EFiled: Mar 10 2020 04:31PM EDT
Filing ID 64813145
Case Number Multi-Case

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S OPENING BRIEF ON APPEAL

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Dated: March 10, 2020

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NATURE OF PROCEEDING

In July 2014 NGL Energy Partners L.P. ("NGL LP") and NGL Energy Holdings LLC ("NGL GP," collectively with NGL LP "NGL"[1]) acquired TransMontaigne, a refined petroleum products distributor, from Morgan Stanley (the "Acquisition"). LCT Capital, LLC ("LCT") played a large and pivotal role in NGL's acquisition of TransMontaigne. (Memorandum Opinion on Defendants' Motion for Judgment as a Matter of Law, Ex. A at 1) (the "Opinion"). NGL's CEO Mike Krimbill ("Krimbill") admitted that LCT played a significant role in the Acquisition that justified a transaction whereby LCT would receive consideration that included NGL GP equity interests (the "NGL GP Transaction"). Krimbill Letter to NGL GP Owners dated October 24, 2014 (the "October 24 Letter"). The October 24 Letter valued the NGL GP consideration promised to LCT at $29 million. Opinion, Ex. A at 1.

As the Acquisition progressed, the parties negotiated the NGL GP Transaction. LCT's Lou Talarico ("Talarico") testified that he reached an agreement with Krimbill whereby LCT would receive: (i) a 2% stake in the NGL GP at a $700 million valuation, (ii) NGL would pay LCT's taxes for its receipt of this ownership interest, and (iii) LCT would obtain an option to purchase an additional 3%

[1] NGL LP is a Delaware master limited partnership ("MLP") and is publicly traded on the NYSE. NGL GP is privately held.

ownership interest in the NGL GP for $21 million (the "Promised Consideration"). Despite numerous representations and statements from Krimbill assuring Talarico that LCT and NGL had an agreement, among many other representations, NGL reneged on Krimbill's promise and refused to provide LCT the arrangement that Krimbill had represented LCT would get.

"With no progress and Krimbill's failure to live up to his commitment" (Opinion, Ex. A at 2), Krimbill told Talarico that he would have to sue NGL. Talarico, 7/24/2018, Tr. at 249. [A587].

LCT commenced the litigation in August 2015 in Superior Court. On September 29, 2015, LCT filed the Amended Complaint, alleging claims against NGL for breach of contract, fraudulent misrepresentation, *quantum meruit* and unjust enrichment. First Amended Complaint. [A239-A298].

Three days before the trial began, the Superior Court incorrectly dismissed the breach of contract and unjust enrichment claims but allowed the claims for fraudulent misrepresentation and *quantum meruit* to proceed to trial.

The trial followed, and at the close of evidence, Defendants moved for a judgment as a matter of law pursuant to Delaware Superior Court Rule 50(a). Specifically, Defendants argued (a) jury confusion due to an alleged "unitary damages case", and (b) the evidence did not support the fraud claim. 7/30/2018 Tr.

at 233-252. [A1278-A1297]. The Superior Court reserved decision until after the jury rendered its verdict.

Subsequently, the jury found for LCT on fraud liability; Defendants conceded *quantum meruit* liability. The jury awarded damages to LCT of i) $4 million under *quantum meruit*, and ii) $29 million under fraudulent misrepresentation. The jury answered "no" on the verdict sheet to the question of whether the damages for fraudulent misrepresentation were the same as for *quantum meruit*. Jury Verdict Sheet dated August 1, 2018 [A1338-A1339]. The Superior Court then denied Defendants' Rule 50(a) motion in a letter to the parties on August 14, 2018 stating, "the Court finds *there is a reasonable basis for the decision rendered by the jury* and the motion for judgement as a matter of law is hereby denied." (Judge Carpenter's August 14, 2018 Letter denying Defendants' Rule 50(a) Motion [A1340] (emphasis added).

After the Superior Court's denial of the Rule 50(a) Motion, NGL moved for Judgment as a Matter of Law, or in the Alternative, for a New Trial, where NGL argued, *for the first time*, that the $29 million was an impermissible award of benefit of the bargain damages.

On December 5, 2019, the Superior Court issued the Opinion granting NGL's motion, in the alternative, for a new trial on damages only. The Opinion found that awarding benefit of the bargain damages as a remedy for fraud where plaintiff and

defendant did not enter into a binding contract was an unsettled question of Delaware law. Opinion, Ex. A at 10. The Superior Court ultimately ruled that benefit of the bargain damages were not recoverable in those circumstances. Opinion, Ex. A at 16-17.

LCT appealed the Opinion to the extent that the Superior Court found that under Delaware law, "an enforceable contract is required in order for plaintiff to recover benefit of the bargain damages in a fraud case." Opinion, Ex. A at 10. On December 23, 2019, the Superior Court certified appeal of Plaintiff's application "relating to awarding benefit of the bargain damages in a tort claim in which there is no contractual relationship between the parties." Superior Court Order on Plaintiff's Application for Certification of Interlocutory Appeal (the "Certification"), Ex. B at 4. On January 7, 2020, this Court accepted LCT's interlocutory appeal, and the Superior Court's certified question. Supreme Court Order Accepting Interlocutory Appeal ("Order Accepting Appeal"), Ex. C at 4. Plaintiff seeks a decision from this Court finding that an enforceable contract between a defrauded plaintiff and the defendant is not required in a fraud case for the defrauded victim to recover benefit of the bargain damages.

SUMMARY OF ARGUMENT

1. Benefit of the bargain damages should be available in the absence of a contract between plaintiff and defendant to put the plaintiff in the same position he would have been in if the defendant's representations had been true.

2. The function of a contract between the defrauded party and the party committing the fraud is that it enables a court to evaluate the benefit the defrauded party would have received had defendant's representations been true. Here a contract is not necessary because the Superior Court found there was sufficient evidence of the benefit that defendants had represented that plaintiff would receive.

3. Since benefit of the bargain damages are available in the absence of a contract for a claim based on promissory estoppel they should also be available in the absence of a contract for a claim based on fraud.

4. There is a public policy in Delaware against fraud and NGL should not be permitted to keep $500 million of benefit derived from defrauding LCT.

STATEMENT OF FACTS

Overview

It is for this Court to decide if the law of Delaware permits a defendant to retain hundreds of millions of dollars of benefit derived through fraudulent conduct and leave the plaintiff with the completely inadequate and, as the trial court put it, "incredibly unfair," remedy of out of pocket damages.[2] Opinion, Ex. A at 16. Neither logic, justice, nor the case law mandates such a result. LCT is entitled to what NGL represented it would get, especially in light of the significant benefit NGL derived through defrauding LCT.

Judge Carpenter's words cut to the heart of the question presented to this Court:

> So from your perspective, your CEO's…misleading, clearly outrageous conduct by any rational business plot should have no damages associated with it because it's given no number. If I was to accept your argument that [$]4 million is it, quantum meruit is it, I am, in effect, to a large degree supporting the misconduct that I find to be outrageous. I have to give it some number. There has to be some fraud. To say that he did not mislead, to say that his conduct was reasonable and appropriate, I can't do that.

Judge Carpenter, Hearing on Defendants' Defendants' Post Trial Motion for Judgment as a Matter of Law on April 11, 2019, ("Post-Trial Motion Hearing") Tr.

[2] While this Court accepted this interlocutory appeal on a question of law, these facts are included to the extent they are relevant to our legal analysis and as well to the issues raised by NGL in its cross-appeal.

at 83:6-18. [A1423].

Krimbill represented to Talarico that LCT would receive equity interests in the NGL GP for its role in the Acquisition. The Acquisition in Krimbill's words created value to the NGL GP alone of $500 million. Krimbill in his own words described the $29 million as a "fair arrangement…as [NGL] never would have had this opportunity at our price without LCT bringing it to us." JX 281. [A236-A237]. It is now NGL's position that LCT should only receive out of pocket damages on its fraud claim while NGL retains the fruits of its fraudulent and reprehensible conduct, hundreds of millions of dollars of value derived as a direct result of LCT's efforts.[3]

NGL's assertions to the contrary are baseless. As the Superior Court stated, "Krimbill's testimony was unbelievable, and it was supported by several other witnesses who were less than candid or credible...those [witnesses] associated with NGL were simply not credible." Opinion, Ex. A at 8.

The jury evidently agreed with the Superior Court's characterization of NGL and its witnesses' testimony, as it awarded Plaintiff $33 million at the conclusion of the trial – $4 million for *quantum meruit* and $29 million for fraudulent

[3] At the April 11, 2019 hearing on Defendants' Motion for Judgment as a Matter of Law, NGL argued that LCT should receive nothing for its fraud damages. Transcript of Hearing on Defendants' Post-Trial Motion for judgment as a Matter of Law, dated April 11, 2019, at 52 [A1392].

misrepresentation. Reflecting on the jury's verdict, the Superior Court stated to opposing counsel during a post-trial hearing on April 11, 2019:

> Any reasonable review of the jury's decision found that *they believe your client was a $44 million liar.*[4]
>
> I mean, if you look at the verdict, whatever the number is for the false representation, in the big picture, that was a statement concerning the credibility of your client, and the credibility not of your CEO, but the credibility of all the other witnesses who came in and tried to support him who were equally unpersuasive, equally arrogant.

(Post-Trial Motion Hearing, 04/11/2019 Tr. at 8, [A1348-A1349] (emphasis added)).

LCT is entitled to that value, especially in light of the significant benefit NGL derived through defrauding LCT. A retrial will only give Defendants, who were liable below for fraud, another chance to change their story.

[4] When asked about the $44 million figure by Defendants' counsel, the Superior Court indicated, "I forgot what the number is. One is 4 million. One is – what is the other, 30?" (4/11/19 Tr. at 9 [A1349]). The Court was referring to the $33 million verdict comprised of $4 million for *quantum meruit* and $29 million for fraud.

Background Facts

In December 2013, LCT learned that Morgan Stanley planned to sell TransMontaigne, a refined petroleum products distributor. Talarico believed that TransMontaigne was an attractive investment, and ultimately secured an invitation into the sales process. Talarico, 7/24/2018 Tr. at 43-58. [A381-A396]. As Krimbill put it, "(LCT) (Lou Talarico) was able to initiate negotiations with MS [Morgan Stanley] and propose a purchase price in the $200-$250 million range that was not rejected…LCT was able to get MS to deal directly with NGL outside of an auction process which may have saved us tens of millions of dollars. Other potential buyers such as Buckeye Partners were estimated to be offering $450 million, per the Wall Street Journal."[5] JX281. [A236]. Don Jensen, an Executive Vice President who runs the NGL business unit responsible for the TransMontaigne acquisition, testified that LCT "played a critical role, they brought us the deal, yes." 7/27/2018 (Afternoon) Tr. at 108. [A1261].

LCT put together a team that brought unique knowledge and insight to the Acquisition. LCT understood the regulations under the Dodd Frank legislation that required Morgan Stanley to divest TransMontaigne. Talarico 7/24/18, Tr. at 48-49 [A386-A387]; Kurz, 07/25/18, Tr. at 164-65. [A759-A760]. LCT uniquely understood the value presented by TransMontaigne, including $100 million in cash

[5] This was not disputed at trial.

flows from a marketing business that no other bidder understood. Talarico, 07/24/18, Tr. at 71-73. [A409-A411].

On May 16, 2014, specifically through LCT's efforts, NGL submitted an initial offer to Morgan Stanley. In the weeks that followed, LCT negotiated the terms of the deal on behalf of NGL, including resolving several very sensitive business and financial issues that threatened to derail the transaction. Talarico, 7/24/2018 Tr. at 124-127. [A462-A465]. As the trial testimony demonstrated, but for LCT's perseverance, skilled deal-making, credibility and insight regarding the tremendous commercial opportunity at hand, NGL would not have been the successful buyer.

On June 8, 2014, the NGL LP and Morgan Stanley entered into a purchase agreement (the "Acquisition Agreement") pursuant to which the NGL LP agreed to purchase "100% of the common stock of TransMontaigne Inc., Morgan Stanley's Interests in TransMontaigne Partners L.P. and Certain Related Assets" for $200 million. JX166. [A231-A232]. The Acquisition Agreement included a section stating that LCT and UBS Securities were investment advisors and that their fees would be paid as part of the deal. Krimbill, 07/26/18, Tr. at 57. [A872]. At both announcement and closing of the Acquisition, LCT was listed as financial advisor in NGL's press release that read, "LCT Capital and UBS Investment Bank are serving as NGL's financial advisors…" JX166. [A231-A232].

The acquisition officially closed on July 1, 2014. The purchase price for TransMontaigne was $200 million plus working capital, an incredible bargain creating $500 million of value for NGL according to the October 24 Letter. JX 281. [A236-A237] In the October 24 Letter, Krimbill praised LCT's pivotal role in the transaction. JX281. [A236-A237]. While being deposed, Krimbill stated that LCT played a "limited" role and that Talarico did not participate in negotiations with Morgan Stanley, a statement which was easily refuted. The video of the deposition was played at trial. Krimbill then testified regarding his own deposition, "I guess I have a different recollection as to his participation." 7/26/2018 Tr. at 17-20. [A832-A835].

The evidence was overwhelming that NGL realized an enormous benefit from the deal—value that was derived directly from LCT's efforts. NGL received: (i) a favorable purchase price of $200 million when others were offering $450 million (JX281 [A236-A237]), (ii) a working capital windfall of $140 million (JX 467 [A234]), (iii) $500 million of value created to the NGL GP, (JX281 [A236-A237]), and (iv) additionally, hundreds of millions of dollars of cash flow to the NGL LP. Talarico, 7/25/2018, Tr. at 50. [A645].

While the Acquisition progressed, LCT negotiated the NGL GP Transaction. On or around May 9, 2014, and at the request of John Raymond,[6] Talarico proposed that LCT receive a 15% ownership interest in the TransMontaigne GP, plus the right to purchase an additional 10% interest in the TransMontaigne LP as a co-investment. Talarico, 7/24/2018, Tr. at 181-84. [A519-A522]. NGL, through Raymond, countered that LCT receive a 2% ownership interest in the NGL GP. In the correspondence supporting the counter-offer, the 2% interest in the NGL GP was described as "comparable to an 18% profits interest in a $100 [million] investment generating a net 6x ROI [Return On Investment]." PX115 [A226].

Krimbill, however, thought LCT should get more than the 2% GP interest. 7/24/2018 Tr. at 188-189, 194-195. [A526-A527; A532-A533] On May 17, 2014, Krimbill and Talarico agreed to the Promised Consideration:

- A 2% ownership interest in NGL Holdings at a $700 million valuation;
- NGL's payment of LCT's taxes on its ownership interest; and
- An option to purchase an additional 3% ownership interest in NGL Holdings.

Talarico, 7/24/2018 Tr. at 226 [A564].

[6] John Raymond is the CEO of Energy & Minerals Group, an investor in NGL as well as a member of the board of directors of NGL.

Krimbill later confirmed LCT's arrangement on May 30, 2014. JX140 [A228], Talarico, 7/24/2018 Tr. at 220-223. [A558-A561] Krimbill, in the first week of June 2014, also confirmed the arrangement with Karl Kurz, a LCT witness who testified at trial. 7/25/2018 Tr. at 179-180. [A774-A775].

On June 4, 2014, Talarico, Krimbill, and Bruce Toth, counsel for NGL, met to discuss documenting the NGL GP Transaction. Krimbill dictated to Toth the terms of the Promised Consideration at the meeting. Talarico, 7/24/2018 Tr. at 223-228. [A562-A567]. Toth asked Talarico to confirm the details and Talarico did so in an email the following day, writing "[LCT] will receive 2% of [NGL Holdings] at $700 million valuation; NGL to pay taxes[.] We will have the opportunity to purchase up to 3% of the [NGL Holdings] at a $700 million valuation." JX155 [A230]; Krimbill, 7/26/2018 Tr. at 98. [A913]. There was no disagreement about the terms at the meeting nor did Toth refute the terms in Talarico's email sent the next day. Toth, 7/26/18, Tr. at 123-126. [A938-A941]. Krimbill also represented to Talarico that he had spoken with most of the Board, and again confirmed the arrangement with LCT. JX151. [A229]. 7/24/2018 Tr. at 230. [A568].

On June 16, 2014, Raymond sent an email to LCT confirming NGL's agreement with LCT. The email reads, "Checking in here to make sure all is going as agreed to re acquiring your GP interest etc at NGL … *we need to get this done properly and honor what we all discussed/agreed on NGL end of it*!" PX331. [A233]

(emphasis added).[7] On June 23, 2014, at Krimbill's suggestion, Talarico called Toth to discuss the status of the NGL GP Transaction documentation. While Toth admitted that he told Talarico "we are working on it," Toth also admitted at trial that neither he nor his law firm ever even began working on any documentation to formalize the NGL GP Transaction in writing.[8] 7/26/18, Tr. at 134-136. [A949-A951].

The Acquisition closed on July 1, 2014, and NGL made no progress on the NGL GP Transaction documentation for several months after closing.

On November 25, 2014, Krimbill admitted that he was not going to honor the Promised Consideration and began a long process to try to renegotiate the NGL GP Transaction. Over the next six months Krimbill proposed economic arrangements that only got worse and worse. Ultimately, Krimbill told Talarico that if he wanted the Promised Consideration LCT would have to sue NGL. 7/24/2018, Tr. at 248-

[7] After Raymond was finished testifying, NGL subsequently (and improperly) tried to introduce his deposition testimony through an expert witness. The Court would not allow it, stating, "Would you like the Court's impression of Mr. Raymond?...I have no idea what you're doing now other than putting out somebody's deposition [sic] which credibility in this courtroom left a lot to be desired." 7/27/2018 (Morning) Tr. at 106-07. [A1168-A1169].

[8] Toth's testimony also lacked credibility as he made several inconsistent statements. 7/26/2018 Tr. at 104-160. [A919-A975]. Further, NGL counsel and Toth crossed the privilege line multiple times at trial, with Judge Carpenter observing, "if you're not waiving [privilege] for litigation reasons, that's clear…But if you're hiding information that's relevant to these proceedings. I have to decide what the remedy is." 7/26/2018 Tr. at 216-221. [A1031-A1036].

250. [A586-A588]. There was never any discussion between the parties of a typical "investment banking" fee prior to this litigation. 7/24/2018, Tr. at 178-179. [A516-A517].

The litigation commenced in August 2015. Prior to trial, NGL moved for partial summary judgment. On July 19, 2018, three days before the beginning of trial, the Superior Court dismissed LCT's breach of contract and unjust enrichment claims, but allowed the claims for fraudulent misrepresentation and *quantum meruit* to proceed to trial. Memorandum Opinion on Defendants' Motion for Partial Summary Judgment, dated July 19, 2018 ("Summary Judgment Opinion") at 32. [A337].[9]

At the close of evidence, Defendants moved for a judgment as a matter of law pursuant to Rule 50(a), citing jury confusion as well as challenging the evidence presented with respect to the fraudulent misrepresentation claim. The Superior Court reserved decision until after the jury rendered its verdict. 7/30/2018, Tr. at 233-252. [A1278-A1297].

At the end of the first week of trial, the Superior Court requested that counsel submit a damage instruction on fraudulent misrepresentation. 7/27/2018 (Afternoon), Tr. at 112. [A1262]. NGL did not object to the instruction on damages

[9] The Summary Judgment Opinion was filed under seal in the Superior Court, and remains sealed to this date. It has been included in the appendix in accordance with Supreme Court Rule 10.2(5).

for fraudulent misrepresentation. 7/30/2018, Tr. at 233-252. [A1278-A1297]. When deliberations began, the jury was presented with a verdict sheet that began with a damages line, at NGL's request, for *quantum meruit*. The verdict sheet then ended with a second line for fraudulent misrepresentation damages. Verdict Sheet, [A1338-A1340]. Defendants did not challenge the separate lines for each set of damages in the verdict sheet. 7/31/2018, Tr. at 3-4. [A1311-A1312]. Notwithstanding NGL's post-trial plea for jury confusion regarding a "unitary damages case" and two damages lines, it is important to note that NGL's proposed verdict sheet contained two damages lines. NGL Proposed Verdict Sheet [A1313-A1315].

The jury ultimately found for LCT on fraud (NGL conceded *quantum meruit* liability), and awarded LCT $4 million under *quantum meruit*, and $29 million under fraudulent misrepresentation. Importantly, in interrogatory #3, the jury specifically found that the damages were not the same regarding fraud and *quantum meruit*. Verdict Sheet [A1338-A1339]. Following the jury verdict, the Superior Court denied Defendants' Rule 50(a) motion in a letter to the parties on August 14, 2018. [A1340].

NGL then moved for a Judgment as a Matter of Law, or in the Alternative, for a New Trial. NGL argued, *for the first time*, that the $29 million was an impermissible award of the benefit of the bargain damages.[10]

On December 5, 2019, the Opinion granted in part NGL's motion for a new trial on damages only. The Opinion stated that "[a]s it appears that Delaware Courts have not settled the issue of whether an enforceable contract is required in order for a plaintiff to recover benefit-of-the-bargain damages in a fraud case," it would look to cases cited in various other jurisdictions. Opinion, Ex. A at 14. The Court went on to hold:

> "A review of the cases clearly reflects that where there is a formal contractual relationship between the parties, benefit-of-the-bargain damages can be obtained. This is not surprising as, in most cases, the contractual agreement has occurred as a result of, or been influenced by, the fraudulent conduct. It is only fair then to allow the aggrieved party to recover what would have been the bargain without the fraud. Unfortunately, the facts here do not fit the traditional benefit-of-the-bargain case law as there is no formal agreement to "affirm" and thus seek the benefit of the contract nor is there any contract to "rescind" to restore the parties to status quo ante.
>
> Based on the above, the Court concludes that to get damages under the benefit-of-the-bargain concept, the contractual bargain must have been created and formalized. Without such structure, the discussions between the parties are simply negotiating positions to which a meeting of the mind has not been finalized. While perhaps incredibly unfair to the unique factual setting of this case in light of the reprehensible

[10] The Defendants did not raise this in issue in their Rule 50(a) Motion. 7/30/2018 Tr. at 233-252 [A1278-A1307].

> conduct of the Defendants, the Court must find you do not get the bargain if it is not clearly created."

Opinion, Ex. A at 15-16.

The Superior Court continued, stating that given that the verdict sheet contained separate lines for a fraudulent misrepresentation award and a *quantum meruit* award, the jury was likely confused because Plaintiff presented a unitary theory of damages. Opinion, Ex. A at 16-17. It was thus impossible for the Superior Court to ascertain what the jury believed was "reasonable compensation for the unique services provided" by LCT. Opinion, Ex. A at 17. The Superior Court ordered a new trial on damages only.

On January 7, 2020, this Court accepted interlocutory appeal of the Superior Court's finding in the Opinion that benefit of the bargain damages were not available in a fraud case absent an enforceable contract. Order Accepting Appeal, Ex. C.

ARGUMENT

I. The Superior Court Improperly Excluded Benefit of the Bargain Damages As a Remedy for Defendants' Fraud

A. Question Presented:

Did the Superior Court wrongfully conclude that in ordering a new trial on damages that "benefit-of-the-bargain damages were not recoverable in a fraud case absent an enforceable contract . . ." Order Accepting Appeal, Ex. C at 3.

B. Scope of Review:

The question presented above is a question of law, therefore it should be reviewed *de novo* by this Court. *See, e.g., Doe v. Cahill,* 884 A.2d 451 (Del. 2005) ("A claim that a trial court applied an incorrect legal standard raises a question of law that [the Delaware Supreme Court] reviews *de novo*."); *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 56 (Del. 2019) ("[The Delaware Supreme Court will] review questions of law…de novo.").

Furthermore, to the extent that Defendants now raise arguments that were not raised at trial, this Court should only hear those arguments to the extent they raise "plain error." *Wright v. Meck*, 788 A.2d 133 (Del. 2002) ("Where a party has not objected at trial, that issue will not be addressed on appeal unless the appellant can demonstrate plain error.").

C. Merits of Argument:

The absence of an enforceable contract accompanying fraud should not deny a defrauded party the value of his expected bargain. "A willful fraud should cost as much as a broken promise. If the cheat can anticipate that the worst that can happen is that he shall be called upon to pay back his profit upon the trade, he may be encouraged to defraud." C. McCormick, Handbook on the Law of Damages § 121, at 453 (1935). Such a rule serves to deter fraud and underpins the "societal consensus that lying is wrong." *See Abry Partners V LP v. F&W Acquisition LLC*, 891 A2d 1032, 1035 (Del. Ch. 2006). Accordingly, benefit of the bargain damages are available as a remedy for fraud where a jury found the defendant defrauded the plaintiff and the pattern of misrepresentations continued for a significant period time, despite the Superior Court having found the parties did not enter into an enforceable contract.

1. The purpose of fraud damages is to put the plaintiff in the same financial position as if defendant's representations had been true

Although Delaware law recognizes two measure of damages for fraud, the benefit of the bargain rule and the out of pocket measure, this Court acknowledged the benefit of the bargain rule is the most common and accepted standard. *Stephenson v. Capano Dev. Inc.*, 462 A.2d 1069, 1076 (Del. 1983).

In *Stephenson*, this Court stated:

> "The most common and accepted standard is the benefit of the bargain rule. Under it the plaintiff recovers the difference between the actual and the represented values of the object of the transaction. . . The aim of this method is to put the plaintiff in the same financial position that he would have been in if the defendant's representations had been true." (Citations omitted.)[11]

Id. at 1076.

The Court also described the out of pocket rule:

> "The other rule, applied less frequently, is one that gives the plaintiff the difference between what he paid and the actual value of the item. . . . This is the out of pocket measure, and is designed to restore the plaintiff to his financial position before the transaction occurred. Each approach has its relative merits, and one may be more suited than the other in a given case." (Citations omitted)

Id. at 1076.

In the related footnote the Court stated:

> "In any event, the choice must initially be the plaintiff's subject only to such rational and reasonable limitations as are imposed by the circumstances of a given case and the interests of justice."

Id. at 1076, n.4; *see also Zeliff v. Sabatino,* 104 A.2d 54, 56 (N.J. 1954) ("The just method of determining damages necessarily varies with the facts of the particular

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[11] Similarly, Delaware's Pattern Jury Instructions on "FRAUD: BENEFIT OF THE BARGAIN RULE" states:

> If you find that [defendant's name] has committed fraud, then **[plaintiff's name] is entitled to damages that will put [him/her/it] in the same financial position that would have existed had [defendant's name]'s representation been true**. Your award should reflect the difference in value between the actual value of [**___describe the transaction___**] and the value represented by [defendant's name]. **(emphasis added)**
>
> Del. P.J.I. Civ. § 22.17 (2000).

case . . . [i]f one or the other rule is inflexibly adhered to, while certainty would be achieved it would in many instances be at the expense of justice.").

In this case, the out of pocket measure would not do justice to LCT. A remedy which merely seeks to place the plaintiff back in the financial position he was in before the transaction occurred allows defendant to reap a windfall (and likely leaves plaintiff worse off once considering the time and cost of litigation). The application of the out of pocket measure also would condone the reprehensible conduct of NGL by treating it more leniently than the law treats a party who honestly breaches a contract.[12]

The Court in *Stephenson* also found a plaintiff "may recover for any injury resulting from the direct and natural consequences of his acting on the strength of

[12] The objectionable effect of the out of pocket measure has been acknowledged by one court as follows:

> As to the defrauder, how can he lose under the out-of-pocket rule? If his fraud is not discovered, he pockets his dishonest profit. But even if his fraud is discovered, he need only pay his actual money profit, to the extent of the difference between the contract price he has received and the value of the unwanted goods he has delivered. He need repay the person defrauded not a penny, due to his delivery of the unwanted goods in place of the wanted goods. But if, instead of being a willful fraud doer who violates his contract, he is an honest man who violates such contract, the honest man must repay this very difference between the value of the wanted goods and the value of the unwanted goods delivered. *United States v. Ben Grunstein & Sons*, 137 F. Supp. 197, 209 (D.N.J. 1955).

the defendant's statements," holding "the plaintiff is entitled to recover all damages which are a direct and proximate result of the false advertising." *Stephenson*, 462 A.2d at 1077-78. The Court's language is quite clear: "there was no enforceable contract right with respect to financing." *Id.* at 1072. Therefore, the Court considered damages as the "actual and represented values of the object of the transaction" and not the value of something acquired or sold in a contract. *Id.* at 1076.

Here, Krimbill represented that LCT would receive a 2% ownership in NGL Holdings, an option to purchase an additional 3% and NGL would pay the taxes resulting from giving LCT that 2%.[13]

The jury could have concluded that LCT would get at least $29 million based on Krimbill's own trial testimony, "we certainly had 5% for [$]21 million."

[13] LCT's expert witness, Jonathan Nathanson testified that at a $1 billion GP valuation the values of these representations were:

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

7/27/2018 (Morning), Tr. at 46-74. [A1119-1147].

This allowed the trier of fact to accept or reject in whole or in part the components. Just days before the Acquisition closed, an MLP investor purchased 1% of the NGL LP for $10 million, a $1 billion valuation, in an arms-length transaction. Nathanson, 7/27/2018 Tr. at 48-49; 51-52. [A1121-A1122; A 1124-A1125].

Lou Talarico also testified to an identical valuation. 7/25/2018 Tr. at 255. [A593].

7/27/2019 Afternoon Tr. at 55. [A1224]. Krimbill represented in his October 24th Letter that buying 5% for $21 million would equate to $29 million in consideration. JX281 [A236-A237]. The $29 million figure was also supported by the expert's valuation.

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

> "But couldn't the jury find that your client represented that he was going to get the two percent, was going to have the option of the three percent? There was lots of confusion about the tax situation.
>
> I mean there is really no dispute that your client had discussions with Mr. Talarico about the two percent and three percent and for a long period time, led him to believe that was the deal that was going to be entered." (Tr. 90:20-91:6) [A1430-A1431].
>
> ". . . When the jury comes up to a damages number, they simply said we are not going to accept either side in regards to the tax number. We are just going to void it out." (Tr. 92:20-22) [A1432].

As the Superior Court noted, "there is really no dispute that your client had discussions with Mr. Talarico about the two percent and the three percent and for a long period of time lead him to believe that was the deal that was going to be entered." Post-Trial Motion Hearing, 04/11/2019 Tr. at 91:2-91:6. [A1431]. Accordingly, this was the "object of the transaction" between LCT and NGL. The Superior Court recognized this stating "[Krimbill] misled Talarico regarding his authority to authorize *compensation they agreed to*, and he continued the pattern of misrepresentation for a significant period of time." Opinion, Ex. A at 7-8 (emphasis added). The Superior Court noted further, "It was not unreasonable for Talarico to

believe Krimbill could deliver on the compensation they discussed and to rely on those representations. . . It is clear the jury agreed with Plaintiff that NGL, specifically Krimbill, misled Plaintiff on a number of occasions to believe a unique fee arrangement was both plausible and going to happen, and there was evidence that would clearly support this conclusion."[14] Opinion, Ex. A at 8. The jury's award of $29 million was the only way to put LCT "in the same financial position that [LCT] would have been in if the defendants' representations had been true."[15] *Stephenson*, 462 A.2d at 1076.

Because the rule in Delaware is benefit of the bargain, the burden is on NGL to show why under the facts of this case where defendants (1) received over $500 million of value, (2) represented that LCT would get the Promised Consideration, and (3) through their conduct prevented the execution of a contract, there should be a reason for creating an exception to this general rule. There is not. LCT should be placed in the same financial position it would have been if the defendant's representations had been true, otherwise NGL will be rewarded for its fraudulent conduct.

[14] The NGL GP Transaction was the only consideration ever discussed between the parties and therefore the object of the transaction.

[15] The jury had Mr. Nathanson's testimony valuing Mr. Krimbill's representations which was supported by Mr. Krimbill's admitted $29 million valuation.

2. The Superior Court erred in its analysis of the case law

The Superior Court distinguished *Stephenson* on the grounds that the plaintiff had an option contract to buy a house, on which the benefit-of-the-bargain damages would be based. In fact, the benefit-of-the-bargain in *Stephenson* related to a low-cost mortgage for which, it had already been established, there was no contract. *Id.* at 1072. The Court found that the financing terms were neither 'independent [nor] divisible from the sale of the land."[16]

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

As, this Court in *Stephenson* went on to say:

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[16] While the case involved the "measure of [the 'Act'] damages under the Consumer Fraud Act . . . as a result of fraudulent statements . . ." (*Stephenson,* 462 A.2d at 1070), this Court after discussing how the Act was different from common law fraud went on to say "In all other respects, however, the statute must be interpreted in light of established common law definitions and concepts of fraud and deceit." *Id*. at 1074.

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

Id. at 1075.

As the quoted language makes clear in discussing the "intrinsic relationship" this Court was talking about liability under the Consumer Fraud Act, not damages. When it subsequently addressed damages this Court specifically said that benefit of the bargain is the most common and accepted standard and its purpose is to put "the plaintiff in the same financial position he would have been in if defendant's representations had been true." *Id.* at 1076.

The Superior Court also relied on *Shuttleworth v. Abramo*, Civ. A. No. 11650, 1994 Del. Ch. LEXIS 126 (Del. Ch. July 24, 1994)[17] as justification for its findings that benefit of the bargain/expectancy damages were not available due to the absence of a contract between LCT and NGL.

Shuttleworth involved co-mingled funds of the married couple where the decedent spouse had alleged promised to leave all of his assets to the surviving

[17] The Superior Court in the Opinion refers to *Shuttleworth* as a Supreme Court decision. Opinion, Ex. A at 12. The Opinion includes a Westlaw cite, as the decision was not reported. However, *Shuttleworth* is a decision by Chancellor Allen deciding a motion to dismiss. *Shuttleworth* is actually a decision of the Delaware Chancery Court, as confirmed by the Lexis cite above.

spouse and failed to do so. In discussing damage remedies for fraud the Court noted that a fraud case "typically involves an inducement to perform a contract" and then discussed the possible remedies under that situation. *Shuttleworth*, 1994 Del. Ch. LEXIS 126, at *19. *Shuttleworth* does not stand for the proposition that a contract is necessary for benefit of the bargain/expectancy damages in every case of fraud. Ultimately, the Chancellor in *Shuttleworth* applied this Court's decision in *Adams v. Jankouskas*, 452 A.2d 148 (Del. 1982) involving the application of a trust remedy to co-mingled funds.

In *Adams*, the husband and wife pooled their earnings in joint accounts which were controlled by the wife, who invested the money. The testimony was that if one died the other would inherit everything. 452 A.2d at 151.

When the wife died she left virtually all of her estate valued at over $350,000 to her niece. The Chancellor awarded the husband 50% of the estate left by the [wife] on the theory that the transaction between [them] created a constructive or resulting trust on the [wife's] part for the benefit of [the husband]." *Id*.

The Supreme Court said:

> It is important to note that this is not a case where a party was disappointed with what he received under a will. Rather it is one in which joint funds were committed in obvious trust to one partner and then pooled purchase property and make investments for the mutual benefit of both. Under these circumstances Chancery may impose the trust upon the accumulated assets on whatever form they may take.

Id. at 153.

In *Shuttleworth*, the Chancery Court found that the wife had contributed "32% of the total earnings of the couple over the course of the marriage." *Shuttleworth*, 1994 Del. Ch. LEXIS 126, at *17. The Chancery Court, applying the *Adams* decision, held that the wife would be entitled to "no more than 32% of the total property of which the [husband] died seized." *Id*. at *23. Since she had already received 68% of all known assets owned by her husband at death, the Chancery Court dismissed the case. While the Chancery Court stated the remedy for the fraud claim would be restricted to restitution, "returning both plaintiff and defendant to their original positions, as if the fraudulent transaction had never occurred", the decision relied heavily on the *Adams* formula for imposing a constructed trust on pooled funds. *Id*. at *19-20.

As acknowledged by the Superior Court, the facts of *Shuttleworth* bear no resemblance to the facts of the present case (Opinion, Ex. A at 12) and, as such, the decision does not support the Superior Court's conclusion that benefit of the bargain/expectancy damages are not available here.

This is not a case of pooled funds but a case where NGL fraudulently induced LCT to work on NGL's behalf to close the Acquisition, giving NGL an acknowledged $500 million benefit—a massive windfall which cause Krimbill to acknowledge "we never would have had this opportunity at our price without LCT bringing it to us." (JX 281) [A236-A237] NGL, however, disregards the Chancery

Court's explanation of restitution acknowledging the remedy applies to *both* plaintiffs and defendants. "Just as defendant would be required to return to plaintiff any benefit derived from his fraud, plaintiff would be required to restore to the defendant any benefit she received as a result of the transaction." *Shuttleworth*, 1994 Del. Ch. LEXIS 126, at *20, n. 9. As such, the application of restitution would mandate that NGL return the $500 million plus benefit it derived as a result of the Acquisition.

To the extent that the Superior Court found that benefit of the bargain/expectancy damages are not available based on *Shuttleworth*, that is not and should not be the law of Delaware.

3. The Opinion was inconsistent with Delaware law on Promissory Estoppel

Under Delaware law, benefit of the bargain damages are available in certain circumstances in the absence of a contract for a promissory estoppel claim. *RGC International Investors v. Greka Energy Corp.*, No. CIV.A.17674, 2001 WL 984689 at *14-15 (Del. Ch. Aug. 22, 2001) (overturned on other grounds); *see also Grunstein v. Silva*, Civ. A No. 3932-CVN, 2011 WL 378982 at *11 (Del. Ch. Jan. 31, 2011). It would be completely inconsistent and inappropriate for benefit of the bargain damages to be available for promissory estoppel claims in the absence of a contract but not for claims for fraud in the absence of a contract.

In *Greka*, RGC refrained from exercising its conversion rights prior to a merger because of a promised note exchange in a term sheet. After the merger took place the note exchange contemplated by the term sheet did not take place. "Although [Defendant] Greka [like NGL here] received all of its intended consideration that followed from the term sheet, namely the closing of the merger and the resulting financial rewards that accrued to Greka, RGC received nothing. Thus RGC was subject to the type of injustice the doctrine of promissory estoppel is intended to prevent." *Greka*, 2001 WL 984689, at *14. Then-Vice Chancellor Strine found that Greka was entitled to benefit of the bargain damages:

> Finally, the doctrine of promissory estoppel as applied in Delaware does not require an award of damages to be limited to a party's reliance interest. As the Delaware Supreme Court noted in its landmark 1958 decision in *Chrysler Corp. v. Quimby*, '[t]here appears to be considerable uncertainty in the decisions respecting the correct rule of damages in promissory estoppel cases. The doctrine, at bottom, embodies the fundamental idea of the prevention of injustice.' As noted by Chief Justice Southerland, damages in these cases have, among other possibilities, 'secured for the promise the expectancy of its value.' If the facts of a case so merit, a plaintiff may recover its expectation interest from a recovery of damages in a promissory estoppel case.

Id. at *15.

The Chancery Court also added that defendants' arguments contra to expectation damages were "particularly tenuous" because plaintiff did not ask the Chancery Court for an "indeterminable estimation of future profits." *Id*. at *16.

In *Grunstein*, the Chancery Court stated "Defendants' implication that only reliance damages are available in a promissory estoppel claim is incorrect," and added "if the facts of a case so merit, a plaintiff may recover its expectation interest from a recovery of damages in a promissory estoppel case." *Grunstein*, 2011 WL 378782, at *11 (*quoting RGC*, 2001 WL 984689, at *15). Plaintiffs in *Grunstein* alleged that defendants had improperly retained the benefits of an acquisition that they both had worked on, in violation of a partnership agreement (the court denied summary judgment on a claim for breach of the partnership agreement, which was allegedly oral). The Chancery Court agreed that the promissory estoppel claim could go to trial, and that expectation damages were available as a potential remedy. *Id*.

Here damages are not speculative. Damages were easily calculated by LCT's expert and the $29 million confirmed in writing by NGL. Accordingly, it would be strangely anomalous if Delaware law were to permit benefit of the bargain damages in the absence of a contract in promissory estoppel cases and not permit it in cases of deliberate fraud where there is a clear basis for establishing benefit of the bargain/expectancy damages.

4. Decisions in other jurisdictions find benefit of the bargain damages are not dependent on the existence of a contract

Numerous jurisdictions have addressed the exact question presented by LCT's appeal, and have ruled that benefit of the bargain damages are available to a fraud victim even in the absence of a contract.

In *Veilleux v. National Broadcasting Co.*, 206 F.3d 92 (1st Cir. 2000) (applying Maine law), defendant represented to plaintiff that defendant was producing a television program on the trucking industry that would not feature a group notorious for its criticisms of the trucking industry. Plaintiff participated in the television program, which cast the trucking industry in a negative light, and prominently included the criticisms of the group critical of the trucking industry

The First Circuit held "the proper measure of damages for a misrepresentation claim is plaintiff's lost bargain" and found plaintiff "must establish that his pecuniary loss was caused by the difference between the broadcast that was represented (which excluded [the anti-trucking group]) and the broadcast that was delivered (which included [the anti-trucking group])." *Veilleux*, 206 F.3d at 125. The fact that plaintiff and defendant did not have a contractual relationship did not prevent an award of benefit of the bargain damages.

While the United States Court of Appeals for the First Circuit in *Veilleux* noted that calculating plaintiff's precise harm might be difficult (*Id*.), no such difficulty exists here; NGL's fraudulent representations to Talarico, valued by

Nathanson, LCT's expert, and the $29 million in consideration to LCT referred to in the October 24 Letter, represent the minimum pecuniary harm that LCT suffered because of NGL's misrepresentations.

The North Carolina Court of Appeals came to a similar conclusion and awarded a fraud victim benefit of the bargain damages in the absence of a contract between plaintiff and defendants in *Leftwich v. Gaines*, 134 N.C. App. 502 (N.C. Ct. App. 1999). In *Leftwich*, Plaintiff sought to purchase an adjacent property, believing that synergies with her own property would make the combined property worth more money than either was worth by itself. Plaintiff made an offer on the adjacent property, then spoke with one of the defendants, a local town official, about the adjacent property. The defendant made several misrepresentations to plaintiff, including that the property contained several condemned buildings and that any attempt to change the zoning for the property "would be illegal." *Id*. at 506. The defendant also advised plaintiff to lower her offer for the property, but secretly arranged for his girlfriend, another defendant, to make an offer on the property that exceeded plaintiff's. *Id*.

The seller accepted defendant girlfriend's offer for the adjacent property, and plaintiff sued for fraudulent misrepresentation. The Court permitted benefit of the bargain damages and set out the following principle:

> We therefore hold…that a plaintiff may recover benefit of the bargain damages in a fraud action if she establishes (1) that the damages are the

> natural and probable result of the tortfeasor's misconduct and (2) that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty.

Id.

LCT satisfies the elements outlined by the *Leftwich* court. LCT's benefit of the bargain damages are the natural and probable result of NGL's misconduct. If NGL's representations had not been false, LCT would have received the Promised Consideration. The second element is satisfied because the benefit of the bargain is readily apparent here without need of any standard or calculation—it was explicitly stated in the October 24 Letter and testified to by Talarico and Nathanson.

In *Dastgheib v. Genentech, Inc.*, 438 F.Supp.2d 546 (E.D. Pa. 2006) (applying North Carolina law), the Eastern District of Pennsylvania rejected the defendant's argument that plaintiff's damages expert could not testify to benefit of the bargain damages because only reliance damages were proper in a fraud claim based on an unenforceable promise. *Id.* at 552. The court stated that "benefit-of-the-bargain damages in a case of fraud is consistent with the underlying purpose of a fraud recovery, to put the plaintiff in the same position as if the fraud had not been practiced on him." *Dastgheib*, 438 F.Supp.2d at 553. The court allowed plaintiff's expert to testify to benefit of the bargain damages, which was the total present value of a royalty stream that plaintiff would have received had defendant's representations been true. *Id*. Plaintiff was not precluded from benefit of the bargain

damages merely because there was no enforceable promise between plaintiff and defendant.

The Iowa Supreme Court has also embraced benefit of the bargain damages for fraud victims where the plaintiff was not fraudulently induced to enter into a contract. In *Midwest Home Distrib. v. Domco Indus.*, 585 N.W.2d 735 (Iowa 1998), plaintiff brought breach of contract, promissory estoppel, and fraud claims. The defendant fraudulently misrepresented to plaintiff that it would obtain an exclusive distributorship. Defendant engaged with another distributor behind plaintiff's back, and plaintiff alleged its profits fell because plaintiff did not receive the future business that defendant promised as part of the exclusive distributorship relationship. Plaintiff also was damaged by the fact that it had to forego other opportunities for different deals, and because it spent time and money in promoting defendant's products. *Id*. at 742.

At the trial, the jury rejected the breach of contract claim but found for Plaintiff on the fraud and promissory estoppel claims and awarded lost profits damages. The Iowa Supreme Court stated the "purpose underlying the benefit-of-the-bargain rule is to put the defrauded party in the same financial position as if the fraudulent representations had in fact been true." *Id*. at 739. The Iowa Supreme Court continued, citing Restatement (Second) of Torts Section § 549, comment i:

> When the plaintiff has no out-of-pocket losses, the benefit-of-the-bargain rule must apply, otherwise:

> the defrauding defendant has successfully accomplished his fraud and is still immune from an action in deceit . . . . This is not justice between the parties. The admonitory function of the law requires that the defendant not escape liability and justifies allowing the plaintiff the benefit of his bargain.

Midwest Home Distrib., 585 N.W.2d at 739.

The Iowa Supreme Court added that the jury's verdict was reasonable because had defendant's statements been true (i.e. that the plaintiff was the sole distributor), the plaintiff would have benefited financially and would have earned substantially higher profits. *Id.* at 742. The loss of profits suffered by plaintiff was the direct result of defendant's promises being false, and the fact that defendant entered into an arrangement with another distributor. Further, benefit of the bargain damages also reinforced the Restatement's public policy rationale that a defendant shall not escape liability and keep the bounty of his fraud. *Id*.

Other courts throughout the country have adopted a flexible approach and affirmed benefit of the bargain damages where plaintiff was not fraudulently induced to enter into a contract. For instance, under Florida law, "a defrauded plaintiff is entitled to recover damages under the 'flexibility theory' which permits the court to use either the 'out-of-pocket' or the 'benefit-of-the-bargain' rule, based upon which will more appropriately compensate the defrauded party." *Aerotech Resources, Inc. v. Dodson Aviation, Inc.*, 91 Fed.Appx. 37 (10th Cir. 2004) (applying Florida law). In *Aerotech*, the Tenth Circuit affirmed a jury award of plaintiff's net profit, despite

the fact that plaintiff and defendant had not entered into a contract, and that the contemplated transaction never took place. *Id*. at 1224-25. *See also Lewis v. Citizens Agency of Madelia, Inc.*, 306 Minn. 194 (1975) (plaintiff permitted to receive the benefit of the proceeds of a non-existent life insurance policy that defendant represented she had, rather than repayment of out of pocket premiums).

5. The lack of a written contract was the direct result of the fraud itself

The Superior Court recognized that LCT believed it had a definitive agreement (7/26/2018 Tr. at 79 [A894]) and, in the court's view, Krimbill failed "[to] honor the commitment clearly made to Talarico" (Opinion, Ex. A at 8) on behalf of NGL. The fact that there was no written contract was the direct result of the intentional fraud by Defendants (specifically Krimbill) with the assistance of NGL's lawyer Bruce Toth.

On June 4, 2014, Krimbill organized a meeting between himself, Toth and Talarico. Talarico, 7/24/2018 Tr. at 223-224. [A561-A562]. Krimbill explained to Talarico that Toth was responsible for documenting NGL's GP transactions and that he would "paper up" the GP Transaction. Talarico, 7/24/2018 Tr. at 223-225. [A561-A563]. On June 23, 2014, when there was no progress on the written contract, Talarico called Toth, at Krimbill's suggestion, to discuss the status of the documentation. While Toth stated he told Talarico "we are working on it," Toth admitted at trial that neither he nor his law firm ever began working on any written

documentation when Talarico inquired about the status of the documentation. 7/26/18, Tr. at 134-136. [A949-A951].

While fraud usually involves a contract or the purchase or sale of goods[18] neither should act as a litmus test in order for benefit of the bargain damages to apply. The function of a contract between the defrauded party and the party committing the fraud is it enables a court to evaluate the benefit the buyer or seller has received through its fraudulent conduct – that is certainty of damages. In the absence of a contract, damages may be difficult to determine. That is not the case here. The Superior Court stated, "[T]here was sufficient evidence for the jury to find that NGL made fraudulent representations to Plaintiff regarding the fee arrangement…It is clear the jury agreed with Plaintiff that NGL, specifically Krimbill, misled Plaintiff on numerous occasions to believe a unique fee arrangement was both plausible and going to happen, and there was evidence that would clearly support this conclusion." Opinion, Ex. A at 7-8. The United States Supreme Court is clear on this issue:

[18] There is some authority that, at least in cases involving fraudulent representations to induce the sale of goods, a defrauder is a warrantor of the truth of his statements, and the defrauded party is to be put in "as good a position as he or she would have occupied had the fraudulent statements been true." *See* 27 Williston on Contracts § 69:47 (4th ed.). Further, "in most jurisdictions recovery is allowed on false representations on the basis of warranty; that is, the plaintiff recovers, not the damages caused by being induced to enter into the transaction, but the damages he or she suffers by the failure to make good the representations." 27 Williston on Contracts § 69:53 (4th ed.).

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the inured person, and thereby relieve the wrongdoer from making any amends for his acts…
>
> the constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done.

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 566 (1931) (citations omitted).

This Court recognized this same principle when it said in *Stephenson*:

> Capano argues that in the first instance it is impossible even to determine if Stephenson would have been eligible for one of the advertised mortgages. As to this latter point, were it not for the false representations made, Capano's silence at a time it had a duty to speak, and its unjustified efforts to renege on the sale of this house, its argument might have had substance. But that is not this case.

Stephenson, 462 A.2d at 1076.

Here it is clear-cut. The Superior Court found that there was more than sufficient evidence to support the jury's damages award. Certification, Ex. B at 3 ("If the Supreme Court decides that Plaintiff is entitled to benefit-of-the-bargain damages on the fraudulent misrepresentation claim, the jury's verdict would be supported by the evidence…").

6. Delaware has a strong public policy against lying and fraud

As stated in *Arby Partners V LP v. F&W Acquisition LLC*, 891 A.2d 1032, 1035 (Del. Ch. 2006), "[t]he public policy against fraud is a strong and venerable one founded on the societal consensus that lying is wrong." The Chancery Court

further holding that limiting liability for intentional misrepresentations was not enforceable as a matter of public policy in Delaware. *Id*. at 1036. Here, the Superior Court stated:

> [T]he evidence was overwhelming that Krimbill failed to be candid and honest in his dealings with plaintiff, he misled Talarico regarding his authority to authorize the compensation they agreed to, and he continued the pattern of misrepresentation for a significant period of time…there is no doubt that Krimbill took advantage of the situation to Plaintiff's detriment. Even sophisticated businessmen have the right to expect some semblance of honesty and candor in their dealings, and Krimbill's conduct fell way below any reasonable ethical standards. It was not unreasonable for Talarico to believe Krimbill could deliver on the compensation they discussed and to rely on those representations.

Opinion, Ex. A at 7-8.

NGL has admitted that LCT created value for it of "approximately $500 million," and $29 million in consideration was a "fair arrangement." JX 281 [A236-A237]. To permit NGL to keep $500 million of value is contrary to Delaware's public policy against fraud and is not supported by logic, precedent or the facts of this case.

The settled law in other jurisdictions makes it clear that benefit-of-the-bargain damages are available without an enforceable contract. Vice Chancellor Laster addressed the public policy interests of the state in policing the fraudulent activity of its entities stating, "Delaware has a powerful interest of its own in preventing the entities that it charters from being used as vehicles for fraud. Delaware's legitimacy as a chartering jurisdiction depends on it." *NAACO Indus., Inc. v. Applica Inc.*, 997

A.2d 1, 30 (Del. Ch. 2009). Here, justice requires that LCT receive the benefit of the NGL GP Transaction that NGL represented to LCT, so that Defendants' reprehensible conduct is punished, and similar misconduct is deterred in the future.

The circumstances of this case and the interest of justice mandate that NGL not be permitted to walk away with $500 million in value it received as the bounty of its fraud and disavow the at least $29 million it promised to LCT.

CONCLUSION

It is respectfully requested that this Court find that benefit of the bargain damages are available under the facts of this case and reverse the Opinion of the Superior Court, below, and reinstate the jury's $29 million award for fraudulent misrepresentation. Plaintiff also respectfully requests any other relief the Court deems just and proper.

Dated: March 10, 2020

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