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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 |

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| 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 |

**REPLY BRIEF OF APPELLANTS OXBOW CARBON & MINERALS HOLDINGS, INC., WILLIAM I. KOCH, INGRAHAM INVESTMENTS LLC, OXBOW CARBON INVESTMENT COMPANY LLC, AND OXBOW CARBON LLC**


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## SUMMARY OF ARGUMENT

The Minority Members implicitly concede the trial court's implied covenant analysis is indefensible. Rather than leading with a defense of that ruling, which adopted a theory that the Minority Members abandoned after trial, the Minority Members have come up with yet another new theory about the purported plain meaning of the LLCA. Remarkably, on this appeal, they now claim for the first time that the LLCA's plain language affirmatively permits them to force an Exit Sale by paying a Top-Off, without resort to the implied covenant. They never made this argument below in any pleading, brief, the pretrial order, or at any hearing; it therefore was not "fairly presented" as required by Rule 8. Indeed, consistent with their own principal's testimony, the Minority Members argued exactly the opposite below: that there supposedly was a gap in the LLCA "because it does not explicitly permit or prohibit a top-up payment to a particular Member to satisfy the 1.5X Clause."[1]

In any event, the LLCA expressly precludes the differential consideration inherent in a Top-Off. In particular, the LLCA requires that all Members receive "the same terms and conditions" in an Exit Sale. The LLCA also expressly states that "resulting proceeds" from an Exit Sale and "prior distributions" are the only

[1] A671.

sources that count towards 1.5x, and that Exit Sale proceeds must be distributed *pro rata* to all Members. The Minority Members cannot evade those plain requirements.

The Minority Members' last-minute switch is unsurprising since, as demonstrated in the opening brief, the trial court's implied covenant ruling violated numerous controlling principles of Delaware law. Indisputably, the implied covenant cannot be invoked to override a contract's express terms, as the court did here to accommodate its own notions of "fairness." The court rewrote the LLCA to impose a term that it expressly found Koch would not have agreed to when the LLCA was negotiated in 2007, in violation of Delaware law. Indeed, instead of focusing on the parties' bargaining positions as of the time the LLCA was signed in 2007, as Delaware law requires, the court instead imagined a hindsight-driven, hypothetical renegotiation of the LLCA in 2011, and implied a term into that hypothetical agreement. The Minority Members cling to the court's improper time-shifting, but offer no support for that approach under Delaware law.

Nor was there any "gap" for the implied covenant to fill. The trial court's attempt to manufacture a gap in the LLCA based on events that transpired long after the LLCA was executed fails. The Board's exercise of its authority in 2011 to admit the Small Holders without imposing different terms from those set forth in the existing LLCA, with the unanimous approval of the Minority Members, neither created a gap nor was unanticipated. Enforcing the LLCA as written does not

deprive the Minority Members of the benefit of their bargain, but instead ensures clear contracts between sophisticated parties are enforced as written.

In short, the implied covenant cannot rescue the Minority Members from their failure to seek protection against the foreseeable effects of a later market downturn. Reversal is required.

## ARGUMENT

### I. The Minority Members' New Top-Off Interpretation Fails

#### A. The New Top-Off Theory Was Not Fairly Presented

This case was tried on an implied covenant theory, after the Minority Members lost on their now-abandoned "leave-behind" argument at summary judgment. Post-trial, the trial court reaffirmed its plain-language reading of the LLCA, again rejecting the "leave-behind" claim. On appeal, instead of first defending the court's implied covenant analysis or renewing their "leave-behind" theory, the Minority Members offer a brand new reading: the LLCA's "plain language allows the Minority Members to top off the Small Holders."[2] But they never argued below that, *as a matter of the LLCA's plain language*, they can force an Exit Sale by paying a Top-Off. That is because their principals repeatedly testified that they had no such right:

> Q: Now, did Crestview ever negotiate for the right to be able to make a top-off payment in the event that the exit sale did not result in the fair market value being achieved?
> ***
> A: I don't believe so.
> ***
> Q: You didn't tell the investment committee that you understood that Crestview had a top-off payment right, did you?
>
> A: We did not have a top-off payment right.[3]

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2 MMBr.1.

3 AR106; AR117; *see* A791.

Instead, they viewed a Top-Off as "a commercial solution to solve a problem."[4]

Under Supreme Court Rule 8, "[o]nly questions fairly presented to the trial court may be presented for review," thus foreclosing "new arguments on appeal." *See Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678 (Del. 2013). Likewise, the Court may affirm on the basis of an "alternative ground" only if it was "fairly presented" below. *See RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015).

Improperly stashing their justification for raising a waived argument in a footnote, the Minority Members claim their "affirmative right to a Top-Off" theory was presented on summary judgment based on *correspondence* attached to the *Koch Parties'* motion.[5] But no legal argument was made. Rather, on summary judgment, the Minority Members asserted only their "leave-behind" theory."[6] Their summary judgment briefs never argued that the plain language of the LLCA permits them to force an Exit Sale by paying a Top-Off.[7]

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4 AR88; *see* A796.

5 MMBr.32n.5 (citing A538-39 ¶¶ 14-154). This pre-litigation correspondence, which was never even cited by the Minority Members, is insufficient to have fairly presented this argument below. *See Stayton v. Clariant Corp.*, 2014 WL 28726, at *3 (Del. Jan. 2, 2014).

6 A489-90, A498-99; AR16-17. While the trial court found later that a Top-Off was inconsistent with the Highest Amount Theory, at no time did the Minority Members present that argument to the trial court, and instead pressed their "leave behind" interpretation post-summary judgment.

7 *CompoSecure L.L.C. v. CardUX, LLC*, 2018 WL 5816740, at *8 (Del. Nov. 7, 2018) (MMBr.33) demonstrates that this issue was not fairly presented below.

After the trial court rejected the "leave-behind" theory on summary judgment, it suggested, *sua sponte*, that an implied covenant claim might somehow be viable.[8] The Minority Members then altered their strategy to pursue a Top-Off right through the implied covenant. In their pre- and post-trial briefs, the Minority Members argued that "the LLC Agreement contains a gap because it *does not explicitly permit or prohibit a top-up payment to a particular Member* to satisfy the 1.5X Clause."[9] Delaware law precludes them from now advancing the exact opposite contention for the first time on appeal. *See Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 892 (Del. 2015), *as revised*, (Mar. 27, 2015) (party "did not fairly raise a ... claim at trial" when "for much of trial" it argued the opposite point).

### B. The LLCA's Plain Text Prohibits A Top-Off

#### 1. A Top-Off Is Foreclosed

Even if it were properly before this Court, the Minority Members' new contract theory fails. The LLCA "forecloses" forcing an Exit Sale by making a Top-Off payment to satisfy the 1.5x requirement, whether paid by "Crestview, Load Line or the buyer in the Exit Sale…."[10] The LLCA's plain text compels this result.

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There, a party had fairly presented an issue where, unlike here, the argument had been referenced in the amended complaint, pre-trial brief and post-trial brief.

8 A545-46; MMBr.23.

9 A671; A1477.

10 Op.128.

Indeed, the very fact that the Minority Members advance their new theory for the first time on appeal demonstrates it is not evident from the plain language of the LLCA.

The LLCA does not provide for a Top-Off right, as the Minority Members have already conceded. They do not cite any language in the LLCA that authorizes a Top-Off, because there is none. The most the Minority Members can say is that a Top-Off is not prohibited by the LLCA. While this is wrong, the absence of a prohibition cannot create an affirmative contractual right where none exists—especially where the putative right would violate express contractual provisions, as the trial court found.

A Top-Off paid by the Minority Members cannot count toward the 1.5x Return Requirement. The LLCA expressly limits the sources that count toward this requirement to "resulting proceeds" from an Exit Sale and "prior distributions" by Oxbow. An Exit Sale is prohibited "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."[11]

The Minority Members claim that this "provision does not say that the 'resulting proceeds' to the Small Holders must come directly from the buyer."[12]

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11 A2115-2116 (Art.XIII-§8(e)).

12 MMBr.4.

Under Section 8(e), the "proceeds" sufficient to meet the 1.5x Return Requirement (beyond prior distributions) must "result[]" from the "*Exit Sale*." And "Exit Sale" is defined as "a Transfer of all, but not less than all, of the then-outstanding Equity Securities of the Company" to an arms-length buyer.[13] A separate payment made by the Minority Members to the Small Holders does not "result" from the Transfer to the buyer; it "results" from a separate payment by the Minority Members. Simply put, a Top-Off is not proceeds resulting from the Exit Sale. Thus, the Minority Members cannot end run this provision by making a separate payment.

Moreover, treating a Top-Off payment as proceeds from an "Exit Sale" would violate the Equal Treatment Requirements. The LLCA requires that Exit Sale proceeds be distributed "in accordance with [the Members'] Percentage Interests" and distributed to "all unitholders in proportion to the number of units held."[14] Thus, these provisions "foreclose[] a Top Off Option"—under which sales proceeds would be re-allocated so that the Small Holders receive more than their *pro rata* share of consideration.[15] In a Top-Off scenario, the Minority Members would insert themselves into the funds flow and reallocate their proceeds in order to force a sale prohibited by the LLCA.

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13 A2079 (Art.I ("Exit Sale")).

14 Op.33, 128.

15 *Id.*

Moreover, Article XIII, Section 7(d) requires that all units transferred in an Exit Sale "shall be Transferred on the *same terms and conditions* as each other Unit so Transferred."[16] A sale in which "[the Minority Members] or the buyer ... would come up with greater consideration for the Small Holders" would obviously violate the "same terms and conditions" requirement.[17] By definition, a sale occurring only because of an additional payment to certain Members is not a transfer on the "same terms and conditions" for all Members.

The Minority Members also try to evade the "same terms and conditions" requirement by contending it is a "non sequitur" to say that price is a "term or condition."[18] Not only is price a term and condition, "[o]ften it is the most important term," as Delaware law recognizes.[19]

Nor is there any merit to the Minority Members' suggestion the Equal Treatment Requirements are satisfied so long as a controlling Member does not "demand extra consideration as compensation for its controlling stake."[20] While prohibiting the controlling Member from receiving a control premium is *one* consequence of the Equal Treatment Requirements, these provisions are not so

16 A2114 (Art.XIII-§7(d)) (emphasis added); Op.128.
17 Op.128.
18 MMBr.29.
19 Op.128.
20 MMBr.29.

limited.[21] Indeed, the Minority Members' argument that price is not a term or condition is belied by the fact that they claim that the "same terms and conditions" provision precludes payment of a control premium to Oxbow Holdings.[22]

The Minority Members' arguments rest on a fatal contradiction. For purposes of arguing that a Top-Off payment counts as "resulting proceeds" toward the 1.5x Return Requirement, they must treat the payment by the buyer and the Top-Off as one transaction. But with respect to the Equal Treatment Requirements, they treat the Top-Off as a separate transaction that falls outside of those requirements, claiming that "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."[23] There is no merit to this distinction, and they cannot have it both ways.

Accordingly, the LLCA does not permit the Minority Members to force an Exit Sale by paying a Top-Off.

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[21] The Minority Members cite *Southeastern Pennsylvania Transportation Authority v. Volgenau*, 2013 WL 4009193, at *24 (Del. Ch. Aug. 5, 2013), for the proposition that an equal treatment provision must use specific words, but there is no such requirement under Delaware law.

[22] MMBr.27.

[23] MMBr.4-5 (emphasis omitted).

### 2. While Barred By The Parol Evidence Rule, Extrinsic Evidence Does Not Support A Top-Off

Because the LLCA is unambiguous (as the Minority Members concede), extrinsic evidence as to its meaning is barred by the parol evidence rule. *See Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991).[24]

Although they claim no error in the trial court's exclusion of extrinsic evidence, and have consistently argued throughout this litigation that the LLCA is unambiguous, the Minority Members nevertheless urge that "*[a]ssuming* the parties' course of conduct is relevant at all" (which it is not) "it is entirely consistent with" an interpretation permitting a Top-Off.[25] That contention is belied by the court's findings and the record.

*First*, the trial court credited testimony by Koch "that during negotiations in 2007, any request by Crestview for a Top Off Option would have been a 'deal killer'" because it was "very important" to him that "everybody gets … [the] same terms and conditions" in an Exit Sale.[26] The fact that the court found Koch *would not have agreed* to a Top-Off when the LLCA was negotiated further demonstrates no such right was incorporated into the LLCA.

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[24] Op.133.

[25] MMBr.31 (emphasis added).

[26] Op.155-56; A936-37. Based on Koch's two-decade litigation with his brothers trying to vindicate his rights as a minority investor, he had "almost a religious fanaticism about getting people treated equally." Op.20n.57 (A932; A945).

*Second*, the trial court likewise found that in negotiating the LLCA, Crestview "wanted everyone to receive the same terms in an Exit Sale."[27] The parties' shared intent on this point demonstrates they prohibited a transaction in which Members receive different consideration.

*Third*, "[t]he parties did negotiate over what categories of returns would be included when determining whether the 1.5x Clause had been met, starting with only sale proceeds, then progressing to sale proceeds plus distributions other than tax distributions, and finally settling on sale proceeds plus all prior distributions, including tax distributions."[28] The parties included nothing other than "resulting proceeds" of an Exit Sale and prior distributions, which eliminates the possibility of a Top-Off.

*Finally*, until appeal, the Minority Members consistently took the position that the LLCA did *not* affirmatively permit them to force an Exit Sale by paying a Top-Off.[29] Indeed, they reported as of the time the LLCA was signed that the proceeds from an Exit Sale needed to provide "1.5 times *any* investor's aggregate capital contributions to date."[30]

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27 Op.21.
28 Op.34; *see* A794-95; A1718.
29 *Supra* 4-6.
30 AR430 (emphasis added); Op.33.

Likewise, the Minority Members' suggestion that the trial court's interpretation of the contract should be overturned because Oxbow's counsel supposedly did not adopt that interpretation until the eve of litigation fails.[31] An unambiguous contract is governed by its words, rather than a party's (let alone counsel's) subjective beliefs regarding their meaning. *See Osborn v. Kemp*, 991 A. 2d 1153, 1159 (Del. 2010) ("Delaware adheres to the 'objective' theory of contracts"); *Demetree v. Commonwealth Tr. Co.*, 1996 WL 494910, at *4 (Del. Ch. Aug. 27, 1996) ("An inquiry into the subjective … understanding of the individual parties is neither necessary nor appropriate" where the contract is unambiguous).

The Minority Members' argument regarding the Koch Parties' beliefs are particularly disingenuous in light of their new Top-Off theory, adopted for the first time on appeal. In contrast, the Koch Parties have consistently advocated the Highest Amount Theory in their pleadings, on summary judgement, at trial, and post-trial.

Accordingly, the LLCA forecloses a Top-Off payment to force an Exit Sale, and the Minority Members' new theory should be rejected.

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[31] MMBr.21.

## II. The Trial Court's Implied Covenant Holding Was Erroneous

The fact that the Minority Members lead with a new contract theory demonstrates their recognition the trial court's invocation of the implied covenant cannot be sustained. When they finally reach that issue,[32] they cannot avoid the dispositive principles governing the implied covenant under Delaware law, which, with one exception, they do not dispute in their brief.

### A. Properly Analyzed As Of The Time Of Contracting In 2007, The Implied Covenant Claim Fails

The trial court's conclusions about the LLCA as negotiated in 2007 demonstrate the Minority Members' implied covenant claim fails for numerous independent reasons.

#### 1. The LLCA Forecloses An Implied Top-Off Right

The Minority Members do not dispute bedrock Delaware law that the implied covenant cannot "override the express provisions of a contract." *Nemec v. Shrader*, 991 A.2d 1120, 1128 n.26 (Del. 2010).[33]

As detailed above, the Top-Off right found by the trial court violates three separate express requirements of the LLCA: (i) the "resulting proceeds" element of the 1.5x Return Requirement; (ii) the *pro rata* distribution requirement; and (iii) the "same terms and conditions" requirement. Thus, the Highest Amount Theory is no

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32 MMBr.34.

33 KPBr.4, 59.

"gotcha," as the Minority Members complain.[34] It is dictated by the terms governing the Exit Sale.[35]

Indeed, under the guise of the implied covenant, the trial court granted the Minority Members new rights and deprived the Koch Parties of their existing rights by allowing the Minority Members to force an Exit Sale indirectly through the implied covenant when they could not do so directly under the LLCA. That was error. *See Allen v. El Paso Pipeline GP Co., LLC*, 113 A.3d 167, 191 (Del. Ch. 2014) (improper to imply term that would "conflict fundamentally with the plain language and structure" of contract).

Not only would a Top-Off violate the LLCA, it would grant the Minority Members a contractual right they "failed to secure …. at [the] bargaining table." *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 707 (Del. Ch. 2004). As Mr. Hurst, Crestview's lead negotiator, conceded at trial, Crestview did not negotiate for a Top-Off right, even though the parties expressly negotiated over the sources that would count towards "resulting proceeds" to satisfy 1.5x.[36]

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[34] MMBr.4.

[35] Op.132. Nor are the Minority Members "trap[ped] … in this investment indefinitely." MMBr.4. They are free to sell their Units on the open market at anytime or wait until the market recovers, as has begun. A2112 (Art.XIII-§6); Dkt. 8, ¶10.

[36] A786-87, 791, 935; Op.34.

### 2. The Trial Court Expressly Found That Koch Would Not Have Agreed To A Top-Off In 2007

The trial court found that, had the Top-Off concept been raised when the LLCA was negotiated in 2007, it would have been a "deal killer" for Koch, who had the superior bargaining power because Crestview wanted to invest but "Oxbow did not need Crestview's capital."[37] That finding alone defeats any implied covenant claim. Delaware law will imply "only those terms that the parties would have agreed to during their original negotiations … had they considered the issue in their original bargaining positions at the time of contracting." *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 418 (Del. 2013), *overruled on other grounds by Winshall v. Viacom Int'l Inc.*, 76 A.3d 808 (Del. 2013).[38]

The Minority Members do not challenge this finding. And their irrelevant assertion that there is "no harm to the Koch Parties" if the Minority Members pay a Top-Off is wrong.[39] An implied Top-Off right deprives all Members, including the Koch Parties, of their express contractual rights regarding an Exit Sale, including equal treatment. It also gives the Minority Members the ability to force a sale at the most disadvantageous time in the market for their own purposes, in violation of the parties' agreement. There is no "windfall" to the Koch Parties under the Highest

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37 Op.155-56.
38 KPBr.36
39 MMBr.4.

Amount Theory, only a matter of market fluctuation, since, at the time the three Minority Member Directors voted to admit the Small Holders, the Minority Members valued their stake at over $500/Unit.[40]

### 3. There Is No "Intentional Gap" In The Agreement As To The Rights Of Newly-Admitted Members

The Minority Members embrace the trial court's holding that there was an "intentional gap" in the LLCA because it supposedly "left open the question of what rights and obligations subsequently admitted members would have."[41] But there can be no "intentional gap" under Delaware law. Rather, "where the contract is intentionally silent as to the subject, the implied [covenant] … does not come into play." *Dave Greytak Enters., Inc. v. Mazda Motors, Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992), *aff'd*, 609 A.2d 668 (Del. 1992).

In any event, there was no gap here, because the LLCA already sets forth the rights of newly-admitted Members except as specifically varied by Oxbow's Board at the time of admission. Quoting the trial court, the Minority Members argue this "begs the question by assuming that subsequently admitted members have the same rights and obligations as the original members."[42] But that outcome flows directly from the text of the LLCA. The LLCA expressly defines "Member" to include "any

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40 MMBr.45; Op.42.
41 MMBr.40-41.
42 MMBr.40.

Person subsequently admitted as a Member" and treats Members and "Additional Members" identically when defining "Member Interest" and "Percentage Interest."[43] Moreover, Article IV, Section 5 requires that anyone admitted as a Member must agree to be bound by the terms of the LLCA, and Article XVII provides that the LLCA "constitutes the entire agreement of the Members and any additional Members with respect to the subject matter hereof."[44] It would make no sense to require Additional Members to be bound by the LLCA, which "constitutes the entire agreement of" such Additional Members, but then say their rights and obligations are different than those set forth in the LLCA, unless specifically varied by the Board at the time of admission.[45]

These provisions mean that, absent affirmative action by the Board to vary the terms applicable to them, new Members have the same rights as prior Members.[46] Indeed, the trial court recognized as much by finding that the Small Holders have rights under the LLCA, including the right to receive a 1.5x return, notwithstanding that the Board never specified that they had such a right.[47]

The Minority Members argue the "use of 'may' in Article IV, Section 5—which provides new Members "may be admitted … on such terms and conditions as

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43 A2080 (Art.I ("Member")).
44 A2093 (Art.IV-§5); A2122 (Art.XVII-§4).
45 *Id.*
46 *Id.*; KPBr.43.
47 Op.176.

the Directors may determine at the time of admission"—means only that the *admission* of new Members is permissive, without speaking to the terms and conditions of their membership.[48] But this argument renders the second "may" superfluous in violation of Delaware law. *See Osborn*, 991 A.2d at 1159 (Delaware courts "will give each provision and term effect, so as not to render any part of the contract mere surplusage"). As its language makes clear, the LLCA grants the Board permissive powers both with respect to the decision to admit new members, and in varying their terms and conditions relative to other Members. *See Blaustein v. Lord Baltimore Capital Corp.*, 84 A.3d 954, 959 (Del. 2014).[49]

Faced with this dispositive provision, the Minority Members invent new contract language, claiming the LLCA requires the Board "*must* determine" new Members' rights.[50] But the contract actually provides that the Board "*may* determine" those rights at the time of admission. The Minority Members also argue there are no "default rights" for new Members because the LLCA provides Crestview and Load Line certain rights with respect to triggering an exit, as distinct from Oxbow Holdings.[51] But the right to trigger an exit under particular LLCA terms is specifically assigned to members by name; for example, Article XIII,

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48 MMBr.41n.12; *see* A2093 (Art.IV-§5).
49 KPBr.45-46.
50 MMBr.5.
51 MMBr.41.

Section 8(a) grants "Crestview" a "Put Right."[52] By contrast, the 1.5x and Equal Treatment Requirements apply to all Members.[53] Thus, by not expressly varying the Small Holders' 1.5x rights, the Board acted to admit them with the same 1.5x and Equal Treatment Requirements as all other Members.

Finally, the Minority Members claim that "whenever a contract accords discretion to parties in future performance" a gap exists. But this is not a case in which "a contract confers discretion on one party" such that "the implied covenant requires that the discretion be used reasonably and in good faith."[54] The LLCA grants the Board (as distinct from Oxbow's Members, the parties to the LLCA) the authority to admit new Members on such terms as the Directors "may determine." The Minority Members never claimed that the Board, including their own three Directors, acted in bad faith in unanimously exercising its authority to admit new Members.[55] Their argument was always premised on the existence of a gap in the LLCA—but there was no "intentional gap" in the LLCA for the implied covenant to fill.

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52 A2114 (Art.XIII-§8(a)).

53 A2115-16 (Art.XIII-§8(e)); A2114 (Art.XIII-§7(d)).

54 MMBr.40, 44. The Minority Members' citation to *Airborne Health Inc. v. Squid Soap, LP*, 984 A.2d 126, 146–47 (Del. Ch. 2009) is irrelevant, since unlike here, that case involved discretion of a single party, and there was no bad faith here.

55 Nor could they; Volpert seconded the unanimous motion to admit the Small Holders. A1887.

### 4. The Parties Anticipated The Situation Presented

As this Court has held, the implied covenant may only be used to address "developments that could not be anticipated." *Nemec*, 991 A.2d at 1126; *see Gerber*, 67 A.3d at 421 (courts "will not imply terms to 'rebalance[e] economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract'").

The Minority Members do not dispute the parties anticipated at the time the LLCA was executed that Oxbow would add new Members, and "understood that Oxbow operated in a highly cyclical industry … [and that] the 1.5x Clause might not be satisfied when the time to exercise the Put Right arrived."[56] These findings should have ended the analysis, because they meant that the "developments" and "events" at issue were anticipated.

The Minority Members argue the trial court was justified in nevertheless invoking the implied covenant because it found the events surrounding the Small Holder admission process were "unforeseen."[57] Aside from the fact the Koch Parties never had the opportunity to address this argument, it ignores that the text of the LLCA made clear at the time of contracting in 2007 that if Oxbow's Board did not vary the 1.5x rights of new Members at the time of their admission, their 1.5x

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56 Op.162.

57 MMBr.46 (quoting Op.162).

threshold would affect the required price in an Exit Sale by operation of the Equal Treatment Requirements.

### B. The 2011 Small Holder Admission Process Is Not Susceptible To An Implied Term

To evade the trial court's dispositive findings regarding the LLCA and its negotiation in 2007, the Minority Members focus instead on the court's speculation regarding the 2011 Small Holder admission process. This gambit fails because 2011 was not a time of contracting. In any event, even if analyzed as of 2011, the court's findings do not support the conclusion that there was a "gap" in the Small Holder admission process to be filled by an implied covenant.

#### 1. The "Time of Contracting" Was 2007

The Minority Members have not articulated any principle of Delaware law that would render the Small Holder admission process a "time of contracting." *Gerber*, 67 A.3d at 418. There was no contract or amendment among the LLCA's parties negotiated at that time. Indeed, the trial court did *not* imply a term into the LLCA. Rather, the court envisioned a *hypothetical*, amended 2011 version of the LLCA, and found that this *hypothetical* LLCA should contain an implied Top-Off right, and a resulting variation in the existing Members' Equal Treatment Requirements. The court speculated that, in 2011, the Minority Members "*could have* blocked the issuance and forced a negotiation" and "Koch would have

compromised on a Seller Top Off" in this hypothetical negotiation.[58] Of course, it is impossible to know what the parties would have agreed to in a speculative, hypothetical negotiation.

There is no legal justification for basing a ruling on a contract negotiation in 2011 that never occurred. The Minority Members argue "the Small Holders' membership terms ... [are] an *issue of contracting*" because admission purportedly "sets the rights and duties of both the new members and potentially alters the rights and duties of existing members."[59] This is wrong. The admission of new Members occurs in performance of terms of the LLCA, as agreed upon in 2007. While the Board could "alter[] the rights and duties" of *new* Members in connection with admission, the provision says nothing about altering the rights of existing Members.[60] Continuing Members play no role in admission, as would be required to alter their Equal Treatment and other contractual rights. Indeed, the admission provisions require new members to adhere to the pre-existing LLCA by executing a joinder, as was done here,[61] which has no effect on the already-existing contractual rights of the continuing Members.

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58 Op.150, 156.

59 MMBr.49 (emphasis added).

60 *Id.*

61 The Minority Members do not address the trial court's clear error in overlooking that Family LLC executed the required joinder in 2011. *See* A1911; KPBr.51; MMBr.15n.2.

Thus, the Minority Members' argument that the Koch Parties' citation to the trial court's finding that a Top-Off would have been a "deal killer" is somehow "irrelevant and misleading" because the court accepted it only "for purposes of the private equity investment in 2007" fails.[62] It is relevant precisely because 2007 is when the parties entered into the LLCA, including the Exit Sale provisions the Minority Members now seek to vary. That is the only "time of contracting" in this case.

### 2. There Was No "Gap" In The Small Holder Admission Process

The clarity of the LLCA's provisions as agreed upon in 2007 forces the Minority Members to focus on the facts surrounding the process of admission. They misrepresent the record in doing so, and, in any event, present nothing supporting application of the implied covenant here.

*First*, the Minority Members essentially reargue the point, on which they lost below but did not cross-appeal, that the Small Holders were not properly admitted as Members. They argue that "[n]one of the resolutions enacted by the Board mentions membership," notwithstanding that the resolutions issued Units, which can only be issued to Members, and that they consistently treated the Small Holders as Members, including for purposes of distributions.[63] Having failed to cross-appeal

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62 MMBr.49 n.21.

63 MMBr.41; A2093 (Art.IV-§5); Op.118.

from the trial court's holding that the Small Holders are "Members," the Minority Members cannot challenge it now.

*Second*, the Minority Members ignore the trial court's findings concerning their knowledge about the Small Holders' admission, as well as that their three Board representatives joined in the unanimous vote to admit them. While the Minority Members now claim the "Koch Parties failed to follow the conditions to establish the rights of the Small Holders," they acknowledge responsibility for any alleged failure was with the Board as a whole.[64] That is because the LLCA delegates admission to the Board, on which three Minority Member Directors sit, not to the "Koch Parties."[65] The Minority Members were of course free to raise questions at any time. Nor did Koch have an obligation to explain the terms of the LLCA to the sophisticated Minority Members (represented by Davis Polk).[66]

The Minority Members also assert that "[n]one of the resolutions enacted by the Board ... specifies the rights of the members of Koch's family or the

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64 MMBr.1, 2, 7.

65 MMBr.7; KPBr.50; A2093 (Art.IV-§5).

66 A2094 (Art.IV-§7); KPBr.36. The Minority Members' suggestion that Koch "did not disclose that he would control" the Small Holders, MMBr.13, is both irrelevant (since the Small Holders are subject to the 1.5x Return and Equal Treatment Requirements regardless of who controls them) and contrary to the trial court's findings. Rather, Crestview understood Koch would control Family LLC and "just didn't make a big deal out of it." Op.117 (A817); Op.34-37. Likewise, the Fried memo explicitly stated an "affiliate of Oxbow" would serve as manager of Executive LLC. Op.35 (A1807).

executives."[67] This dodges the critical point, which is that the Board was aware that the only variation in those Members' rights as compared other Members, as stated in the memo to the Board and the resolutions admitting them, was the price per Unit.

Similarly, the Minority Members ignore the trial court's finding that the full Board (including their Directors) was provided with a detailed analysis describing the proposal to admit the Small Holders. In effect, they challenge these findings without coming close to meeting the applicable "clear error" standard. As the court found, the analysis provided to the Board explained the ICEC executives would invest in a "single purpose vehicle" which "would become *a member of Oxbow, owning the same class of units as currently exists*."[68] The Minority Members claim that the "trial court properly disregarded" this analysis when, in fact, the court cited it as a reason not to fully credit Hurst and Volpert's testimony regarding what they knew about the Small Holder admittance.[69]

The Minority Members note this analysis stated that "[t]he existing members of Oxbow would be required to consent to an amendment to implement the rights of" new Members, MMBr.36, suggesting they somehow expected they would be able to alter the Small Holders' rights post-admission. But as the court held, the LLCA does not require "formal amendment and member-level consent (as opposed

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67 MMBr.41-42.

68 Op.35 (A1807) (emphasis added).

69 MMBr.36 n.9; Op.147.

to Board-level consent)" to new Member admission.[70] All that is required is "the approval of … the [] Directors."[71] And the Minority Members have no answer to the argument that varying the status of new Units after admission is foreclosed by the plain text requirement that the Board impose any new or different terms and conditions on new Members "at the time of admission."[72] Indeed, the Minority Members' concede that their position would mean the Small Holders effectively have *no rights* in the Company, a facially absurd result.[73]

The Minority Members wrongly claim that Oxbow did not comply with the pre-emptive rights provision of the LLCA.[74] As an initial matter, that notice has nothing to do with setting the terms and conditions of new Members' Units; rather, it provides other Members an opportunity to avoid dilution.[75] In any event, the Minority Members received notice, including the memorandum and written Board resolutions by which Oxbow's Board admitted the Small Holders but varied the terms of their Units only as to price. Despite this notice, the Minority Members

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70 *Id*.

71 A1808. Article VII, Section 2 of the LLCA provides that the consent of the Minority Members is not required to modify the LLCA to reflect admission of new Members. A2098 (Art.VII-§2).

72 A2093 (Art.IV-§5); KPBr. 45.

73 MMBr.42 n.13; KPBr.47.

74 MMBr.41 (citing A2111).

75 A2110-11 (Art.XIII-§5).

never exercised preemptive rights. Instead, Crestview considered selling some of its stake to harvest its enormous profits.[76]

The Minority Members' treatment of the events of 2011 obscures that the trial court's findings are at odds with the premise of its implied covenant analysis: that the Minority Members were somehow unaware of the terms and potential consequences of the admission of the Small Holders, and that, had they been aware, they would have successfully negotiated for a Top-Off. In fact, the trial court's own findings show that they knew all relevant information, and simply took no steps to change how the Small Holders would be treated in an Exit Sale. Thus, even if it was proper to apply the implied covenant to the 2011 admission process, the Minority Members' claim would fail because the consequences of admitting new Members to the 1.5x Return threshold were foreseeable during that process as well.[77] Moreover, the Minority Members cannot meet their burden of showing that a Top-Off term was so obvious that the parties "must have intended" to include it in their agreement. *Dieckman v. Regency GP LP*, 155 A.3d 358, 368 (Del. 2017).[78] To the contrary, the Minority Members never even asserted such a right existed under the plain language of the LLCA until appeal.

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76 Op.41-42 (A1894; A1909; A799).
77 *Supra* 21-22.
78 MMBr.43-44.

### 3. The Minority Members Waived Any Claim That The Admission Process Created A Gap

Burying their concession in a footnote, the Minority Members admit that they raised the "admission gap" argument in their pre-trial brief, but abandoned it in their post-trial briefs.[79] This constitutes waiver. *See SinoMab Bioscience Ltd. v. Immunomedics, Inc.*, 2009 WL 1707891, at *12 n.71 (Del. Ch. June 16, 2009). They try to resuscitate this claim by incorrectly arguing this issue was raised at oral argument. While it would be improper sandbagging to make an unbriefed argument at post-trial argument, the Minority Members never argued that the admission process constituted a gap, only that admission of the Small Holders was not foreseeable.[80]

The cited decision in *Airgas, Inc. v. Air Products and Chemicals, Inc.*, 2010 WL 3960599 (Del. Ch. Oct. 8, 2010) does not require a different result. There, the trial court found an argument was abandoned, but also went on to explain why it was rejected on the merits. *Id.* at *9. Here, the court improperly ruled on the basis of the abandoned argument.

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79 MMBr. 38n.11.

80 A1586.

## III. Oxbow Holdings Cannot Have Breached The Cooperation Covenant

The Minority Members do not dispute that, if an Exit Sale could not proceed under the LLCA, there was no such sale for Oxbow Holdings to use reasonable efforts to effectuate.[81] Because there was no such sale available, the trial court's finding that Oxbow Holdings breached its reasonable efforts obligation was error.[82]

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81 KPBr.54.

82 The ArcLight Indication also failed the "All Securities Requirement." KPBr.56. The undisputed evidence shows that Crestview's principals intended to roll over a portion of their equity, notwithstanding that ArcLight's offer was nominally for 100% of the Company. Op.90 (A2016); MMBr.53 n.23.

## IV. The Trial Court's Damages Award Was Erroneous

The Minority Members cite no case awarding both specific performance of a contract plus "backstop" insurance against the risk that performance will not achieve a particular economic result.

The sole case the Minority Members cite in support of their position that they could directly assert their legal fees claim is inapplicable. *In re Cencom Cable Income Partners, L.P.*, 2000 WL 130629 (Del. Ch. Jan. 27, 2000), was decided years before *Tooley v. Donaldson, Lufkin & Jenrette*, 845 A.2d 1031, 1033 (Del. 2004), and involves facts, where, unlike here, the business association ended, but for a two-party winding-up process. The fees award also constituted improper veil-piercing, since the trial court held the Koch Parties liable for the Company's debts in violation of Delaware law and the LLCA, notwithstanding that it described the award as "compensatory damages."[83]

Finally, the Minority Members fail to identify a single instance where they sought either "backstop" damages or sought an award of Oxbow's legal fees prior to the remedies phase. They therefore waived those claims.[84]

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83 MMBr.57; RemOp.2-3.

84 KPBr.57-60.

## CONCLUSION

This Court should reverse the judgment of the Court of Chancery and enter judgment for the Koch Parties.

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