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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| OXBOW CARBON & MINERALS HOLDINGS, INC., INGRAHAM INVESTMENTS LLC, OXBOW CARBON INVESTMENT COMPANY LLC, WILLIAM I. KOCH,<br><br>Plaintiffs and Counterclaim Defendants-Below/Appellants,<br><br>v.<br><br>CRESTVIEW-OXBOW ACQUISITION, LLC, CRESTVIEW-OXBOW (ERISA) ACQUISITION, LLC, and LOAD LINE CAPITAL LLC,<br><br>Defendants and Counterclaim Plaintiffs-Below/Appellees. | No. 536, 2018<br><br>Court below: Court of Chancery of the State of Delaware<br><br>C.A. No. 12447-VCL<br><br>PUBLIC VERSION FILED NOVEMBER 30, 2018 |
| OXBOW CARBON LLC,<br><br>Plaintiff and Counterclaim Defendant-Below/Appellant,<br><br>v.<br><br>CRESTVIEW-OXBOW ACQUISITION, LLC, and CRESTVIEW-OXBOW (ERISA) ACQUISITION, LLC,<br><br>Defendants and Counterclaim Plaintiffs-Below/Appellees. | No. 536, 2018<br><br>Court below: Court of Chancery of the State of Delaware<br><br>C.A. No. 12509-VCL |

**ANSWERING BRIEF OF**
**DEFENDANTS BELOW-APPELLEES**
**CRESTVIEW-OXBOW ACQUISITION, LLC, CRESTVIEW-OXBOW (ERISA) ACQUISITION, LLC AND LOAD LINE CAPITAL LLC**

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Dated: November 21, 2018

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## NATURE OF PROCEEDINGS

Appellants William I. Koch *et al.* (collectively, the "Koch Parties") argue that the trial court improperly employed the implied covenant of good faith and fair dealing to rewrite the plain terms of an unambiguous contract.[1] In their view, the LLC Agreement ("Agreement") governing Oxbow expressly precludes the Minority Members from using their own proceeds from an Exit Sale to ensure that the Small Holders who purchased units in 2011 receive a 1.5x return on their investment, and the trial court thereby erred by invoking the implied covenant of good faith and fair dealing to allow such a "top off" payment.

That argument is wrong for two independent reasons. *First*, the Agreement's plain language allows the Minority Members to top off the Small Holders. *Second*, even if it did not, the Agreement also provides that before the issuance of any new units, Oxbow must give each member written notice of the "terms and conditions" of those units, and the Board then determines the rights associated with those units. Because Oxbow's Board never determined the terms and conditions of the Small Holders' admission in 2011, the trial court properly

[1] Capitalized terms not otherwise defined have the same meaning as in the trial court's February 12, 2018 decision (referred to as "Op.__"). The court's remedies disposition is cited as "Rem.Op__." "OB" refers to the Koch Parties' Opening Brief. Emphasis is added unless otherwise noted.

invoked the implied covenant of good faith and fair dealing to conclude that, had Oxbow's Board properly addressed the issue, the parties would have agreed that the Minority Members could top off the Small Holders to satisfy the 1.5x return-on-investment provision. For either reason, this Court should affirm the judgment.

The dispute here is straightforward. When the Minority Members in 2007 invested $265 million to purchase a roughly one-third interest in Oxbow (controlled by Koch and his affiliates), the Minority Members insisted on—and received—an express contractual right to exit that investment after seven years by offering to sell their interests to Oxbow at Fair Market Value ("FMV"). Although Oxbow was not required to accept that offer, the Agreement included a strong incentive to do so: if Oxbow declined, the Minority Members could force Oxbow's sale to a third party for at least FMV, provided that each member received a 1.5x return on its investment. This litigation represents the culmination of the Koch Parties' efforts to thwart the Minority Members' contractual exit rights.

Because Oxbow declined to buy the Minority Members' interests, the Agreement *entitles* the Minority Members to force an Exit Sale subject to two limitations: (1) the aggregate consideration received by *all* Oxbow's members must equal or exceed Oxbow's FMV, and (2) proceeds to *each* of Oxbow's members must equal at least 1.5x that member's capital contributions (minus prior

distributions). There is no dispute that, when this controversy arose in 2016, Oxbow's FMV was approximately $2.65 billion, or $169/Unit. Nor is there any dispute that such FMV would allow each of Oxbow's original investors to recover more than 1.5x its individual capital contributions. Nor is there any dispute that a third party was prepared to buy Oxbow at $176/Unit.

Rather, the controversy here involves the return to the Small Holders (two Koch-controlled LLCs) that in 2011 purchased a 1.4% interest in Oxbow. Because these Small Holders purchased their interest years after 2007, and by 2016 had not received the same amount of return on their capital as the original investors, the Small Holders would not receive a 1.5x return on their investment from a sale of their interest at $176/Unit unless the Minority Members supplemented those proceeds from their own sale proceeds (which they are willing to do). But the Koch Parties insist that the Agreement forecloses the Minority Members from supplementing the Small Holders' proceeds to satisfy the 1.5x provision. According to the Koch Parties, the Minority Members cannot force an Exit Sale unless *the sale price paid* directly by the buyer provides the Small Holders with a 1.5x return. Because the Agreement also specifies that all units must be sold at the same price, the Koch Parties' theory ("Highest Amount Theory") is that all members must receive a minimum sale price of $414/Unit, roughly 250 percent

higher than the Units' FMV—an utterly implausible outcome. The Koch Parties think they have a "gotcha": the fortuitous sale of less than 2% of Oxbow to the Small Holders in 2011 effectively allows the Koch Parties to trap the Minority Members in this investment indefinitely.

Nothing in the Agreement remotely allows, much less requires, that result. The Agreement provides that the Minority Members cannot "require any other Member to engage in [an] Exit Sale unless the *resulting proceeds* to such Member … equal at least 1.5 times such Member's aggregate Capital Contributions." But the provision does not say that the "resulting proceeds" to the Small Holders must come directly from the buyer. Rather, as a matter of law and logic, those proceeds also could come from the Minority Members' proceeds, as long as the Small Holders receive a sum totaling 1.5x their investment. That interpretation makes sense: it is undisputed that the purpose of the 1.5x provision is to ensure that, in the event of an Exit Sale, each member receives a 1.5x return on *its own* investment, not a 1.5x return on *someone else's* investment. There is certainly no harm to the Koch Parties if the Minority Members top off the Small Holders from their own Exit Sale proceeds. And that is entirely consistent with the Agreement's separate provision that, in an Exit Sale, "each Unit Transferred … shall be Transferred on the same terms and conditions as each other Unit so Transferred." The "terms and

conditions" on which the units are "Transferred" to the *buyer* have nothing to do with the "resulting proceeds" to any particular *seller*. As long as the buyer pays a uniform price for all units, so that no seller receives a control premium, the Minority Members are free to top off the Small Holders to ensure that their resulting proceeds yield a 1.5x return on their investment.

Another path to the same result (which the trial court followed) is to invoke the implied covenant of good faith and fair dealing. The Agreement does not automatically guarantee new members the same rights as existing members. To the contrary, the Agreement specifies that, if Oxbow proposes issuing units to new members, it must give each existing member written notice describing the units, their price, and the "terms and conditions" on which they are to be issued or sold. Before such units may be offered to proposed new members, the Board must determine the rights associated with those units. Neither step happened here because the Koch Parties never identified, nor did the Board determine, the proposed rights of the Small Holders' units. In turn, the Minority Members were not properly informed at the time of the issuances of their implications—and had no opportunity to leverage their power to veto the issuances unless their exit rights were preserved. Because the Small Holders were never given the same rights as the original members, the trial court properly invoked the implied covenant to

conclude that, had the parties negotiated over the terms and conditions of the Small Holders' admission in 2011, they would have agreed that the Minority Members could top off the Small Holders to satisfy the 1.5x provision.

Because the trial court correctly concluded that the Minority Members are entitled to exercise their Exit Sale right if they top off the Small Holders with Exit Sale proceeds, this Court should affirm the judgment.

## SUMMARY OF ARGUMENT

1. Denied. The trial court properly invoked the implied covenant of good faith and fair dealing, because the Koch Parties failed to follow the conditions to establish the rights of the Small Holders. Accordingly, the trial court was entitled to deploy the implied covenant to determine the terms of admission, and properly found that the parties would have conditioned the issuance of units in 2011 upon the Minority Members' ability to top off the Small Holders to preserve their Exit Sale right.

But this Court need not reach the trial court's application of the implied covenant, because it can affirm based on the Agreement's plain language.

2. Denied. The Agreement allows the Minority Members to top off the Small Holders. The trial court also correctly recognized that because the Koch Parties failed to follow the contractual rules in connection with the admission of the Small Holders in 2011, they cannot capitalize on their own malfeasance to use the admission of the Small Holders to thwart the Minority Members' contractual Exit Sale right.

3. Denied. The trial court correctly held that the Koch Parties breached the Agreement's cooperation covenant by affirmatively doing everything possible

to thwart an Exit Sale. The Koch Parties do not, and cannot, establish that the trial court's extensive factual findings in this regard are clearly erroneous.

4. Denied. The trial court correctly granted the Minority Members specific performance of their Exit Sale rights, with a floor set at the price offered in the ArcLight transaction. Similarly, the trial court properly awarded the Minority Members their *pro rata* share of the fees Oxbow paid to Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. ("Mintz"), which worked in Koch's interest, not Oxbow's.

## STATEMENT OF FACTS

### A. Factual Background

#### 1. The Agreement (2007)

This dispute arises out of the Minority Members' 2007 investment of $265 million in Oxbow to acquire roughly a one-third interest in the Company. *See* Op.28. As a condition for that investment, the Minority Members obtained exit rights to ensure that Koch, the majority unitholder, could not lock them into the investment indefinitely.

The 2007 version of the Oxbow Agreement provides that, after seven years, the Minority Members have the right to "Put" their Oxbow units at FMV. Oxbow need not accept the Put, but if it declines, the Minority Members may sell Oxbow under the conditions set forth in Art. XIII, Section 8(e):

> If … the Company rejects the Put Notice …, the Exercising Put Party may require all of the Members to engage in an Exit Sale, on the terms set forth in Section 7(c), Section 7(d) and Section 9(b), in which [1] the aggregate consideration to be received by such Members at the closing of such Exit Sale equal or exceed Fair Market Value; [2] provided, that the Exercising Put Party may not require any other Member to engage in such Exit Sale unless the resulting proceeds to such Member (when combined with all prior distributions to such Member) equal at least 1.5 times such Member's aggregate Capital Contributions through such date.

A2115-16. An "Exit Sale" is a "Transfer of all, but not less than all, of the then-outstanding Equity Securities of the Company and/or all of the assets of the

company to any non-Affiliated Person(s) in a bona fide arms'-length transaction or series of transactions …." A2079.

None of "the terms set forth in Section 7(c), Section 7(d), and Section 9(b)" precludes the Minority Members from topping off other members to satisfy the 1.5x provision. Section 7(c) specifies that each member must pay its *pro rata* share of the expenses of such a transaction. A2114. Section 7(d) specifies that each unit transferred to the buyer in an Exit Sale must be transferred "on the same terms and conditions" as every other unit transferred. *Id*. And Section 9(b) specifies that "[a]llocation of the aggregate purchase price payable in an Exit Sale will be determined by assuming that the aggregate purchase price was distributed to [Oxbow Holdings] and the remaining Members" on a *pro rata* basis. A2116.

If the Minority Members exercise their Exit Sale right, Article XIII, Section 8(f) requires "cooperat[ion]" from other members. *Id*. Specifically, "[i]n such event, each party hereto agrees to use its *reasonable efforts* to take or cause to be taken or do or cause to be done all things necessary or desirable to effect such Exit Sale," including "vote for, consent to and raise no objections against any Exit Sale …." *Id.*

The Agreement also provides for the issuance of additional units and the admission of new members, but does not guarantee them the same rights, duties,

and obligations as the original members. To the contrary, Article XIII, Section 5(b) specifies that "[i]f the Company proposes to issue [new units], the Company will give each member written notice of its intention, describing the [units] and the price and *terms and conditions* upon which such [units] are to be issued and/or sold," and gives existing members the right to purchase their *pro rata* share of such new units. A2111. Where the new units are to be offered to potential new members, there are no default terms for those units:

> Subject to Article XIII, Section 5, upon the approval of the Directors, additional Persons may be admitted to the Company as Members and Units may be created and issued to such Persons as determined by the Directors *on such terms and conditions as the Directors may determine at the time of admission*. The terms of admission may provide for the creation of different classes or series of Units having different rights, powers and duties. As a condition to being admitted as a Member of the Company, any Person must agree to be bound by the terms of this Agreement by executing and delivering a counterpart signature page to this Agreement, and make the representations and warranties set forth in Section 7 below as of the date of such Person's admission to the Company. The address, Percentage Interest and Capital Contribution of each such additional Member shall be added to Exhibit A, which shall thereby be amended.

A2093 (Article IV, Section 5). Indeed, even the original members do not have the same rights. A858, A1071. For example, the Minority Members have exit rights under Article XIII, Section 8, as described above. By contrast, Koch-affiliate OCMH has exit rights under Section 9, which allows OCMH to compel an Exit

Sale in which the Minority Members receive a 2.5x return, but does not require any minimum return to any other member. A2116.

Additionally, the Agreement provides that "each Director shall have fiduciary and other duties with respect to the Company as would apply to such Director if such Director were a director of a Delaware corporation." A2093. The Agreement also prevents Oxbow from "entering into, terminating or amending any transaction, agreement or arrangement with or for the benefit of any Member or any of its Affiliates ..." without a Supermajority Vote, which requires the Minority Members' consent. A2087-89.

### 2. The Small Holders Purchase Units (2011)

In late 2010 and spring 2011, Koch proposed to issue a small number of new "shares" (representing a roughly 1.4% interest in Oxbow) to certain family members and former executives of a newly-acquired Oxbow affiliate at $300/share. Op.37-39. Oxbow twice approached its transactional counsel, Latham & Watkins ("Latham"), to prepare the contractually required documentation to amend the Agreement to add new members. B1329, B1439, B1441. Latham did so, but Koch never presented those amendments to the Board. Nor did Koch provide the Minority Members with written notice of the terms and conditions on which the new units would be issued.

Rather, Koch proceeded as if the issuance of "shares of Company stock" was a matter of no consequence. In particular, at the Board meeting to approve the issuances:

- The Board did not discuss, much less "determine" the "terms and conditions" for the entry of new members, including their "rights, powers and duties," *see* Op.145-48; A2038-42;
- Koch did not suggest that the transaction would impact the Minority Members' Exit Sale right, *id.*;
- The Board never approved the issuance of units to LLCs, as opposed to individuals, *id.*;
- Koch did not disclose that he would control the LLCs, making it a "related party" transaction subject to supermajority approval—including the approval of at least one Crestview Director and the Load Line Director, *id.* A2087-89.

On April 28, 2011, without any discussion of the rights and obligations of new members, the Board unanimously adopted two resolutions:

> RESOLVED, that the Company is authorized to issue up to $20,000,000 of shares of Company stock to the family of William I. Koch's family, including unit holder Joan Granlund, at a price of $300 per share.
>
> FURTHER RESOLVED, that the Company is authorized to issue up to $10,000,000 of shares of the Company stock to former [affiliate] executives at a price of $300 per share.

A2040.

One day later, Koch and Oxbow's CFO, Zach Shipley, discussed that the Agreement contained a "preemptive rights provision," which provided "all

members certain rights of participation in any equity [issuance] by the Company." Op.38. While Shipley questioned "whether we need to get a slightly different approval from the Board," neither he nor Koch aired these concerns with the full Board. *Id.*

A few months later, on November 9, 2011, the Board reconvened to increase the number of "shares" to be issued to the affiliate executives, as none had yet been issued. While the Board agreed to offer "$15,000,000" worth of "*stock*" to the employees, it again failed to discuss—let alone determine—the terms and conditions of membership or "address the question of preemptive rights." Op.39.

Although "the issuances were related-party transactions," Op.148, at neither Board meeting did Oxbow "consider whether the issuances to the Small Holders required a Supermajority Vote." Op.43. Nor did Oxbow ever "obtain a specific waiver of the existing members' preemptive rights." *Id.*

In the ensuing months, Koch formed Family LLC and Executive LLC to purchase units, despite the Board having only approved the sale of shares to individuals. Koch controls both LLCs—Family LLC directly and Executive LLC indirectly as the sole manager of the managing member of Executive LLC. Op.39; *see also* A716-17; B1439-40, B2359 No. 23.

Oxbow subsequently issued the units to Family LLC in December 2011, and to Executive LLC in March 2012. Op.40. At the time, however, the new members did not "agree to be bound by the terms of th[e] Agreement by executing and delivering a counterpart signature page to [the] Agreement, and mak[ing] the [requisite] representations and warranties," nor was Exhibit A to the Agreement amended to specify "[t]he address, Percentage Interest and Capital Contribution of each such additional Member." A2093; Op.43-44.[2] Indeed, "[t]he Small Holders did not provide Oxbow with signed signature pages until 2016, *after* this litigation began." Op.44.

Tellingly, at the time of the issuances, the individual members of Family LLC and Executive LLC were not informed of the 1.5x provision, and only learned of it shortly before this litigation commenced. *See* Op.157; *see* B723. And while Koch now claims that the 1.5x provision is intended to ensure the Small Holders receive a 1.5x return on their investment, the members of Executive LLC signed an operating agreement allowing Koch to buy all of them out at FMV *at any time*, without any 1.5x protection. Op.157-58.

[2] Family LLC's "joinder" (OB 51) does not satisfy these requirements.

### 3. The Minority Members' Exit Efforts

Beginning in 2013, Koch became concerned that Crestview would be able to exercise its Put right in 2014. Op.45. Koch worried that Oxbow would be unable to raise funds to pay the Put Price, thereby triggering an Exit Sale. *See id.* Crestview agreed to multiple Agreement amendments to delay its exit to "give Koch more time to raise money and alleviate Koch's anxiety about the Put." *Id.*

In May 2015, with the Put exercise date approaching, Koch personally hired Mintz to pursue ways to avoid the Put and block an eventual Exit Sale (the engagement was subsequently modified to reflect an engagement by Oxbow). Op.63-64; Op.69; Rem.Op.35-37. Mintz identified multiple strategies, including "delay[ing] the payment of the Put in order to have negotiating leverage," and creating "serious deadlock in the put process." Op.69.

Crestview formally exercised its Put Right on September 28, 2015, and Load Line exercised its Tag-Along right. Op.70. A valuation exercise thereafter set Oxbow's FMV at $169/Unit. Op.3-4. Mintz, on behalf of Koch, continued its efforts to invalidate the Put and prevent an Exit Sale. Op.73-75. Oxbow formally rejected the Put on January 19, 2016, and Crestview formally exercised its Exit Sale right the next day. Op.79-80.

Notwithstanding the contractual duty to use "reasonable efforts to take or cause to be taken or do or cause to be done all things necessary or desirable to effect such Exit Sale," A2116, the Koch Parties did everything possible to thwart a sale. As the trial court found, the Koch Parties ordered Oxbow and its counsel affirmatively to "obstruct," "derail," and "delay" the Exit Sale process, and directed counsel to devise multiple strategies to do so, including "[d]evise a lawsuit" to prevent the Exit Sale. *See* Op.79-80.

Many strategies were developed by the Koch Parties, Mintz, and Ropes & Gray ("Ropes") as they sought to thwart an Exit Sale; but tellingly, all of those strategies assumed that if a buyer offered FMV, the Minority Members could top off the Small Holders to satisfy the 1.5x provision. Not once did any of their related communications suggest that an Exit Sale could be prevented because the Agreement mandated a sale price of $414 for every unit (versus a $169 FMV), thus making an Exit Sale impossible. In November 2015, for example, Mintz and Morris Nichols jointly made a presentation on "various options" to avoid the Put and Exit Sale that "did not discuss the Equal Treatment Requirements, and [] did not develop the Highest Amount Theory." *See* Op.73-74. In that presentation, Mintz "advised [the Board] that a Top Off provided a viable path" to satisfy the 1.5x provision for the Small Holders. *Id*. Koch's meeting notes confirm that

"[n]ot all [members were] at 1.5x" and that "[s]ome[one] has to come up with cash for [the Family LLC delta]." Op.75.

In a January 2016 meeting with the Koch Parties, "Mintz Levin thought that even if the 1.5x Clause gave rise to a Blocking Option, Crestview could use a Top Off" to satisfy the 1.5x provision for the Small Holders. Op.78. Another Mintz lawyer advised that he "thought that the Minority Members could force Koch to sell because, if a buyer existed [at FMV], the Small Holders could be topped off." *Id.* Yet another Mintz attorney "shared [this] view about the viability of a Top Off." Op.79. Robert Popeo, the lead Mintz attorney, echoed these views, concluding that to force an Exit Sale "Crestview must net $169 after Investment Bank fee— [and] pay out to [Family LLC]," a reference to a top off. A1440-41; Op.82.

These views were universally shared by the principal negotiators of both the 2007 Agreement (Bill Koch, his then-advisor Jim Freney, and in-house lawyer Dave Clark) and its amendments (Michael McAuliffe, Oxbow's General Counsel, and Bill Parmelee, Oxbow's CFO). Immediately after Crestview exercised its Exit Sale right, in January 2016, McAuliffe and Parmelee noted that the 1.5x provision could be satisfied with a top off. Op.80-81 (citing B1447). Shortly thereafter, on February 18, 2016, Parmelee wrote to Mintz's Rich Kelly and Clark, stating that

the Small Holders could be paid "[$414] per unit from the consideration paid, while other unit holders receive substantially less on a per unit basis." Op.80-81 (citing B1469). Kelly repeated this view to Koch, Clark, Parmelee, and Popeo, noting that "the sale price will need to be above $169/Unit in order for holders of Units to net at least $169/Unit as is required for such an Exit Sale (not to mention the extra amounts needed to assure all holder[s] will get at least 1.5 times their respective investments.)." Op.87-88 (citing B1495). None of Koch, Clark, or Parmelee—the Agreements' negotiators—disagreed that the Agreement allowed a top off. In fact, according to Koch, he and his advisors discussed an Exit Sale with a top-off payment throughout January and February 2016, but *no one* suggested that "a top-off payment was prohibited under the Agreement." Op.81.

In March 2016, ArcLight, a private equity investor, submitted a $2.4 billion bid ($176/Unit) for Oxbow, which exceeded FMV ($169/Unit). B1523-28. Koch's response was immediate and unequivocal: "I think I should write a thanks [sic] you but NO to ArcLight …. I will not in any way accept Crestview and/or Davis Polk negotiate [sic] a deal that binds my family and me!!!!!" B1541-53; *see also* B1558-60.

ArcLight's offer did not alter Koch's views on the feasibility of a top off. To the contrary, following receipt of the letter, Koch instructed Freney to calculate

the amount necessary to top off the Small Holders to a 1.5x return, and Freney advised Koch and Mintz that $27.9 million was the "*[a]mount required to achieve minimum 1.5x aggregate capital contribution for all unitholders*." Op.92; B1447-50; B1475-82; B1529-31. Freney circulated, and Koch and Mintz approved, multiple iterations of these calculations, each referencing $27.9 million as the top-off amount. Op.92-93. But Koch's belief that the Agreement allowed for a top off was most clearly evidenced by his e-mail, sent only to Koch-appointed Directors (and reviewed in advance by Mintz) following the ArcLight bid, in which he acknowledged that"[t]he Agreement requires that all members receive at least $169/Unit while other members are required to receive *additional funds* which will bring their returns to 1.5 times their original investments." B1754-59; Op.95-96.

Even as Oxbow strained to justify rejecting ArcLight's $176/Unit offer, it did not cite a $414/Unit threshold as a basis to block an Exit Sale (later defined as the "Highest Amount Theory"). On March 18, Koch's counsel, Ropes, devised a letter to "shoot[] the [ArcLight] LOI down," B1567, detailing 11 reasons why the bid was deficient. B1561-64. None of those reasons included the Highest Amount Theory or referenced a $414/Unit requirement for all members. *Id*. On the same day, Popeo emailed Koch to advise him that if Oxbow's investment bank, Goldman, determined that the implied value of the ArcLight bid exceeded FMV of

$169, then Oxbow was "dead in the water" in trying to avoid an Exit Sale. Op.93 (citing B1566). All these communications reflect the Koch Parties' universal belief that the Agreement allowed for a top off for the Small Holders.

It was not until March 24, 2016, that Oxbow—through Mintz—first developed the Highest Amount Theory that an Exit Sale could not proceed unless all members received $414/Unit, or 1.5x the Small Holders' investment. Op.96. In an internal e-mail, Mintz litigation partner Bret Leone-Quick described "*a fun new theory*" that "I don't think we have discussed" on "how the 1.5x threshold can work to potentially block an Exit Sale." B1735; Op.96. Even Mintz questioned this newfound litigation theory, as Mintz's Kelly noted internally that "the contrary reasoning is that it is *implied* that other members need to (and have *implicitly agreed* to) forego or reallocate whatever is needed in order to top up the little non-1.5X parties to 1.5X." *Id*.

Mintz's initial internal draft of the letter to Crestview that first articulated the "fun new theory" acknowledged that Oxbow "initially believed" that a top off was permitted under the Agreement. Op.97-98; B1742. Even after Mintz unveiled the "fun new theory," Oxbow's advisors continued to disagree, with Popeo opining that it was "unlikely to succeed in Court." B1903. Similarly, Cravath—which was Oxbow's corporate counsel for any Exit Sale—"was prepared to advise that in [its]

experience, most provisions like the 1.5X Clause could be addressed with a Top Off." Op.136; B520.

Despite Koch's efforts, ArcLight continued pursuing Oxbow, and on May 27, 2016, submitted another offer. Op.102; A2043. In response, Koch instructed Ropes to prepare a lawsuit against Crestview and "not hold back …. That is what I want! No holds barred." B2329-31. As Koch grappled with the revised proposal, Popeo offered him simple advice: "if [Bill Koch] wants to kill deal," he should "fire EJ [Eric Johnson, Oxbow's president] and file lawsuit." B3091; Op.103. Koch did just that.

In the midst of a June 10, 2016 Board meeting to discuss the revised offer, the Koch Parties (other than Oxbow) filed this lawsuit. Op.103-04. On the same day, Koch fired Johnson. Op.103. These events, as predicted, swiftly killed the ArcLight deal. Op.105. Oxbow filed its own copy-cat suit thereafter, allowing Koch to litigate the case at Company expense. Op.107.

### B. Proceedings Below

The Koch Parties' complaints alleged a breach of the Agreement and sought, among other things, declaratory relief. The Minority Members answered and counterclaimed for breach of the Agreement and declaratory relief. Op.106.

In response to early summary judgment motions, the Koch Parties advanced their newly minted position that an Exit Sale could proceed only if the buyer paid a price of $414/Unit, over *double* Oxbow's FMV. B92-102. The Minority Members' principal arguments were that the Agreement did not create a blocking right for the Small Holders, and that the Small Holders could be "left behind" in an Exit Sale, *see* A539-40, 546-47. The parties' supporting correspondence also raised the Minority Members' alternative proposal that, even if they could not leave behind the Small Holders, the Minority Members could pay a top off to satisfy the 1.5x provision. A538-39 ¶ 14; B250-51.

The court expressly rejected both the Minority Members' "leave behind" and "top off" theories, holding that the Agreement's plain language mandated the Highest Amount Theory.

The court recognized, however, that this interpretation essentially nullified the Minority Members' Exit Sale right. Thus, the court noted that the Minority Members "argue with some force that given the overall structure of the agreement and the concept of the Exit Sale, they never would have agreed that investors with a stake as small as the Small Holders' would be able to block the operation of the Exit Sale right." A545-46 ¶ 23(b). But that, according to the court, "is an implied covenant argument, and it is fairly litigable." *Id.*

Following extensive discovery and a six-day trial, the trial court issued a comprehensive 177-page opinion concluding that the Minority Members could exercise their Exit Sale right by topping off the Small Holders. Although the court reaffirmed its earlier interpretation of the Agreement, Op.123-38, it concluded that the Board's failure to raise, much less address, the question of the terms and conditions on which units were issued to the Small Holders in 2011 warranted applying the implied covenant. Op.138-150. Had the Board properly called the question, the court concluded, the parties would have agreed to allow a top off. Op.150-63.

The court also held that the Koch Parties breached their contractual duty of cooperation, Op.164-67, instead "spen[ding] most of their energy and resources trying to design ways to thwart [an Exit Sale]." Op.167.

On September 19, 2018, the trial court issued a remedial order granting the Minority Members specific performance of their Exit Sale right. Rem.Op.1. Recognizing that the Koch Parties killed the ArcLight bid, the court also held that the Minority Members could recover damages if the ultimate Exit Sale price were lower than the ArcLight offer. Rem.Op.2. The court also ordered the Koch Parties to reimburse the Minority Members for their *pro rata* share of Mintz's fees, which

had been wrongfully charged to Oxbow, as Mintz had acted as Koch's personal counsel in obstructing an Exit Sale. Rem.Op.3-4.

## ARGUMENT

## I. THE AGREEMENT REQUIRES THE SMALL HOLDERS TO ACCEPT A TOP OFF FROM THE MINORITY MEMBERS.

### A. Question Presented

Whether the Agreement entitles the Minority Members to top off the Small Holders to satisfy the 1.5x provision.[3]

### B. Scope Of Review

Contract interpretation is a question of law subject to *de novo* review. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010). This Court "may affirm on the basis of a different rationale than that which was articulated by the trial court, if the issue was fairly presented to the trial court." *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015); *see generally* Del. S. Ct. R. 8.[4]

### C. Merits Of Argument

The Agreement grants the Minority Members the right to exit their investment after seven years by giving Oxbow the option (but not the obligation) to buy out their interests. *See* A2114-16. If Oxbow declines the Put, the Minority

[3] This issue was preserved below. A1088 ¶¶ 207-210, 265; B66 at 37; A531 ¶¶ 14-15.

[4] Because the Minority Members are not seeking to enlarge the rights accorded by the court's judgment, a cross-appeal is unnecessary. *See Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 815 n.13 (Del. 2013).

Members are entitled to trigger an Exit Sale subject to only two conditions: (1) the aggregate consideration received by *all* Oxbow members must equal or exceed FMV, and (2) the resulting proceeds to *each* member (when combined with all prior distributions to such member) must equal at least 1.5x *such* member's aggregate capital contribution.

This dispute turns on the second limitation. The Koch Parties contend, and the trial court agreed, that the "plain language" of the Agreement establishes that "[t]he Exit Sale must provide *the same consideration to all members*," A540 ¶ 16, so that "the Member with the highest required sale price sets a floor price for all Members." OB 14. That interpretation—*i.e.*, the "fun new theory"—is incorrect: the Agreement permits the Minority Members to top off the Small Holders to ensure that they receive 1.5x their capital contributions.

In fact, the Agreement imposes only two conditions on the members' Exit Sale remuneration: (1) each of the units transferred in an Exit Sale must be transferred to the buyer "on the same terms and conditions as each other Unit so Transferred," A2114, and (2) "[a]llocation of the aggregate purchase price payable in an Exit Sale will be determined" on a *pro rata* basis, A2116. These provisions prevent a controlling unitholder from obtaining a control premium from the Exit Sale buyer. A top off paid by the Minority Members is entirely consistent with

both conditions and that purpose—each unit is still transferred to the buyer on "the same terms and conditions," and the aggregate price paid by the buyer for all units is still distributed *pro rata* to the members. The buyer is paying every member the exact same amount per unit. A top off from the Minority Members simply ensures that the "resulting proceeds" to the Small Holders equal 1.5x their capital contributions, A2116, achieving the return on investment they expected, without reducing any other member's *pro rata* share of the purchase price. This outcome fulfills the purposes of the Agreement, and—not surprisingly—nothing in the Agreement prohibits it.

The trial court concluded otherwise only by characterizing Article XIII, Sections 7(c), 7(d), and 9(b), which in turn reference certain distribution provisions, to establish generalized "Equal Treatment Requirements." Op.127; *see also* Op.3, Op.73, Op.132. In the court's view, these requirements "*effectively* require equal and ratable treatment of members in an Exit Sale." Op.127. But that is an overly broad characterization of the text of those provisions, which only require the sale of the units on the "same terms and conditions," A2114, and allocation of the aggregate Exit Sale amount paid by the buyer on a *pro rata* basis, A2116. Nothing in these provisions states that each holder of units "will be entitled to receive *equal per share payments or distributions*," as a generalized

equal treatment provision ordinarily would. *See Southeastern Pa. Transp. Auth. v. Volgenau*, 2013 WL 4009193, at *24 (Del. Ch. Aug. 5, 2013). Thus, nothing in these provisions prevents the Minority Members from providing the Small Holders with *additional* proceeds to ensure that their "resulting proceeds" satisfy the 1.5x provision.

The trial court erred by holding that Section 7(d)'s requirement of uniform "terms and conditions" prohibits a top off. The court asserted that "[t]he price that a member *receives* for its units is a term of the transfer"—indeed, often "the most important term." Op.128. But that is a *non sequitur*. Section 7(d) addresses the "terms and conditions" under which the units are "Transferred" to a "non-Affiliated Person"—a buyer—in an "Exit Sale." As long as the buyer purchases all units on the same terms, that requirement is satisfied; a controlling member "cannot demand extra consideration as compensation for its controlling stake." *See* Op.130; *see also* Op.134. Nothing in Section 7(d) "forecloses having certain members *receive* greater consideration … than others," Op.128. A top off does not implicate selling the units on "different terms." *Id.*

Similarly, none of the provisions governing allocation of the purchase price among members forecloses one member from topping off another. Section 9(b) specifies the "aggregate purchase price payable in an Exit Sale" will be

"allocat[ed]" among members "in accordance with Article XI, Section 1," which in turn requires *pro rata* distribution to Members "in accordance with their Percentage Interests." A2116. These provisions address only allocation of the aggregate funds the buyer pays.

Because neither of the two contractual limitations on the Minority Members' Exit Sale right applies, the Minority Members "may *require* all of the Members to engage in an Exit Sale." A2115. Just as the Minority Members "may not require any other Member to engage in [an] Exit Sale *unless* the resulting proceeds to such Member" satisfy the 1.5x provision, it follows that the Minority Members *may require* any other Member to engage in an Exit Sale if that provision is satisfied. *Id.* In other words, the Minority Members are entitled to require an Exit Sale unless one of the limitations applies. And, every other member is thus contractually obligated "to use its reasonable efforts to take or cause to be taken or do or cause to be done all things necessary or desirable to effect such Exit Sale," including by "vot[ing] for, consent[ing] to and rais[ing] no objections against any Exit Sale …." A2116.

The Koch Parties' contrary interpretation ignores the Agreement's text and structure, and creates an absurd result. It is undisputed that the purpose of the 1.5x provision was to ensure each individual member received at least a 1.5x return on

its *own* investment before being forced to sell. *See* Op.155 (1.5x provision is intended "to provide a minimum financial return"); B83. Whether that return comes from the sale proceeds the buyer pays, or is supplemented with Exit Sale proceeds from another member, is immaterial.

There is no unfairness to the Koch Parties if the Minority Members top off the Small Holders. As the trial court recognized, the Koch Parties' current position that the Exit Sale price must exceed FMV by more than *$2 billion* due to the fortuity that a small number of units were issued to the Small Holders in 2011 creates a "commercially unreasonable" result. Op.162. "It makes no sense that Oxbow Holdings has the ability to insist on a right to receive 1.5 times *somebody else's* capital contributions." *Id.*

Assuming the parties' course of conduct is relevant at all, it is entirely consistent with this interpretation. *See* Op.133-38. At no time during the negotiation of the Agreement, or the subsequent admission of the Small Holders, did *anyone* suggest that the Agreement precluded the Minority Members from topping off any other members to satisfy the 1.5x requirement. Mintz conceded at trial that there is *not a single document* in which the Koch Parties stated that each member must receive the same amount in an Exit Sale. A1436. With some understatement, the trial court stated that "[the Koch Parties] did not historically

act as if the Small Holders were an impediment to the Exit Sale Right." A545-46 ¶ 23(b). In fact, as noted above, the Koch Parties and their counsel—relying on the plain language—recognized until the eve of this litigation that the Minority Members could "top off" the Small Holders. *Supra* 16-21.

In accepting the Highest Amount Theory, the trial court acknowledged that "the fact that [Mintz] came to this reading late in the day is a reason to be skeptical about it," Op.136, but nevertheless concluded that "it ends up being the only reading that gives meaning to the Agreement when read as a whole." *Id*. Respectfully, to the contrary, a reading that the Minority Members can top off the Small Holders gives meaning to the Agreement as a whole. The trial court thus erred by rejecting the top off theory as a matter of the Agreement's plain language. A540-41; Op.4.[5]

[5] The Minority Members also argued below that the Agreement's plain language allowed them to "leave behind" the Small Holders in an Exit Sale. The trial court rejected that interpretation, and the Minority Members do not challenge that holding here. For present purposes, the Minority Members "fairly presented" their plain-language top off theory below, Del. S. Ct. R. 8, as underscored by the fact that the court *specifically addressed and rejected* that theory in its ruling on the cross-motions for summary judgment. *See* A538-39 ¶ 14 (noting the Minority Members argued "an Exit Sale could provide differential consideration to certain members so as to generate proceeds equal to at least 1.5 times the aggregate capital contributions made by those members"); A539-40 ¶ 15 (recognizing "Minority Members' argument that … Minority Members can compensate the Small Holders separately to provide them with 150% of their aggregate capital contributions."); *see also* Op.127-28 (reiterating rejection of plain-language "top off" theory). Even

## II. THE IMPLIED COVENANT PROVIDES FOR A TOP OFF.

### A. Question Presented

Whether the trial court properly determined that the implied covenant of good faith and fair dealing entitles the Minority Members to top off the Small Holders to satisfy the 1.5x provision.[6]

### B. Scope Of Review

Whether a contract fails to address an issue such that the court may apply the implied covenant is a legal question subject to *de novo* review. *See Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 889 (Del. 2015). The court's factual determinations, including that the Board did not determine the Small Holders' rights and how the parties would have addressed the issue, are reviewed for clear error. *See Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1212 (Del. 2012).

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if the Minority Members "now shine[] a much brighter light" on their plain-language top-off position, the trial court's express consideration and rejection of that theory establishes there is "no waiver." *CompoSecure, L.L.C. v. CardUX, LLC*, __ A.3d __, 2018 WL 5816740, at *8 (Del. Nov. 7, 2018).

[6] This issue was preserved below. A1170-71; A670-88; A1237-56.

## C. Merits Of Argument

### 1. The Trial Court Correctly Applied The Implied Covenant.

Even if the trial court correctly interpreted the plain language of the Agreement, the court properly recognized that the language was not the end of the inquiry. An implied covenant "attaches to every contract" and is "employed to analyze unanticipated developments or to fill gaps in [a] contract's provisions." *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441-42 (Del. 2005). The implied covenant also applies where a plaintiff "proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected." *Dieckman v. Regency GP LP*, 155 A.3d 358, 367 (Del. 2017) (internal quotation omitted). The implied covenant allows courts to fulfill the parties' reasonable expectations under their contract without "circumvent[ing] the parties' bargain, or … creat[ing] a free-floating duty … unattached to the underlying legal document." *Dunlap*, 878 A.2d at 441.

Here, the trial court recognized that the parties' Agreement "clearly contemplated the possibility of members later joining Oxbow," but did not "specify the rights that later-admitted members would have." Op.144. Under Article IV, Section 5 of the Agreement, Directors must "determine" the "terms and conditions" upon which new unitholders will be admitted as Members, and such

terms "may provide for the creation of different classes or series of Units having different rights, powers and duties." A2093.[7] That Board determination is made after Oxbow provides mandatory "written notice" of its intention to issue new Units, including the "price and terms and conditions" of such Units, as Article XIII, Section 5(b) requires. A2111.

The trial court found that the Directors did *not* "determine" the "terms and conditions" of the Small Holders' unit issuances, or otherwise address their "rights, powers and duties." Op.145-46. This factual finding is entitled to deference.[8] Further, the Board never *discussed*—much less *approved*—the "terms and conditions" of the Small Holders' ownership stake, or their resulting "rights, powers and duties." A2093; *see generally* B870 (Koch concedes there "was no [Board] discussion" ... "about which specific, rights, or duties [the Small Holders] would have as unit holders").

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[7] The Koch Parties selectively rely upon the trial court's statement (Op.148) that the "Koch Parties created a gap" by not following formalities in 2011. OB 45, 49, 51, 53. In doing so, they ignore the court's holding that the gap was "created" by Section 5 in 2007 and not filled in 2011. Op.144-45.

[8] *See Robinson v. Re/Max Avenues, Inc.*, 2009 WL 74129, at *2 (Del. Super. Jan. 9, 2009) ("application of a term of a contract to disputed facts is a question of fact"); *Univ. of Del. v. Wyman Elec. Serv. Co.*, 1994 WL 469213, at *4 (Del. Ch. Aug. 11, 1994).

The trial court recognized that the issuance of units to the Small Holders was flawed from beginning to end. The Board was never told the identity of the Small Holders. Op.145. Instead, the Board resolutions refer only to "the family of William I. Koch[]" and "former [affiliate] executives." *Id.* And the resolutions refer to stock issuances, rather than membership, which is significant because the Agreement distinguishes between unit ownership and membership. A2110 (a transferee of units "not admitted as a Member" has only limited rights). The Board resolutions do not identify the Small Holders' "rights, powers and duties." Op.145; A2093. Nor was the Board advised that admitting the Small Holders would adversely affect anyone's Exit Sale rights.[9]

The Board also failed to follow the procedures for "related party" transactions when issuing the units. Because Koch controlled the Small Holders, the trial court concluded that their admission required supermajority approval.[10]

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[9] The Koch Parties rely on one line in one email—sent *six months* before the relevant Board meeting and concerning only Executive LLC—to argue that the Directors knew "prior to voting" about the rights being given to both Small Holders. OB 16, 46. The trial court properly disregarded this email, which acknowledged that "[t]he existing members of Oxbow would be required to consent to an amendment to implement the rights of [the LLC] as described above." Op.147. That never happened.

[10] The Koch Parties argue that the trial court "wrongly concluded" that the "Supermajority Vote requirement" was violated. OB 51. But the trial court concluded only that a Supermajority Vote was required and, had proper formalities

Op.148 (referencing Agreement Art. III § 3(d)(11)). Neither Koch nor Oxbow, however, ever identified Koch's self-interest in the transaction or the need for supermajority approval—in violation of Koch's "unremitting obligation" as a fiduciary to disclose his self-interest. *See HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 119 (Del. Ch. 1999).

Instead of determining the rights of the Small Holders, the Board resolutions approving the sale of units to the Small Holders obscured those rights. Those resolutions authorized issuances of "shares" of "Company stock," A2040, and the trial court found that the reference to "stock" suggested the grant of "a common-stock-like instrument without special rights, powers, preference, or privileges." Op.145. Because the sale involved employees, the trial court further found "[t]he directors could have reasonably expected that management would develop the specific terms of the 'proposed stock purchase plan' and ask the Board to approve them." Op.147. But the Board never determined the "terms and conditions," leaving the Agreement's gap unfilled and requiring application of the implied covenant. *See Dieckman*, 155 A.3d at 368.

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been followed, the "[the Minority Members] could have blocked the issuance and forced a negotiation." Op.150; *see also* Op.148.

### a. The Implied Covenant Ruling Is Consistent With The Agreement And The Facts.

The Koch Parties are wrong that the trial court's implied covenant ruling is "foreclosed by the [Agreement's] plain terms," OB 32,[11] for two reasons.

First, as set forth in Part I above, none of the "equal treatment" provisions the Koch Parties identify—Article XIII, Sections 7(c), 7(d), and 9(b)—prohibits the Minority Members from paying a top off.

Second, as the trial court found, the Agreement left "open" "the rights that later-admitted members would have" when it expressly acknowledged in Article IV, Section 5 that new members would be admitted on "such terms and conditions as the Directors may determine at the time of admission." Op.144.

Because the Agreement left "open" the "terms and conditions" of the new members, the Directors were obligated to determine the terms of admission consistent with their duty of good faith. As the trial court explained, "[t]he Board had the power under the New Member Provision to issue the units to the Small

[11] The Koch Parties incorrectly argue that the Minority Members waived the trial court's formulation of the implied covenant—though the issue was presented in pretrial briefing (as they concede, OB 53), in closing argument (A1586-87), and decided by the trial court. Regardless, the trial court had discretion to consider these issues, *see Airgas, Inc. v. Air Prod. and Chems., Inc.*, 2010 WL 3960599, at *9 (Del. Ch. Nov. 23, 2010) (addressing issue "not once mentioned" in briefing), and this Court may consider issues raised *sua sponte* below. *See Reddy v. MBKS Co., Ltd.*, 945 A.2d 1080, 1086 (Del. 2008).

Holders on the condition that they not be able to invoke the 1.5x Clause. The Board could also have created a new class or series of units that did not possess the right to invoke the 1.5x Clause." Op.150. The Koch Parties argue that they had the "explicit contractual right to receive 'the *same* terms and conditions' as every other member in an Exit Sale," OB 33, but that contradicts Article XIII, Section 5(b) which required written specification of the terms and conditions of new units, A2111, and Article IV, Section 5, which expressly provides that the Board determines "*different* rights, powers and duties" for new members. A2093. The trial court correctly found both that these terms were left open, and that the Board's failure to set the terms of the Small Holders' units creates a gap that should be filled by applying the implied covenant. Op.150.

The Koch Parties mischaracterize both the Agreement and the trial court's factual determinations in arguing that there is no gap in the Agreement concerning the Small Holders' membership rights.

*First*, the Koch Parties incorrectly argue that the Directors' authority to determine the rights of future members "is a grant of Board authority, not a 'gap.'" OB 43. But the Board has an affirmative obligation to act on behalf of Oxbow and the existing members when creating a contractually binding commitment with a *third party* (the Small Holders) to establish the new members' "terms and

conditions" of admission. A2093. The Koch Parties' position that "admitting new Members is not an act of contracting" is absurd. OB 45. Oxbow is an LLC and the rights of its members thus are contractually created. By selling units (which Oxbow did), and fixing the "terms and conditions" of new members (which Oxbow did not do), the Board is establishing contractual arrangements between existing and new members. The gap in the Agreement is no less a gap merely because the Agreement vests discretion to address this gap in Oxbow's Board. *See Airborne Health Inc. v. Squid Soap, LP*, 984 A.2d 126, 146–47 (Del. Ch. 2009) ("When a contract confers discretion on one party, the implied covenant requires that the discretion be used reasonably and in good faith.").

*Second*, the Koch Parties argue that selling units to the new members somehow vested them with default rights, and that because the "Board did not exercise its power to vary the Small Holders' rights, their Units are equivalent to all others." OB 47. This argument has no basis in the language of the Agreement and contradicts the trial court's factual findings.

The Koch Parties' "default" rights argument should be rejected for the same reason the trial court did so: it "begs the question by assuming that subsequently admitted members have the same rights and obligations as the original members," and "the LLC Agreement took a different course" because it "left open the

question of rights and obligations subsequently admitted members would have." Op.148-49. The trial court held that there is no set of default rights for new members because that issue was *expressly* unresolved in the Agreement. This is consistent with the Agreement's grant of *different* rights to the original members (*compare*, *e.g.*, Art. XIII § 8 (A2114) *with id.* § 9 (A2116)), and its requirement that Oxbow (when issuing new units) give "written notice … describing the [Units] and the price and terms and conditions upon which such [Units] are to be issued and/or sold." A2111. Oxbow's failure to give notice, coupled with the Board's failure to identify such terms or conditions, did not confer the same rights on the Small Holders as the original members.[12]

The Koch Parties' "default" rights argument must also be rejected because it contradicts the trial court's factual determinations. The trial court found that the Board did not grant the Small Holders some undefined set of default rights. Op.148-49. None of the resolutions enacted by the Board mentions membership,

[12] The Koch Parties argue that Article IV, Section 5 confers "permissive" authority to determine terms and conditions because it references the rights "as the Directors may determine at the time of admission." OB 45. But Article XIII, Section 5(b) contains *mandatory* language requiring written notice of the terms and conditions of any new Units, which precedes the Directors' actions with respect to such new Units under Article IV, Section 5. Moreover, the use of "may" in Article IV, Section 5 does not make the determination of the new Members' rights permissive. Rather, it recognizes that admission of new Members is not mandatory, but that Directors "may" admit new Members and give them new Units once terms and conditions of such Units are determined by the Board.

specifies the rights of the members of Koch's family or the executives, or even refers to Family LLC or Executive LLC. Op.145. The court concluded that because the resolutions mentioned "stock," this "implied a common-stock-like instrument without special rights, powers, preferences or privileges, such as a preferential right to receive 1.5 times invested capital before being forced to engage in a sale."[13] *Id*. These fact findings are entitled to substantial deference. *See Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 154 (Del. 1996).

### 2. The Koch Parties' "Intentional Gap" Argument Is Unavailing.

While the Koch Parties argue that "there is no such thing as an 'intentional gap,'" because the implied covenant applies only to matters "that could not be anticipated" and the parties anticipated new members, OB 35 (citing *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010)), this is not the law.

[13] The Koch Parties argue that this would be an "absurd" outcome because that means the Small Holders would have no rights. OB 47. But the absurdity lies with Koch's intentional failure to determine the rights of the Small Holders. Any true third party investing millions of dollars would have insisted on written contractual protections. But because Koch sat on both sides of the Small Holders' admission, he felt no need to properly document the transaction. Oxbow actually instructed Latham twice to prepare an amendment to the Agreement to admit the Small Holders, but never introduced it to the Minority Members. *See* A773; B1327; B1441. The Koch Parties should not benefit from their own wrongdoing. Op.150 ("Oxbow's failure to follow proper formalities when admitting the Small Holders leaves the Koch Parties poorly positioned to argue that there is no gap to fill.").

As this Court has explained, the implied covenant "is best understood as a way of implying terms in an agreement, whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions." *Dunlap*, 878 A.2d at 441.[14] Either a contractual gap *or* an unanticipated development can trigger the implied covenant.[15] The Koch Parties' "intentional gap" argument asks this Court to reverse its decision in *Dunlap* and to require both a gap *and* that the gap be unanticipated. But *Nemec* did not purport to overturn *Dunlap*, and this argument should be rejected.

*Second*, Delaware courts have repeatedly employed the implied covenant to address situations in which parties leave an "intentional gap"—*i.e.*, the absence of language governing a future situation not fully addressed in the agreement. That happens where "aspects of the deal are so obvious to the participants that they never think, or *see no need*, to address them"— situations that by definition could

[14] *See also Nemec*, 991 A.2d at 1126 n.17 (quoting this language from *Dunlap*); *Halpin v. Riverstone Nat'l., Inc.*, 2015 WL 854724, at *10 (Del. Ch. Feb. 26, 2015) (same).

[15] *See also Brinckerhoff v. Enbridge Energy Co.*, 2016 WL 1757283, at *18 (Del. Ch. Apr. 29, 2016) ("[T]he Supreme Court has held that a plaintiff's identification of a contractual gap is not an absolute prerequisite to sustain an implied covenant claim where one party "acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain" (citing *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 421 (Del. 2013)), *rev'd on other grounds*, 159 A.3d 242 (Del. 2017).

be anticipated. *Dieckman*, 155 A.3d at 368 (quotation omitted).[16] It also arises whenever a contract accords discretion to parties in future performance, creating an "intentional gap" where the contract does not limit discretion except insofar as "the implied covenant requires that party to exercise its discretion reasonably."[17] In fact, the trial court previously noted that "[t]he implied covenant is *particularly important* in contracts that endow one party with discretion in performance; *i.e.*, in contracts that *defer a decision* at the time of contracting," a holding that applies here, where the parties deferred deciding the terms and conditions applicable to new members. *Amirsaleh v. Bd. Of Trade Of City of New York, Inc.*, 2008 WL 4182998, at *8 (Del. Ch. Sept. 11, 2008) (citing Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 380-85 (1980)).

*Third*, there is no clear error in the trial court's factual finding that Oxbow's failure to complete the Exit Sale resulted from "[a]n *unanticipated* confluence of events [that] should not bestow on the Koch Parties the power to block the Exit

[16] *See also In re El Paso, L.P. Derivative Litig.*, 2014 WL 2768782, at *18 (Del. Ch. June 12, 2014); Mohsen Manesh, *Express Contract Terms and the Implied Contractual Covenant of Delaware Law*, 38 Del. J. Corp. L. 1, 7 (2013).

[17] *In re Encore Energy Partners LP Unitholder Litig.*, 2012 WL 3792997, at *12 (Del. Ch. Aug. 31, 2012); *see also Policemen's Annuity & Benefit Fund of Chi. v. DV Realty Advisors LLC*, 2012 WL 3548206, at *12 (Del. Ch. Aug. 16, 2012).

Sale Right and demand a massive windfall." Op.162. The trial court made three determinations supporting its finding that the parties did not anticipate the need for a top-off right for subsequently added unitholders not reaching the 1.5x threshold: (1) the parties did not discuss the top off when the Agreement was negotiated in 2007, Op.34; (2) no party anticipated that later-admitted Small Holders would be admitted in a 2011 process with no notice or discussion concerning their purported Exit Sale rights or disclosure of Koch's self-interest, Op.162 (describing the "unforeseen … poorly documented admission of the Small Holders")[18]; and (3) there was no evidence that the parties anticipated the Highest Amount Theory, which "produces [the] extreme and *unforeseen* result in this case," Op.6, before the "fun new theory" was developed in 2016, Op.152 ("Until March 2016, no one among the Koch Parties had identified the Highest Amount Theory…").

In addition, because the parties all understood (and Koch admitted) that the function of the 1.5x clause was to be "compensatory," Op.161, there is no basis for them to have anticipated that the Small Holders would refuse a top off that could provide a windfall 1.5x return (*i.e.*, $414/Unit) that is more than twice the 2016 FMV of their Oxbow units. *See Gerber*, 67 A.3d at 422 (("Gerber could hardly

[18] *See Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001) (stockholders can "rely upon their board to discharge each of their three primary fiduciary duties at all times").

have anticipated that [the general partner] would rely upon a fairness opinion that did not fulfill its basic function"), *overruled on other grounds by Winshall*, 76 A.3d at 815 n.13.

The trial court rejected both of the Koch Parties' contrary factual arguments: The Koch Parties argue that because the Minority Members bargained for preemptive anti-dilution rights, they must have anticipated this situation. OB 35. But those rights address dilution of economic interest, not Exit Sale rights. The trial court considered the anti-dilution rights and found the situation nonetheless "unanticipated." Op.162.[19] The Koch Parties also argue that because Oxbow's business is "cyclical," this situation was "entirely foreseeable," OB 35, an oversimplification the trial court rejected by noting that the Minority Members are not seeking relief because of the business cycle but because of "the unforeseen confluence of the poorly documented admission of the Small Holders and the resulting transformation of the 1.5x Clause into a near-absolute transactional barrier." Op.162.

[19] Op.148 ("The Koch Parties' failure to follow proper formalities is all the more significant because Oxbow's CFO flagged that Oxbow was not complying with the preemptive rights section in the LLC Agreement….").

### 3. The Trial Court Properly Found The Parties Would Have Agreed To A Top Off.

The trial court faithfully applied this Court's holding that "[t]he implied covenant seeks to enforce the parties' contractual bargain by implying only those terms that the parties would have agreed to during their original negotiations if they had thought to address them … [and] had they considered the issue in their original bargaining positions at the time of contracting." *Gerber*, 67 A.3d at 418. The court properly determined that: (i) "[u]ntil March 2016, no one among the Koch Parties had identified the Highest Amount Theory, so they would not have insisted upon" that interpretation at the time of contracting, and in fact believed "the LLC Agreement allowed … [Minority Members to] make [Small Holders] whole with a Top Off;" and (ii) the Minority Members "never would have consented to admitting the Small Holders if they had understood that the admission would reset the 1.5x Clause." Op.151-52; *see also* Op.152 (citing Volpert's testimony that "by 2011, there was no hurdle" and it would be "completely irrational" to reset the Exit Sale hurdle).

This Court "uphold[s] factual findings unless they are clearly erroneous." *SIGA Tech., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1128 (Del. 2015). "Where there is more than one permissible determination to be drawn from the evidence, and the trial court chooses one, its findings cannot be clearly erroneous." *Id.* at

1130. Given the trial court's "reasoned and thorough approach to evaluating the evidence," its factual determinations must stand. *Id.* at 1138.

While the Koch Parties claim the lower court applied "hindsight bias" and somehow overlooked a few irrelevant and cherry-picked "facts," OB 51-52, they ignore the trial court's well-reasoned factual conclusion that, had the parties addressed the terms of entry of the Small Holders, they would have agreed that the Minority Members could preserve their Exit Sale right with a top off. Op.150-57. The overwhelming facts proven at trial showed that—prior to the "fun new theory" in March 2016—the Koch Parties *always* believed the Agreement required a top off, which fully supports the court's conclusion that they would have agreed to it had the Board determined the "terms and conditions" in 2011. *Supra* 16-21 (summarizing the overwhelming supporting evidence).

Unable to attack the trial court's factual findings, the Koch Parties argue that the court somehow violated "its own prior rulings" by focusing on what the parties would have agreed to in 2011, instead of 2007. OB 44. This "time of contracting" argument fails, given the trial court's well-reasoned analysis of how the gap in the Agreement was "created" by Art. IV, § 5, in 2007, Op.144-45, and then came to fruition in 2011 when Oxbow failed to provide written notice of the terms and conditions of the proposed new units, and the Board failed to establish "the terms

on which Oxbow admitted the Small Holders as members." Op.151. The required determination of the Small Holders' membership terms is itself an issue of contracting because it sets the rights and duties of both the new members and potentially alters the rights and duties of existing members.[20] Op.151 (citing *Gerber*, 67 A.3d at 419). Because admitting new members is itself an act of contracting and an exercise of discretion, the Koch Parties were required in 2011 to act in good faith to accept a top-off, a ruling that "protects[s] the spirit of [the] agreement" and prevents "one side" from using "oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain."[21] *See Chamison v. HealthTrust, Inc.*, 735 A.2d 912, 920 (Del. Ch. 1999), *aff'd*, 748 A.2d 407 (Table), 2000 WL 275649 (Del. Mar. 8, 2000).

#### 4. The Implied Covenant Application Ensures Commercial Reasonableness And Fairness.

Finally, the Koch Parties claim that the court's application of the implied covenant to recognize a top off improperly rewrote the Agreement based merely on

[20] Op.40 ("The issuance of units to the Small Holders had potential implications for the Exit Sale Right.").

[21] The Koch Parties' argument that a request for a top off would have been a "deal killer" in 2007 is irrelevant and misleading. OB 37. The trial court accepted that testimony only "for purposes of the private equity investment in 2007," and did *not* accept that testimony as it relates to investors who would have been buying units later in much smaller amounts—whether discussed in 2007 or in 2011—because "[t]hey were differently situated than the original investors." Op.155-56.

the trial court's "subjective notions of fairness." OB 38. But the trial court did not "rewrite the contract" when it filled a gap with terms it determined, based on the evidence, to which *the parties* would have agreed. The Koch Parties argue that the trial court's reasoning amounts to "second-guessing of a board's exercise of [] authority" that creates "unpredictability." *Id*. 40. But the Koch Parties ignore that the Board *failed* to exercise its authority entirely, giving the court no "decision" to circumvent, and the application of the implied covenant was consistent with the parties' expectations and necessary to effectuate the Board's duty of good faith.

Delaware courts have routinely held that when a party exercises discretion under a contract to act in a commercially unreasonable manner, the court may invoke the implied covenant to prevent such bad faith conduct. *See, e.g., The Chemours Co. TT, LLC v. ATI Titanium LLC*, 2016 WL 4054936, at *6 (Del. Super. July 27, 2016) (invoking covenant to avoid exercise of discretion in a "commercially unreasonable" manner); *Dunlap*, 878 A.2d at 442 ("[T]he implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct[.]"). That is precisely the situation here, where the trial court was correct to conclude that "compelling fairness" prohibited the Koch Parties from evading a duty to act in good faith and refuse a "commercially reasonable" top off. Op.154, 161. That top off avoids trapping the Minority

Members in their investment indefinitely and is consistent with both what the Koch Parties always believed the Agreement required and their belief that the 1.5x provision was meant to be "compensatory." Op.155, 161. This is precisely the "rare and fact-intensive" application of the implied covenant that honors "the parties' reasonable expectations" and turns "on issues of compelling fairness." *Cincinnati SMSA Ltd P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998).

## III. THE TRIAL COURT CORRECTLY CONCLUDED THE KOCH PARTIES VIOLATED THE COOPERATION COVENANT.

### A. Question Presented

Whether the trial court correctly concluded the Koch Parties violated their contractual duty of cooperation under the Agreement.[22]

### B. Scope Of Review

The interpretation of a contract is a question of law subject to *de novo* review. *See, e.g.*, *Osborn*, 991 A.2d at 1158. Findings of fact are reviewed for clear error. *See, e.g.*, *Gatz*, 59 A.3d at 1212.

### C. Merits Of Argument

The trial court's extensive factual findings regarding the Koch Parties' concerted efforts to "'obstruct,' 'derail,' and 'delay' the Exit Sale" more than justify finding the Koch Parties breached the cooperation covenant in Section 8(f). Op.163-67. As the court explained, the Koch Parties (1) "delayed selecting an investment bank and law firm to run the Exit Sale process until after Oxbow had received the Arclight offer," (2) "deliberately slowed the flow of information to Goldman and prospective investors, creating the most constrained process that the Goldman senior bankers had seen in decades, and possibly ever," (3) "instructed Oxbow's CFO, Parmelee, to tell certain executives to dampen their forecasts or

[22] This issue was preserved below. A1168-69; A703-07; A1269-72.

risk their bonuses," (4) "had Ropes & Gray explore the possibility of using a [Special Purpose Acquisition Company] to defeat the Exit Sale right," (5) "fired Eric Johnson" to "bring the process to a halt"; and (6) "ultimately deployed 'litigation as a tool to effectuate [their] strategy' and to 'slow down the Exit Sale or keep potential buyers on the sideline.'" *Id.*

While the Koch Parties argue they did not commit a breach because no sale was possible, OB 54, that argument contradicts the trial court's finding that "Oxbow would have entered into a deal with Arclight" but for the Koch Parties' conduct. That finding was supported by ample evidence and is not clearly erroneous. Op.163-67. The ArcLight transaction never proceeded *because* the Koch Parties breached the cooperation covenant. *Id*. The Koch Parties cannot rely on their own misconduct to evade their breach.[23]

Additionally, while the Koch Parties argue that they cannot breach the cooperation covenant for "taking a contractual position that the trial court upheld as a matter of plain meaning," OB 55, that is a *non sequitur*. The Koch Parties' argument ignores the trial court's finding of fact that their efforts to "'obstruct,'

[23] The Koch Parties misleadingly claim that the ArcLight offer was not a qualifying Exit Sale bid because the "the trial court found" that Crestview intended to rollover its equity "into the new transaction." OB 56. The trial court never found that Crestview planned to rollover its equity in the ArcLight transaction. To the contrary, ArcLight's offer was "to acquire 100% of Oxbow's equity." Op.91.

'derail,' and 'delay' the Exit Sale process" began months *before* they first dreamed up the "fun new theory" on March 28, 2016, *before* they learned what price would be offered in an Exit Sale—and those efforts went well-beyond merely rejecting an offer below $414/Unit. Op.78-80. A plain meaning ruling issued months into litigation does not excuse the Koch Parties' prior misconduct, particularly given the fact that they always believed a top off was allowed. *Supra* at 16-21.

## IV. THE TRIAL COURT CORRECTLY AWARDED COMPENSATORY DAMAGES.

### A. Question Presented

Whether the trial court correctly awarded (1) contingent compensatory damages, and (2) the Minority Members' proportionate share of fees Oxbow paid to Mintz. *See* Rem.Op.1-3.[24]

### B. Scope Of Review

"Whether or not an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed *de novo*." *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999). Factual findings, however, are reviewed for clear error. *See, e.g.*, *Gatz*, 59 A.3d at 1212.

### C. Merits Of Argument

In exercising its "broad discretion to craft a remedy sufficient to compensate [the injured party]," *Heartland Payment Sys., LLC v. Inteam Assocs., LLC*, 171 A.3d 544, 547 (Del. 2017), a court may "award damages or pecuniary compensation along with specific performance when the decree as awarded does not give complete and full relief." *Tri State Mall Assocs. v. A.A.R. Realty Corp.*, 298 A.2d 368, 371 (Del. Ch. 1972). Based on the record, the trial court found that, but for the Koch Parties' breaches, (1) the ArcLight deal would have closed in

[24] This issue was preserved below. A1175-76; B1250-54.

2016, "and the Minority Members would have received at least the value of the ArcLight Offer," Op.167; and (2) "Oxbow never would have needed to hire Mintz Levin," which acted as Koch's "*de facto* personal counsel" while forcing Oxbow (and thus the Minority Members) to foot the bill, *see* Rem.Op.32-37. Because specific performance of an Exit Sale may not fully compensate the Minority Members, compensatory damages are appropriate.

*First*, the trial court properly awarded backstop damages. The Minority Members did not waive their right to such compensatory damages, which they undisputedly sought not only in their remedies briefing, B1250-60, but also in their pleadings, A1175-76 (seeking "damages for breach of contract … and/or breach of the implied covenant"). And even if they had not, the trial court was free to exercise "its own remedial discretion to fashion a different remedy than what [was] requested." *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 6392906, at *2 (Del. Ch. Dec. 16, 2011). Delaware law permits the Court of Chancery broad discretion to award pecuniary damages alongside specific performance to fully compensate an injured party. *See, e.g.*, *Tri State Mall*, 298 A.2d at 371; *Vaughan v. Creekside Homes, Inc.*, 1994 WL 586833, at *1 (Del. Ch. Oct. 7, 1994).

*Second*, the trial court properly awarded the Minority Members their *pro rata* share of Mintz's fees. Oxbow and its counsel did much more than pick sides

in an academic dispute over the Agreement. As the trial court found, Mintz "took the lead in the efforts to delay, obstruct, and derail the Exit Sale," *see* Rem.Op.32, 36-37—a factual finding reviewable for clear error. *See*, *e.g.*, *Gatz*, 59 A.3d at 1212. The trial court did not—and was not required to—pierce the corporate veil to hold the Koch Parties liable for Mintz's fees. Those fees were awarded as compensatory damages for the Koch Parties' (not Oxbow's) breach of the implied covenant and the cooperation provision. *See* Rem.Op.2-3.

Further, the Minority Members argued that Oxbow's spending on Mintz in breach of the Agreement harmed them, which the Koch Parties admit was squarely argued and decided below. OB 59. The trial court correctly determined that the Minority Members could directly assert the claim for fees, rather than derivatively, because the dispute between the parties is "two sided and zero sum" and "pits the Minority Members on the one side against Koch, his family members, and their affiliates on the other side." Rem.Op.33-34. In such circumstances, "the distinction between direct and derivative claims becomes irrelevant." *In re Cencom Cable Income Partners, L.P.*, 2000 WL 130629, at *3 (Del. Ch. Jan. 27, 2000).

## CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

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Dated: November 21, 2018

## CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, my firm caused true and correct copies of the foregoing *Public Version of Answering Brief of Defendants Below-Appellees Crestview-Oxbow Acquisition, LLC, Crestview-Oxbow (ERISA) Acquisition, LLC, and Load Line Capital LLC* to be served upon the following counsel of record by File & Serve*Xpress*:

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