, NGL addressed the fallacy of the Countermand's contention that a limiting instruction would somehow overcome those serious intractable/incurable problems. OB at 24-25.

Moreover, when confronted with the board presentation on which the NGL board approved the Transaction on June 5, 2014 – which showed nowhere near $1 billion in value at that time – Talarico was forced to distance himself from the presentation and concede that NGL did not rely on LCT's now-claimed "value-creation" in proceeding with the acquisition. B002406:18-B002411:22; B002597:20-B002600:15 (2/9/23).

Among other things, however, the evidence LCT was allowed to introduce at trial included: (1) portions of and testimony concerning the October Letter based on post-closing developments and three-year EBITDA projections to estimate $500 million (or $1 billion including the LP) for NGL (A000279-280); and (2) emails and testimony concerning EMG's five-year projections speculating 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), thereby valuing a 2% interest in the NGL GP at $66.8 million (going up to $100 million) assuming/ a merger between NGL and TransMontaigne and an IPO of the NGL GP – neither of which ever occurred (*see* A000263-265, A000267-268, A000270-271). Both the October Letter (drafted four months after the Transaction's close) and EMG's forward-looking projections also indisputably rely on post-closing measures of value creation. Yet the Countermand allowed LCT to revisit such inflammatory value-creation figures throughout trial, and to feature them in

closing (*e.g.*, AR001455 (B003954)) despite their irrelevance and confusing/prejudicial impact.

LCT now argues that it "only provided evidence of the non-speculative value (known and susceptible to proof) created for NGL as of the July 1, 2014 closing date." AB 28-29. *First*, that temporal argument is another deflection, ignoring the unrebutted authority which prohibits value-creation evidence as a matter of law – regardless of timing. *Second*, the only citation LCT offers for its argument is Talarico's own say-so about value-creation, ignoring the unrebutted expert-witness requirement of *quantum meruit* damages. *Third*, the aforementioned exhibits – all introduced over NGL's continuing objections – facially demonstrate that LCT presented speculative evidence of value that, if created at all, would occur post-Transaction (*i.e.*, after July 2014).[6]

In response to NGL's explanation of the confusion that resulted from admission of value-creation testimony/exhibits, LCT should have provided credible counterpoints demonstrating that such evidence was harmless (on an individual and cumulative basis). But that is a showing LCT could not make – largely because its

[6] Even the trial court, which admitted the evidence, observed that Talarico's supposed value-creation figure was neither known nor susceptible to proof; it was his personal, subjective "***opinion*** of the value of his services only as a lay witness." B002169:11-13 (2/7/23 PM). Exacerbating the prejudice, the trial court nonetheless warned NGL about subjecting Talarico's viewpoint to cross-examination, because "if NGL explores the basis for his conclusions" then the "door may be opened for Mr. Talarico" to offer further testimony on the point. B001650:3-6 (2/6/23).

anchoring strategy counted on generating that exact confusion to achieve an inflated award. OB at 48. 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. OB at 48.

Thus, LCT avoids every elephant in the room by insisting that the trial court's limiting instruction was a panacea to remove that mountain of value-creation evidence from the jurors' minds, despite being bombarded with it throughout trial. LCT glibly praises the instruction without explanation of how it could have accomplished that miraculous result given the extent of such improper testimony/exhibits. *See Greene v. Beebee Med. Ctr., Inc.*, 1995 WL 420808, at *2 (Del. July 11, 1995) ("As the trial court noted, however, even with a limiting instruction, the prejudicial effect that [defendant] would suffer as a result of introduction of such evidence was considerable."). LCT also neglects to mention that the instruction was given over NGL's continuing objections about the admission of value-creation evidence as a matter of law – *i.e.*, the principal issue now before this Court. *See* OB at 39 (record citations omitted).

As a fallback, LCT attempts to shift blame by criticizing NGL for not putting on attribution mini-trials in response to LCT's value-creation evidence. That argument is just another deflection, albeit one that undermines LCT's litigation position by advocating for the trials-within-a-trial problem that the Opinion correctly

identified as grounds for excluding such evidence under D.R.E. 403. OB, Ex. D at 25 ("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 the value created independent of its involvement.").

C. The Countermand Violated Law-Of-The-Case Doctrine.

NGL's opening brief presented undisputed facts about the Countermand's eleventh-hour origin, content, and trial-altering impact on the eve of jury selection. NGL also specified the ways in which the Countermand overruled the Opinion's key holdings, thus departing from law-of-the-case doctrine. And NGL discussed the applicable caselaw when explaining why the Countermand failed to clear the high threshold this Court has established to prevent a newly assigned judge from overruling his predecessor simply because he disagrees with her. OB at 25-26.

Regardless of how the other issues on appeal are resolved, there is no denying the factual details in NGL's discussion of the Countermand. But deny them is just what LCT does when it strains credulity (and warps reality) by contending that the Countermand did not alter the Opinion. AB at 34; A000793. Nor can LCT take credible refuge in the Countermand's statement that it "merely clarified" some "minor rubs" when reversing the Opinion's exclusion of critical value-created evidence under D.R.E. 401/402/403, including most of the October Letter that even

the Countermand acknowledged was a "central piece of evidence" which "assumed center stage in the first trial." AB at 35; A000775. Rather than repeat its discussion, NGL refers to the opening brief's detailed discussion on these matters. *See* OB at 11-14, A000778-787.

That said, what must be addressed here is LCT's mischaracterization of the Opinion and underlying motions it resolved. For example, LCT argues that the Opinion "did not 'exclud[e] the majority of the October Letter … as legally irrelevant." AB at 34. That is untrue. While NGL certainly filed a *Daubert* motion that also raised the issue in an expert-specific context, the record confirms that: (a) NGL's separate motion concerning the wholesale inadmissibility of value-creation evidence was granted in full; and (b) the majority of the October Letter was excluded as a matter of law. OB, Ex. D at 2 ("Defendants' Motion *in limine* to Exclude Evidence of Value Creation is GRANTED"). Even the Countermand understood this was so, acknowledging the Opinion had indeed held the October Letter "***inadmissible***, at least in critical part." OB, Ex. B at 5.

Likewise, while it parrots the Countermand's hearsay-driven "party admission" language when arguing about the October Letter, LCT omits to mention that the Opinion expressly precluded value-creation evidence because it is irrelevant under Delaware law. OB, Ex. D at 24-25 (holding that allowing evidence about "value created to Defendants from the transaction … is contrary to the law of the

case and relevant case law."). Thus, the October Letter was found inadmissible on relevance grounds, not because it was hearsay – rendering LCT's "party admission" argument inapposite. *See Paron Cap. Mgmt, LLC v. McConnon*, 2012 WL 214777, at *3 (Del. Ch. Jan. 24, 2012) (such statements are allowed in evidence "[p]rovided [they] are not inadmissible based on some other objection").

These are not isolated incidents; LCT contradicts or misstates the record every time it attempts to diminish the Countermand's departure from the Opinion's rulings. For example, LCT now argues that the Opinion violated law-of-the-case when excluding value-creation evidence. Not so. The Opinion carefully considered the entire history of decisions in this litigation, together with *quantum meruit* precedent from Delaware and elsewhere, when excluding value-creation evidence. LCT also argues that the Opinion's exclusion only applied to expert testimony. Not so. The Opinion correctly recognized the inherent overlap on that issue in the parties' *Daubert* and *in limine* motions, as LCT itself repeatedly did at oral argument. *See* AR001452:15-18 (11/9/22) (recognizing the "central theme that runs through" those motions and that "there certainly is a lot of overlap" between them). Moreover, the Opinion made clear that it was speaking to the issue in both contexts: "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 created arguments together***." OB, Ex. D at 14.

These facts also confirm that, LCT's current posturing aside, the Opinion was anything but a vanilla pre-trial ruling "subject to change when the case unfold[ed]." AB at 12. It was tackling important legal issues about the scope of *quantum meruit* and the viability of LCT's preferred damages model as a matter of Delaware law – the same issues now before this Court – not simply calling provisional balls and strikes on exhibits that might change depending on how the trial progressed. The Opinion required months of judicial effort, more than 1,000 pages of underlying submissions, and six hours of oral argument. Any suggestion to the contrary comes with poor grace, especially when LCT told Judge Adams that the issues being resolved were fundamental to the nature of this case. *See* A000587-89 (9/21/2022); *see also Tilghman v. Del. State Univ.*, 2014 WL 1156242, at *1 (Del. Super. Mar. 4, 2014) (holding *in limine* ruling was law of the case).

Finally, ignoring NGL's related discussion entirely, LCT avoids two more facts that further undermine its strained arguments: (1) the Countermand rested on unfounded speculation that the Opinion had only excluded value-creation evidence "because no claim for unjust enrichment remain[ed]" in the case when, as can be seen, the Opinion never mentioned unjust enrichment; (OB at 21); and (2) the Opinion honored law-of-the-case but still established guardrails that specifically

prohibited, among other things, evidence about the proposal referenced in the October Letter. (OB at 30). *See also* OB, Ex. D at 36-37 (only allowing evidence "to the extent that [it] make[s] no reference to value created by the transaction or the equity buy-in proposal" and clarifying that admissible evidence "exclude[ed] discussions of value creation and the equity buy-in proposal"). Those facts stand unrebutted.

D. Affirmance Would Have Wide-Ranging Implications.

An entire section of NGL's brief was devoted to the effects on Delaware litigants if value-creation evidence were allowed in *quantum meruit* damages trials. LCT's answering brief ignores that entire discussion, waiving any contrary argument. NGL therefore refers the Court to that discussion rather than repeating it here. OB at 26-28.

II. LCT IMPROPERLY SOUGHT BENEFIT-OF-THE-BARGAIN/EXPECTANCY DAMAGES.

LCT similarly fails to address this appeal's second legal issue: the unavailability of benefit-of-the-bargain/expectancy damages in *quantum meruit*. That issue was the subject of discrete analysis in NGL's brief because it presents separate but related grounds for reversal here. And LCT has conceded (at least tacitly) that such damages are unavailable. In an effort to camouflage that concession, however, LCT's brief argues as if this were a single-issue appeal –

collapsing or conflating legal concepts and denying that it presented a benefit-of-the-bargain/expectancy case at trial.

That approach continues LCT's reliance on distraction tactics, most notably regarding: (a) its failure to present any market evidence supporting *quantum meruit* damages; and (b) its failed attempt to have market evidence excluded at trial, which is not part of this appeal because LCT never appealed the Superior Court's denial of that motion.

NGL now returns focus to what is actually before this Court, beginning with the governing legal framework that LCT ignores.

A. Expectancy/Benefit-Of-The-Bargain Damages Are Unavailable.

1. Unrebutted Law.

The prohibition against benefit-of-the-bargain/expectancy damages stems from longstanding recognition that *quantum meruit* is not a breach-of-contract action specific to any particular set of litigants because there is no contract to be enforced. Rather, it is a retrospective measurement of the cost of obtaining such services from a hypothetical provider in that industry. OB at 29-38. Which is why the law also makes clear that *quantum meruit* does not take into account any particular litigants' subjective intentions or expectations because doing so would indirectly enforce a non-existent contract. OB at 31, 33.

These principles are well-established across the country and predate the Opinion, including Delaware decisions holding that *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 and place the services were rendered"; and

- is measured by that evidence "***without regard to the actual intention of the parties***" in the lawsuit where the claim is being prosecuted.

Middle States, 1996 WL 453418, at *10-11; *United Health Alliance, LLC v. United Med., LLC* 2014 WL 6488659 (Del. Ch. Nov. 20, 2014); *see also Caldera*, 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***.").

This is the legal framework within which LCT was required to advocate. None of the arguments LCT prefers to make can be reconciled with our law, however, so LCT simply disregards it. Indeed, other than some quarrelsome footnotes (which are not cognizable argument in any event), LCT's brief never even tries to challenge these black-letter principles. The determinative law on this issue therefore stands unrebutted.

Nor is that the only such authority LCT ignores to its detriment. For example, NGL discussed a variety of decisions confirming that evidence of an alleged agreement is inadmissible to prove *quantum meruit* damages because it would give

plaintiff the benefit of a non-existent bargain – *i.e.,* of the never-formed contract. OB at 29-38. As explained by *McElroy v. Ludlum* more than a century ago:

> the value of the property to be conveyed or the benefit stipulated for ***cannot be received in evidence on the subject of the value of the services, without giving the party the benefit of the contract***; ***and such testimony will be excluded***, especially when the value of the equivalent to be rendered is contingent and indeterminate at the time the contract was made.

32 N.J.Eq. at 837.

Somerville v. Epps held likewise, re-confirming that the correct measure of *quantum meruit* is necessarily "the reasonable value of the services and ***not the value of the promised consideration***" because holding otherwise "would indirectly enforce the [unenforceable] contract." 419 A.2d at 911. [7]

These determinative principles have been part of Delaware jurisprudence since at least 1985, when *Cheeseman v. Grover* re-re-confirmed that:

- *quantum meruit* damages are ***not*** "the sum agreed to be paid" for plaintiff's services, as LCT now contends; and
- evidence of an alleged agreement "may be relied upon ***only*** to show that plaintiff did not act gratuitously" – *i.e.,* only to establish liability, not to prove damages.

[7] *Accord Maglica*, 66 Cal.App.4th at 450 ("[T]he threshold [liability] requirement that there be a benefit from the services can lead to confusion, as it did in the case before us. It is one thing to require that the defendant be benefited by services, it is quite another to *measure* the reasonable value of those services by the value by which the defendant was "benefited" as a result of them.") (emphasis original).

490 A.2d 175 (Del. Super. 1985). The Opinion considered these bedrock principles, in detail, when rejecting LCT's attempt to rewrite the law.

Having no way around this jurisprudence, LCT again resorts to various forms of avoidance. It completely ignores *McElroy*, buries *Somerville* in a conclusory footnote, then dodges *Cheeseman* rather than meaningfully addressing its holdings or impact on this appeal. LCT thus waived argument on those points. *Emerald Partners*, 726 A.2d at 1215; *Lum v. State,* 101 A.3d at 971-72. It also did so by failing to provide any contrary authority or analysis of the law itself. *Flamer v. State*, 953 A.2d at 134.

2. LCT's Arguments.

Having disregarded the applicable precedent, LCT's argument: (a) relies on *Bellanca* and *Pike Creek* for the contention that evidence about the parties' failed contact negotiations – *i.e.,* about a never-formed bargain – was admissible; and (b) contends that it did not seek benefit-of-the-bargain damages at trial. Neither contention withstands scrutiny.

NGL opening brief anticipated the *Bellanca* and *Pike Creek* argument, noting that it failed because (unlike here) each of those cases involved a contract between the litigants. OB at 35-36. NGL explained the same point below. More importantly, so did the Opinion when rejecting LCT's argument:

> ***Neither Pike Creek nor Bellanca stand for the proposition [LCT] 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. 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. Because the plaintiff in *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. ***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.***

OB, Ex. D at 34-35.

It was incumbent upon LCT to address these points, but it never acknowledges the Opinion's analysis or makes any real attempt to confront this issue. All LCT offers is a single-sentence deflection that "the contracts in both cases were unenforceable, which is why *quantum meruit* was being sought, and the issue was whether the evidence supported the *quantum meruit* awards." AB at 43. That deflection misses the mark.

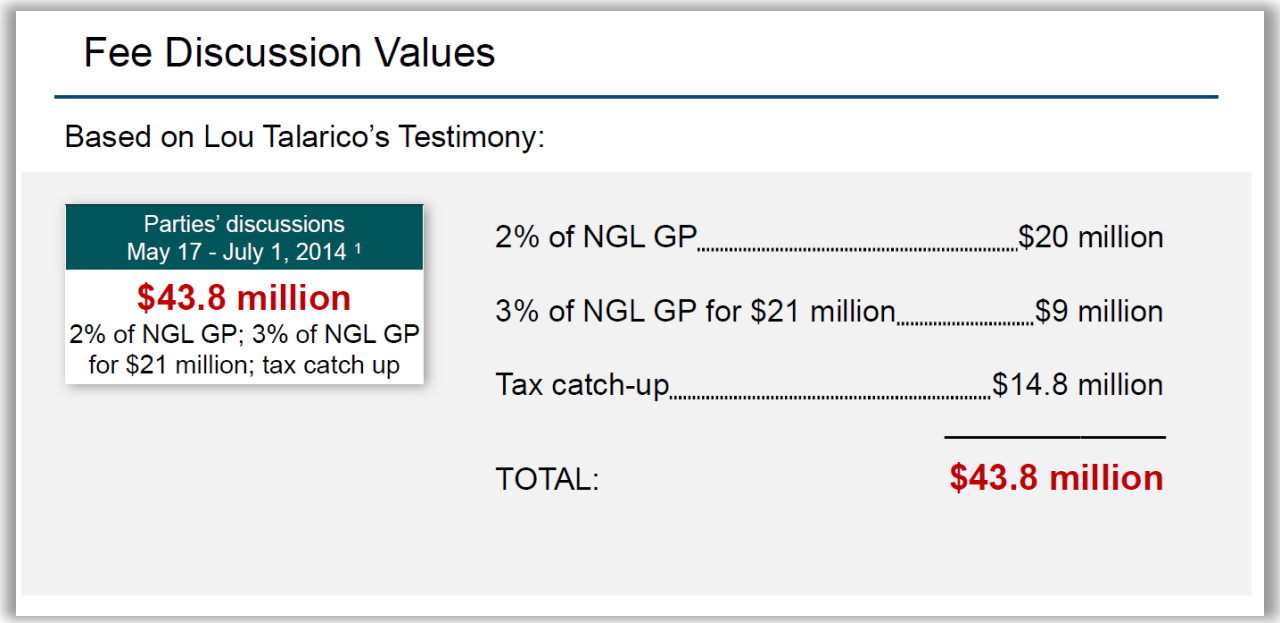
Setting aside the other legal impediments to LCT's position (discussed above), the fact that agreement was actually reached in *Bellanca* and *Pike Creek* is what makes them inapposite. And while LCT only offers an indirect parenthetical from the decision on which *Pike Creek* relied, *Emerson v. Universal Prods. Co.*, 162 A. 779, 781 (Del. Super. 1932), that case likewise involved a contract – underscoring the infirmity of LCT's misplaced arguments as a whole.

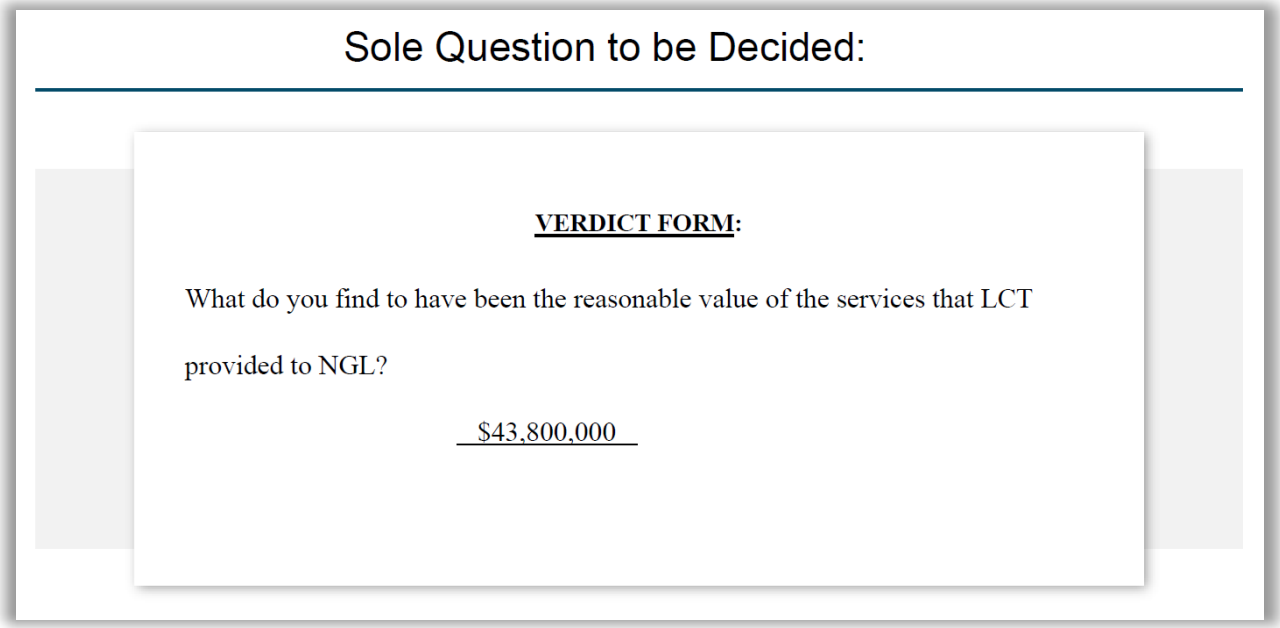
In short, there is no foundation for LCT's attempt to avoid the extensive body of precedent confirming that its benefit-of-the-bargain evidence was inadmissible. Recognizing as much, LCT resorts to the most extreme evasion tactic of all: repeatedly insisting none of that law really matters because LCT never sought benefit-of-the-bargain damages at trial – *i.e.*, to recover Talarico's claimed $43.8 million expectancy interest in a never-formed contract. AB at 38. It is an incredible claim that simply cannot be reconciled with the record.

Indeed, this Court need look no further than LCT's own words when seeking those exact damages from the jury:

> 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.***

See A001075:10-15 (2/15/23). LCT then reinforced its request with PowerPoint slides promoting Talarico's subjective benefit-of-the-bargain calculation as the damages being sought:





AR001456, AR001457. And yet LCT now insists these things never happened. It is another example of LCT's willingness to advance arguments that find no basis in reality.

Nor can LCT deflect from that problem by noting that NGL was less prejudiced than it could have been because the jury's award came in under Talarico's benefit-of-the-bargain figure (having seemingly split the difference on his tax calculation). LCT ignores the tens of millions in prejudice that still resulted, of course. LCT also ignores that its underlying evidence was impermissible as a matter of law, which independently calls for reversal. And LCT ignores the jury confusion that resulted from admission of such evidence, which likewise provides independent grounds for reversal.

3. Benefit-Of-The-Bargain Evidence Was Also Irrelevant To LCT's Services

While no *quantum meruit* plaintiff is entitled to recover the benefit of a never-formed bargain, LCT's claimed "bargain" is particularly irrelevant because the parties' unconsummated discussions were about LCT's potential equity buy-in and post-closing relationship with NGL – not a proxy for the market value of the advisory services rendered.

Indeed, as a contemporaneous message from Talarico confirmed, LCT began negotiations with Krimbill by telling him that LCT was looking to invest in NGL generally. AR001352. That proposed equity buy-in would involve as its foundational predicate a $21 cash payment from LCT to acquire a 5% stake in the NGL GP. It is undisputed that LCT never made any buy-in payment because the structure of that proposal was never agreed upon. Which is precisely the point. That

proposal was premised on many factors which never came to pass, independent of the services provided for the Transaction. As Krimbill testified: "The whole idea, as we said, investing the equity is what can be done in the future. So that investment was really related to the future, not to the [TransMontaigne] transaction. I felt like the – bringing the [TransMontaigne] transaction, whether we closed or not, proved LCT could bring us deals. They could source these." B003203:19-B003205:11 (2/13/23). And had LCT actually invested $21 million, it would have been incentivized to do so. But the parties never agreed to terms; LCT never invested any funds in NGL; and LCT never advised on any future deals. Krimbill's testimony on these points stood unrebutted.

Thus, as explained in NGL's opening brief, evidence about the parties' failed negotiations (*e.g.*, A000260-262; A000273-275; A000277; A000286-293; A000295-303) caused inescapable jury confusion because that evidence implicated a multitude of factors unrelated to the *quantum meruit* question and incorporated references to irrelevant but large-scale figures relating to NGL equity-price differentials and fluctuations – not the prevailing range of advisory fees in the banking industry. *See, e.g.*, OB at 32-33.

B. LCT Misapprehends NGL's Discussion of the Remand Opinion.

When discussing the insurmountable problems caused by allowing LCT to present benefit-of-the-bargain evidence at trial, NGL explained how "the Remand

Opinion specifically rejected LCT's attempt to obtain such damages on its now-defunct fraud claim, and [why] the logic underlying that holding applies with equal or greater force in the *quantum meruit* context." OB at 31-33. That discussion tracked four specific problems identified by this Court's prior analysis, noting how the Countermand's allowance of the same evidence led to the same problems at the remand trial. *Id.*

LCT dubs that argument "bootstrapping" as an excuse to ignore it, then pontificates about the nature of quasi-contract. AB at 40-41. Evasiveness aside, LCT's non-response misses the point.

As long recognized, *quantum meruit* is a quasi-contract claim because there is no contract. That is what the "quasi" disclaimer means; no bargain was ever agreed upon. And that is why allowing LCT to present benefit-of-the-bargain evidence about dead-end negotiations over a never-formed agreement led to the precisely same problems this Court identified in the Remand Opinion, including: (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"

and; (iv) the fact that "[s]uch a windfall would be contrary to Delaware law." OB at 32.

Those problems existed when fraud was in the case and they re-emerged on remand because LCT was permitted to present benefit-of-the-bargain evidence that has no place in *quantum meruit*. It is no more complicated than that.

C. NGL Did Not Waive Its Argument.

This appeal expressly includes NGL's challenge to benefit-of-the-bargain evidence being allowed at the remand trial. LCT offers a throwaway suggestion otherwise, musing the issue could have been included in the prior proceedings before this Court. AB at 41. But LCT correctly took the opposite position on remand. In fact, LCT twice advised the Superior Court that the prior appeal was interlocutory and limited to the damages available in fraud, not *quantum meruit*. *See* AR001433:10-14; AR001442-17:23 (11/9/22) (LCT's counsel: "[T]hat was an interlocutory appeal. ***It was really limited to … could you get benefit of the bargain damages on fraud***." and "***I don't think the Supreme Court was telling this Court anything with respect to what it was supposed to do on the quantum meruit remand*** other than give LCT a new trial.")

Moreover, as detailed in NGL's opening brief, this appeal stems from LCT's surprise announcement at the post-remand conference and subsequent revelation that it planned to seek benefit-of-the-bargain damages. OB at 7. Which is why so many

post-remand resources were then consumed on the issue. And there is no dispute that NGL timely preserved its objections to the admission of such evidence at the remand trial.

In any event, plain error is never waived (*Monrde v. State*, 652 A.2d 560 (Del. 1995)), and NGL submits that allowing such evidence was plain error for all the reasons discussed above and its opening brief.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. DENIED. This Court has previously held that compound interest is disfavored, the underlying statute has not been amended to the contrary, and LCT cites no controlling authority otherwise. In addition, to the extent awarding compound interest is a matter of discretion, the court below already stated it would not have awarded discretionary interest here.

2. DENIED. The Superior Court correctly ruled that: (a) LCT's breach-of-contract claim failed due to the "many undefined key terms," not simply a dispute over tax matters (AB, Ex. C at 21); and (b) LCT's unjust enrichment failed because it was improperly pled, LCT provided services officiously, and *quantum meruit* provided an adequate remedy at law.

ARGUMENT ON CROSS-APPEAL

I. THE CHALLENGED INTEREST AWARD SHOULD BE AFFIRMED.

A. Question Presented

Should the Superior Court's interest award be affirmed?

B. Scope of Review

Decisions entrusted to a court's discretion are given great deference and "by their very nature [are] exercised within a range of choices that may go either way." *Homestore Inc. v. Tafeen*, 2005 WL 1383348 (Del. June 8, 2005). Legal conclusions are reviewed de novo. *Bank of N.Y. Mellon Tr. Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225 (Del. 2011).

C. Merits of Argument

LCT's cursory presentation ignores this Court's holdings that Delaware "clearly disfavors compound interest" and there is "[no] practical distinction between awarding [post-judgment] interest on [pretrial] interest and granting compound interest." *Stone & Co., Inc. v. Silverstein*, Del. Supr., C.A. No. 298, 1998, Walsh, J. (Apr. 1, 1999) (ORDER).

The Superior Court cited *Stone* along with two other decisions from this Court rejecting compound interest. AB, Ex. B at 14 (citing *Summa Corp. v. Trans World Airlines*, 540 A.2d 403 (Del. 1988) and *Rehoboth Marketplace Associates v. State of Delaware*, 1993 WL 191465, at *1 (Del. 1993)). Unable to counter with any

contrary holding from this Court, LCT relies on the same two cases rejected below. Neither makes LCT's point.

In *Brandin v. Gottlieb*, 2000 WL 1005954 (Del. Ch. July 13, 2000), then-Vice Chancellor Strine acknowledged that "6 *Del. C.* § 2301 should not be reinterpreted by the judiciary as calling for compound interest. Any reinterpretation of the statute at this stage should come from the legitimate authority, the General Assembly." *Id.*, at *29.

LCT's other case, *Fortis Advisors, LLC v. Dematis Corp.*, 2023 WL 2967781, at *2 (Del. Super. Apr. 13, 2023), states that compound interest is discretionary in Superior Court. But the Order LCT now appeals already addressed that very point, explaining that it would still "award simple interest ***in this case***" even if applying a discretionary standard. AB, Ex. B at 16. LCT has provided no basis to revisit that determination.

II. THE CHALLENGED SUMMARY JUDGMENT DECISIONS SHOULD BE AFFIRMED.

A. Question Presented

Was summary judgment properly granted on LCT's breach-of-contract and unjust enrichment claims?

B. Scope of Review

Legal conclusions are reviewed de novo. *Bank of N.Y. Mellon Trust Co.*, 29 A.3d at 236.

C. Merits of Argument

1. Summary Judgment Was Proper on LCT's Contract Claim.

The trial court identified three reasons LCT's contract claim failed: (1) "neither party manifested objective assent regarding the alleged oral contract"; (2) "[t]oo many critical terms were being disputed"; and (3) "even more importantly the NGL board had yet to approve any of the terms." AB, Ex. C at 21, 23. At best, LCT only challenges the second reason – waiving argument on the other grounds that support affirmance. Moreover, LCT's challenge fails because it ignores the multiple materials terms which remained unresolved.

The same avoidance tactic was rejected below: "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.'" *Id.* at 23. LCT's cross-appeal does not claim

agreement on some of the most critical terms identified by the Superior Court, including "'...taxes and Class B units, LCT's ability to fund, and restrictions on proceeds use....'" *Id*. at 21.

As detailed in NGL's summary judgment briefing (AR001357-AR001430), the record revealed an absence of agreement on a host of material terms:

- The counterparties to the potential agreements were not identified. (Dkt. 277, Ex. 53, 74, 75.)

- While LCT has argued entitlement to "an option" for a 3% interest, contemporaneous writings only referenced a potential "*buy in* for another 3%," which NGL understood to be mandatory. (*Id.* Ex. 1.)

- Even if a 3% option was discussed, there was no agreement on its terms. As Talarico conceded, he "ha[d] not thought thru as yet" what the 3% would look like. (*Id.* Ex. 53.)

- Unit class being sold remained unsettled, with the parties discussing Class B units to reduce LCT's tax obligations. (*Id.* Ex. 67; Dkt. 8, ¶70.)

- LCT's commitment to provide future services remained undefined. Multiple witnesses explained that "the whole point" of transferring equity was for LCT to "provide future contributions in terms of sourcing additional deals for NGL" and "participat[e] … going forward as active management/oversight." (Dkt. 277, Ex. 37 at 70:7-13; 70:23-71:5; Ex. 7 at 99:12-16; Ex. 4 at 76:24-77:9.)

- Restrictions on the use of proceeds from the purchase of the interests remained open, as Talarico told Kurz and Refvik in April 2015 when saying it was "something that we are going to add [to the next turn of documents]." (*Id.* Ex. 86.) Talarico testified he was uncertain whether use of proceeds was part of the alleged oral agreement. (*Id.* Ex. 8 at 281:23-282:4.)

- Beyond NGL's consistent rejection of any tax payment, LCT's internal position varied on the amount of taxes supposedly to have been

> reimbursed. (Compare D.I. 8 ¶9 ($10.4 million) with Dkt. 277, Ex. 79 (Talarico's withdrawn "expert" opinion) at 11-12 (up to $33.4 million).)

LCT's editorial that "NGL convinced the court that no agreement existed through false deposition testimony" is wrong and irresponsible. AB at 56. Not only did Krimbill's deposition testimony (responding to a question about dilution) not contradict his trial testimony, but it was not even presented to the Superior Court on summary judgment. Instead, as shown above, NGL demonstrated how LCT's own documents and testimony prevented the finding that a contract had been formed. As Talarico admitted on June 4 – weeks after LCT now claims the purported agreement occurred – "I'm sure there will be other details to figure out." B525.

Nor did these parties ever express the "overt manifestation of assent" which "controls the formation of a contract." *See Indus. Am., Inc. v. Fulton Indus., Inc*., 285 A.2d 412, 415 (Del. 1971). Toth never responded to Talarico's email or forwarded it to NGL. B525. LCT is forced to highlight a vague "etc" in the email of EMG's Raymond, an outside director, as the purportedly objective manifestation of assent. LCT relied on those same emails below. And, unsurprisingly, LCT has never cited any authority to find those emails somehow constituted overt assent by NGL.

2. Summary Judgment was Proper on LCT's Unjust Enrichment Claim.

Following a similar tactic, LCT again skips past the first reason summary judgment was entered on this claim and confuses the second. But either reason warrants affirmance.

As the Superior Court explained: (a) LCT improperly pled "an unjust enrichment/*quantum meruit* claim" under "one count" when they are distinct causes of action; and (b) "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." AB, Ex. C at 25. Those points stand unrebutted.

The Superior Court also rejected LCT's claim on the additional ground that LCT "has an adequate remedy at law which will satisfy those principals [of justice or equity and good conscience], that is the *quantum meruit* claim." *Id*. The Superior Court recognized that the "only 'enrichment' that perhaps NGL is unjustly keeping is the compensation that is appropriate and fair for the work performed by LCT." *Id.* at 26. In so holding, the Superior Court found that LCT could never have obtained the enrichment itself and was acting "officiously" in the hopes of reaching agreement. *See Metcap Sec. LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756, at *9 (Del. Ch. Feb. 27, 2009); *Grunstein v. Silva*, 2014 WL 4473641 at *36, n. 278 (Del. Ch. Sept. 5, 2014), *aff'd*, 113 A.3d 1080 (Del. 2015). Thus, the Superior Court concluded that LCT's unjust enrichment claim failed on multiple grounds beyond

those now challenged on cross-appeal. *See id*. ("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***.").

LCT's cited cases are facially inapplicable. Unlike here, there was no *quantum meruit* claim in *Grunstein v. Silva*, 2011 WL 378782, at *9-15 (Del. Ch. Jan. 31, 2011). And unlike here, the plaintiff in *Endowment Research Grp., LLC v. Wildcat Venture Partners, LLC*, 2021 WL 841049, at *13-14 (Del. Ch. Mar. 5, 2021), properly brought actions for *quantum meruit* and unjust enrichment separately.

***

The challenged summary judgment decisions should be affirmed accordingly. It also bears note, given the history of unauthorized submissions below (*see* OB at 9), that LCT's reply brief may not: (a) expand beyond the abbreviated cross-appeal arguments set forth in its opening submission; or (b) offer further advocacy regarding NGL's appeal. *See* Supr. Ct. R. 14.

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