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Case Number Multi-Case

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

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Appellees/Cross-Appellants NGL Energy Partners LP ("LP") and NGL Energy Holdings LLC ("GP") (collectively, "NGL") submit this brief in opposition to the opening brief ("Op. Br.") filed by Appellant/Cross-Appellee LCT Capital, LLC ("LCT"), and in support of their own cross-appeal.

NATURE OF PROCEEDINGS

In the absence of an agreement, LCT provided approximately seven weeks of advisory services to NGL in connection with NGL's acquisition of TransMontaigne, Inc. ("TransMontaigne"). For those services, LCT, lacking any contract, claimed entitlement to over $43 million. As the Trial Court held, however, "essential terms were not sufficiently definite" between the parties; they "never reached a complete meeting of the minds"; and "discussions ... [were] simply negotiating positions." A0326-0327 (Summary Judgment Opinion); Ex. A at 16.

Under well-settled Delaware law, LCT is entitled to recover on its *quantum meruit* claim for the reasonable value of its services – which the jury fixed at $4 million after seven days of trial. Neither NGL nor LCT disputes the jury's valuation of those services, which represents the full pecuniary loss for which LCT can be made whole. Although no basis exists for LCT to recover in excess of that loss, LCT presents a novel theory on appeal by seeking to recover "benefit-of-the-bargain" or expectancy damages despite having failed to reach any bargain.

As the Trial Court found, LCT cannot obtain the alleged benefit of a never-

formed bargain merely because it asserted a fraudulent misrepresentation claim. Rather, Delaware law provides for benefit-of-the-bargain damages only if fraud induced a party to enter into a cognizable contract and thereby create an enforceable bargain. Reflecting the unassailable logic that no expectancy damages are recoverable absent a contract, Delaware precedent holds that where a "contract between [the parties] cannot thus be enforced", "[t]he remedy for the remaining fraud claim … is restricted to restitution … or actual damages." *Shuttleworth v. Abramo*, 1994 WL 384428, at *6 (Del. Ch. July 14, 1994). As the Trial Court recognized, LCT identified no loss beyond the value of its services – "the damages are the damages whether it's *quantum meruit* or it's fraudulent misrepresentation" – and cannot obtain a recovery as if it reached an agreement that it never did. A1295:13-A1296:6. Thus, by obtaining compensation for the value of its work on TransMontaigne, LCT received restitution for its whole pecuniary loss.

Not a single Delaware decision has ever granted benefit-of-the-bargain damages where, as here, no contract existed. Having argued (correctly) during trial that benefit-of-the-bargain damages do not apply and should "be omitted from the [jury] instruction," B2703, LCT is estopped from now reversing itself on appeal. LCT's about-face is an effort to sustain the jury's improper fraudulent misrepresentation verdict of $29 million, which represents a legally unjustifiable

selection of different "negotiating positions," Ex. A at 16, regarding a potential, multi-faceted equity transaction. As the Trial Court determined, the terms of that potential, complex transaction (which did not even involve cash compensation) were never "sufficiently defined," A0325, let alone agreed to. As much as LCT in hindsight may wish it negotiated an arrangement equating to the jury verdict, it did not. In fact, LCT repeatedly admitted it never would have agreed to those terms.

Nor does LCT find support for its novel damages theory by referencing a mere handful of cases from other jurisdictions, both because those cases are readily distinguishable and because non-Delaware precedent overwhelmingly (and virtually unanimously) holds that benefit-of-the-bargain damages require an enforceable bargain. LCT's arguments regarding Delaware public policy likewise turn well-established principles on their head: LCT's theory is squarely inconsistent with the basic policy of this State, which prohibits windfalls in excess of actual loss outside of punitive damages (which the Trial Court rejected in a holding not subject to this appeal), A1300:8-9, and which does not impose contract terms when no agreement was reached.

While the Trial Court correctly rejected expectancy damages in this case, it erred by *sua sponte* setting aside the jury's *quantum meruit* verdict of $4 million. Recognizing the propriety of the *quantum meruit* jury instruction and the factual

basis for the award based on standard financial advisory fees, neither side has objected to that aspect of the verdict. Given that LCT did not even purport to demonstrate any additional pecuniary loss, the *quantum meruit* verdict makes LCT whole for its actual loss and represents the full measure of LCT's cognizable damages.

Even had LCT identified a loss due to fraud beyond the value of its underlying services (it clearly did not), the Trial Court further erred by denying NGL's motion pursuant to Superior Court Civil Rule 50(b) for judgment as a matter of law on fraud liability. The jury's fraud liability finding should be set aside because it is flatly contradicted by LCT's testimonial admissions that it never did and never would have provided services in reliance on an expectation of compensation in the amount of the $29 million award. Without reliance, there can be no fraud liability – let alone damages.

If the denial of NGL's Rule 50(b) motion on fraud liability is upheld, a new trial covering fraud liability will be required because the Trial Court erred by incorrectly instructing the jury that "negligent or innocent misstatements" can satisfy the intent element of fraudulent misrepresentation.

Finally, if a new fraud trial is ordered, the unchallenged $4 million *quantum meruit* verdict should stand to fix the value of LCT's services. LCT, in turn, would

be left with an opportunity to prove if NGL is liable for any fraudulent misrepresentation under a proper jury instruction and if, in addition to the worth of its services, it incurred any other actual loss even though none has been identified.

SUMMARY OF ARGUMENT

Appeal

1. Denied. The Trial Court correctly determined that benefit-of-the-bargain damages are unavailable because no bargain was "finalized" or "created." Ex. A at 16. §I(C)(1-2).

2. Denied. Absent a contract, LCT is made whole by recovering the reasonable value of its services – *i.e.*, its "pecuniary loss." *Grunstein v. Silva*, 2014 WL 4473641, at *37 n.284 (Del. Ch. Sept. 5, 2014), *aff'd*, 113 A.3d 1080 (Del. 2015). §I(C)(1-2).

3. Denied. Because no binding promise existed, promissory estoppel (which was never even pled) is irrelevant. §I(C)(3).

4. Denied. Delaware public policy precludes the windfall that would result from imposing contract terms to which the parties never agreed. §I(C)(5).

Cross-Appeal

5. The Trial Court erred by setting aside the jury verdict and ordering a new trial on *quantum meruit* damages, which neither party sought. The jury was properly instructed on *quantum meruit* damages and answered the unambiguous question: "What do you find to have been the fair value of the services that LCT

provided to NGL?" Because the only pecuniary loss LCT identified was the value of its services, the $4 million award fully compensates LCT. §II.

6. The Trial Court erred by denying NGL's Rule 50(b) motion on fraud liability. The fraud liability verdict should have been set aside because LCT's admissions flatly contradict reliance on a $29 million figure, a necessary element for fraudulent misrepresentation. §III.

7. The Trial Court erred by instructing the jury that it could find NGL liable for an innocent/negligent misrepresentation, a claim that is not cognizable in the Superior Court. In any new trial, fraud liability must be decided based on a correct instruction. §IV.

STATEMENT OF FACTS

I. BACKGROUND

A. Parties

LP, a Delaware publicly-traded master limited partnership, provides pipeline, hauling, terminaling and other logistics in the "midstream" energy sector. B1450; B2282:15-B228381:11.

GP, a Delaware limited liability company, is the privately held general partner of LP. B2085:4-8; B1455-B1456. H. Michael Krimbill ("Krimbill") is the CEO of LP and a board member of NGL. B2084:17-21.

LCT is a Delaware entity whose sole member was its namesake, Louis C. Talarico, III ("Talarico"). A0376:2-4; A0377:23-A0378:1; B1885-B1886. LCT provides financial advisory services in the energy sector. B1535-B1539. Although Talarico operated LCT as a one-person shop, he consulted non-employees, including Olav Refvik and Karl Kurz, regarding TransMontaigne. B1887.

B. NGL's Acquisition of TransMontaigne

In December 2013, Talarico read in news reports that Morgan Stanley planned to sell TransMontaigne, a midstream energy business. A0616:10-17. Hoping to find some role, LCT then sought to represent at least three entities in the sale process before NGL emerged. After failing to move forward with two other potential

bidders, A0618:23-A0619:4; A0623:5-20; A0627:12-17, LCT contacted The Energy & Minerals Groups ("EMG"), a substantial NGL investor. B1534.

Although it was invited into the TransMontaigne sale process, EMG concluded that it lacked the expertise to operate TransMontaigne, B1895:4-11, and approached NGL about joining a bid on April 7, 2014. B1540. After NGL, EMG, and LCT first met on April 22, LCT discussed with EMG limiting NGL's participation and "push[ed]" for an alternative partner for EMG. B1542-B1543; B1544-B1545.

While LCT questioned NGL's involvement, NGL explored an acquisition of TransMontaigne, including assembling – independent of LCT – a team of internal personnel and outside financial (UBS), legal and tax advisors. B2143:1-11. NGL and UBS eventually entered into a written agreement, pursuant to which UBS earned a standard investment banking fee of $1.5 million, or .75% of the acquisition price, for its TransMontaigne services. B1794-B1803. NGL, together with EMG, UBS and LCT, conducted due diligence on TransMontaigne. B1768-B1769. While NGL's internal team wrote "we understand the business well," B1553-B1554, Talarico expressed to Kurz on May 9, 2014, his "concern" over LCT's limited role: the "post from Mike [Krimbill] seems more like an fyi now…." B1555-B1557.

On May 16, 2014, after EMG and NGL decided NGL would proceed alone, B1095 at ¶10, NGL submitted its successful bid for TransMontaigne. B1558-B1696. NGL, EMG, UBS and Talarico met in NGL's office the first week of June to finalize the acquisition. A0502:8-9. On June 5, following a presentation from UBS, B1770, NGL's Board approved the acquisition. B1791. The $200 million acquisition was announced on June 9 and, without further LCT involvement, closed on July 1. B2362:20-22; A0231. By then, LCT was so remote to the process that Talarico only learned of the closing when Morgan Stanley contacted him. B1827.

After July 1, 2014, NGL skillfully operated TransMontaigne with no input from LCT, leasing terminals ahead of schedule and implementing efficiencies. A0236. Due to NGL's management, the transaction was projected in October 2014 to create $500 million in value for NGL. A0236.

C. LCT and NGL Never Reached Agreement

For nearly a year after the TransMontaigne transaction closed, Krimbill and Talarico discussed potential compensation terms for the seven weeks of services LCT provided from the parties' first meeting on April 22 through the announcement of the acquisition on June 9. Despite protracted efforts to negotiate a complex equity transaction long after LCT's services had ceased, Krimbill and Talarico never "fully defined" terms that Krimbill could propose to the NGL directors or GP owners for

approval. A0327. While LCT alleged an "oral contract," A0326, the Trial Court found that "a valid contract does not exist" on two grounds: (1) "the essential terms were not sufficiently definite," A0326-27; and (2) "the NGL board had yet to approve any of the terms" that Krimbill and Talarico discussed. A0328.

1. LCT and Krimbill Never Set Terms to Present for Approval

In rejecting LCT's oral contract claim, the Trial Court ruled that "[t]oo many critical terms were being disputed." A0328. Negotiations began around May 14, 2014, when Talarico raised LCT's potential fee with EMG – not NGL. The next day, Krimbill and Talarico discussed LCT's compensation for the first time. Talarico expressed that LCT was "looking to invest" in NGL as part of a potential equity arrangement. B1697. Krimbill was receptive to LCT doing so, which would give LCT "skin in the game" as an incentive to facilitate future transactions. B2099:12-B2100:8.

On May 17, 2014, after NGL submitted its TransMontaigne bid, Talarico texted Kurz and Refvik that he "[s]poke to Krimbill. Said he'd love to have [u]s get 2% [of GP] in fee and buy in for another 3%. So that's $21 million" at a valuation of $700 million. B1762. Although Krimbill personally remained supportive of LCT acquiring 5% of GP for $21 million, the contemporaneous text is inconsistent with what LCT now labels the "Promised Consideration" it claims "Krimbill and Talarico

agreed" to on that day. Op. Br. 12. Contrary to the so-called "Promised Consideration", the text does not mention, among other things, NGL paying LCT's taxes resulting from an equity transaction, and refers to a mandatory "buy in" rather than any discretionary "option." B1762.

As the TransMontaigne closing approached, Talarico spoke with Krimbill and NGL's outside counsel, Bruce Toth, on June 4, 2014. According to Talarico, that conversation lasted "maybe 15 minutes at the most" and "was also about where we were … in terms of trying to get the TransMontaigne transaction over the finish line with the board meeting coming the next day." A0565:17-A0566:3. Because Toth was focused on the TransMontaigne acquisition rather than LCT's compensation, he asked Talarico to send him an email. A0939:4-23. The next day, Talarico sent Toth (and only Toth) "limited details on the GP transaction(s)." A0230. Talarico concluded the email by acknowledging "there will be other details to figure out." *Id*. Toth understood from the "limited details" in the email that "there were a lot of other items still to be discussed" and did not respond because nothing in the email requested follow-up. A1019:21-A1020:5; A1021:21-A1022:6.

On June 23, 2014, after the acquisition had been announced and LCT's involvement ceased, Talarico emailed Toth (again excluding Krimbill) to "start the process" of specifying terms and admitted that he had "not thought thru as yet" what

the agreement for the 3% "buy-in" would entail. B1811-B1826.

For eleven months after the transaction's close, Krimbill continued to negotiate terms by which LCT potentially could buy into GP. Talarico, however, demanded increasingly onerous terms and predicted (as late as April 2015) that Krimbill "will hit the ceiling" when he saw LCT's latest proposal to restrict NGL's use of LCT's buy-in payment. B1852-B1853; A0326.

When negotiations finally ended in May 2015, numerous material terms remained unresolved:

- Although LCT claims "an option" for a 3% interest, Talarico's text to Kurz on May 17, 2014 acknowledges that Krimbill instead supported LCT making a mandatory "buy in." B1762 (emphasis added). Talarico also conceded on June 23, more than a month after LCT claims an oral contract was formed, that he had "not thought thru as yet," let alone resolved with NGL, what the 3% "buy-in" would entail. B1811. Nor did the parties agree on whether NGL was restricted in its use of the $21 million buy-in. B1853.

- The parties never agreed "whether or not NGL would pay LCT's taxes." A0327. In a May 24 spreadsheet, the only document exchanged between Talarico and Krimbill that references LCT's taxes, Talarico inserted a proposed $6 million tax payment. B1763-B1764. After Krimbill disputed the reference, B1765, Talarico deleted the "tax catch-up" figure the next day in a revised spreadsheet. B1766-1767. As Krimbill told Talarico in a call secretly taped by Talarico, "the only thing I can't do is … go to my GP's and tell them we need to, you know, pay you ten million" for taxes. Talarico replied, "right." B1838:12-18.

- The parties never agreed on the type of GP interests that would potentially be transferred, or the recipients of those interests. A0326. While Talarico and Krimbill discussed customized "Class B" GP units to defer LCT's taxes,

B1763; A0261 ¶70, they never reached closure. Further, Talarico emailed a draft engagement letter to Toth on June 23, in which LCT was only to receive 1/3 of the GP units, with Refvik and Kurz separately receiving the remainder. B1811-B1826; B1804-B1810.

- As both Krimbill and Toth testified, it was critical that any agreement "would include an as-yet undefined period of service that LCT would go out and try and find additional [acquisition] opportunities … in the future." A1016:20-A1017:9; B2099:16-B2100:3. Yet, there was no agreement on "the obligations [LCT] was required to meet to be entitled to the fee." A0327.

2. Corporate Approval Within NGL Was Never Obtained

Talarico understood that any compensation arrangement required approval by, depending on how structured, the NGL Board and/or GP owners. On May 16, 2014, Talarico emailed Kurz a copy of the GP's operating agreement. B1698. Talarico emphasized sections (i) requiring Board approval for new GP units; (ii) providing GP owners preemptive rights to acquire pro rata new units; and (iii) granting significant owners the right of first refusal for existing units. Talarico concluded: "I guess it pays to read partnership agreements that you are looking to get into." *Id.*

Recognizing the need for corporate approvals, Krimbill repeatedly expressed to Talarico only what "he'd love to have" LCT receive and what he "has no problem with" but "wanted to make sure he has it right for his GP owners." B1762; A0228. On June 23, 2014, Talarico acknowledged to Toth that, having read the GP's operating agreement, he "appreciate[d] … steps or a process that NGL needs to complete for this all to happen." B1811. Exactly as he advised Talarico was

required, Krimbill wrote the GP owners on October 24 "asking for a compensation arrangement for LCT" by which LCT would acquire a 5 percent stake in GP for $21 million – which are not the terms that LCT now labels the "Promised Consideration." A0236 (emphasis added) ("October Letter"). As Krimbill told Talarico in another call Talarico surreptitiously taped, "the longer this goes on, the harder it's going to be for me to get the GP owners on board…. I told you from day one, I have no right to promise you anything." B1874:12-18; B1879:10-11.

Ultimately, Krimbill and LCT "never reached a complete meeting of the minds on all material terms" to present for approval, as required, to the NGL Board and/or GP owners. A0326-A0327.

II. PROCEDURAL HISTORY

LCT initiated this litigation in August 2015, filing its three-count amended complaint in September with claims for breach of contract, *quantum meruit*/unjust enrichment, and fraudulent misrepresentation. A0239-98.

A. Pre-Trial

On October 27, 2017, NGL moved for summary judgment on LCT's breach of contract, unjust enrichment and fraudulent misrepresentation claims. NGL did not seek summary judgment on LCT's *quantum meruit* claim because it agreed LCT was entitled to receive the fair value of its services. On July 19, 2018, the Trial

Court granted summary judgment dismissing the breach of contract and unjust enrichment claims.

1. Breach of Contract

In rejecting LCT's contract claim, the Trial Court was "confident in finding that not all material terms are included or sufficiently defined." A0325. As the Trial Court detailed:

> [T]he record demonstrates that neither party manifested objective assent regarding the alleged oral contract. LCT and Talarico himself failed to show intent to be bound to the May 17th contract when Talarico admitted, in the June 5th confirmation email, that the terms of the agreement still needed to be worked out. Similarly, Krimbill's responses throughout the parties' negotiations demonstrate that the parties never reached a complete meeting of the minds on all material terms and were still disputing critical terms such as "... taxes and Class B units, LCT's ability to fund, and restrictions on proceeds use…."

A0326. Given the open issues, the Trial Court concluded that "the parties never formed a contract." A0327.

2. Unjust Enrichment

The Trial Court dismissed the unjust enrichment claim, finding that "[w]hile NGL acknowledges that some compensation is owed, the lack of a clear and precise written fee document provides an avenue for Defendants to justifiably withhold payment until the dispute is resolved." A0331. "[I]n spite of the parties' best efforts to personalize the litigation as some personal affront to one's integrity," the Trial

Court concluded, "this case is simply one to determine the fair compensation" for LCT's services. *Id*.

3. Fraudulent Misrepresentation

At summary judgment oral argument, LCT conceded that "[w]e don't really believe that there was a fraud here." B1924:10-11 (tr. pg. 65). Recognizing the same, the Trial Court described LCT's fraud claim as:

> the throw-in claim at the end … saying, well, if they don't believe anything else, let's throw in the false representation. This is not what it is. This is two business people pitching back and forth to each other trying to come to an understanding.

B1925:5-11 (tr. pg. 68). Although a "throw-in claim", the Trial Court denied NGL's summary judgment motion as to fraudulent misrepresentation. Citing to a Chancery Court holding that "the term 'misrepresentation' is sufficiently broad to encompass fraudulent, negligent, or even innocent statements,"[1] the Trial Court concluded that, "[w]hile there may not be overt fraud," LCT could proceed to trial given "the broad definition of misrepresentations." A0334, 0337.

B. Trial

The case as narrowed by the summary judgment rulings proceeded to trial from July 23 through August 1, 2018. Despite the dismissal of its contract claim,

[1] That case, *Vichi v. Koninklijke Philips Electronics, N.V.,* 85 A.3d 725, 774 (Del. Ch. 2014), addressed the Chancery Court standard.

LCT nevertheless confused the record at trial with repeated references to "an oral contract" and "an agreement," A0482:16-21; "the fee agreement," A0533:1-5; and "our deal." A0585:16-20. LCT's closing argument echoed testimony that NGL "attempted to renegotiate, re-trade the deal." B2538:15-18.

Objecting to LCT's presentation, NGL raised concerns with the Trial Court about potential jury confusion on whether LCT could be compensated based on failed contract negotiations. On the first day of testimony, NGL objected that Talarico's statements regarding an "oral contract" were "potentially both prejudicial and very confusing to the jury" because it already had been determined that no contract existed. A0493:17-A0494:11. NGL also requested a curative instruction clarifying that the jury was not deciding a contract claim. B2224:14-22; B2673 at B2677. The Trial Court declined to provide the instruction. A1316-37.

Having repeatedly injected contract references into the trial, LCT then sought to recover damages based on its alleged expectations from failed negotiations rather than an assessment of the reasonable value of its services. As the Trial Court found, LCT advanced a "single unitary claim for damages" that presented no difference between the value of its services and its loss due to NGL's alleged fraudulent misrepresentation. Ex. A at 16. For example, LCT's expert, "hired to provide an opinion on damages," B2016:4-6, presented a single damages model based on "a

valuation of three components of LCT's compensation package": the 2% stake in GP, a tax catch-up, and 3% buy-in. B1987:3-11. LCT further acknowledged that the "damages numbers were the same for both claims." B2728.

At the close of evidence, NGL moved pursuant to Rule 50(a) for judgment as a matter of law on LCT's fraud claim on two bases. A1278:19-A1287:6.

First, NGL argued that only the *quantum meruit* claim should go to the jury because LCT offered no evidence of different damages for fraudulent misrepresentation. A1283:23-A1284:7. The Trial Court agreed that:

> the damages are the damages whether it's quantum meruit or its fraudulent misrepresentation. There's been no evidence separating them. They're the same. … [T]here's nothing different in the damages associated with not being appropriately paid for the services that were agreed to versus a fraudulent misrepresentation. There's really no difference in the evidence presented as to what those damages would be. They should [be] the same.

A1295:13-A1296:6. Although the Trial Court reserved judgment on NGL's 50(a) motion, it considered creating a single damage award line on the verdict sheet so there could be no "attempt to bootstrap an additional damage for misrepresentation." A1296:7-11. Ultimately, however, the Court included a damages line for each claim, which it later described as an "unfortunate" decision given "that evidence was only presented on a single unitary claim for damages." A1311:6-A1312:1; Ex. A at 16.

Second, NGL argued that LCT had not produced sufficient evidence of fraud

liability for that claim to be presented to the jury. A1285:3-A1286:7. Rejecting that position, the Trial Court stated "[d]o I think the fraudulent misrepresentation case is a smoking gun? No," but concluded that the claim should go to the jury. A1296:17-20. The Trial Court then instructed the jury that "the term 'misrepresentation' is sufficiently broad to encompass fraudulent, negligent, or even innocent statements." B2624:2-4.

After testimony, LCT moved to amend its pleading to add a claim for punitive damages. A1297:3-5. Denying the request, the Trial Court held that "I don't find this to be a case where punitive damages is warranted." A1300:8-9. According to the court, "[a]t the end of the day this is a dispute between two very high-powered ego people … I'm not going to make it something more than what it is." *Id*. at 18-22.

On August 1, the jury agreed with NGL that the value of LCT's services was within the standard investment banking fee range of "point five percent to two percent" of the transaction value, or $1 million - $4 million. B2588:17-19 (NGL closing argument); B2395:14-B2396:5 (NGL expert). Neither side has argued that the jury's $4 million award is incorrect.

However, the jury also awarded $29 million on LCT's fraudulent misrepresentation claim, reflecting a figure raised, after LCT already performed its

services, during negotiations regarding a complex equity arrangement. The parties ultimately never agreed to those terms, which LCT admittedly rejected. NGL renewed its Rule 50(a) motion, which was denied.

C. Post-Trial

On August 15, 2018, NGL moved for judgment as a matter of law on LCT's fraudulent misrepresentation claim or, alternatively, for a new trial on fraud liability and damages. B2680-B2699; B2730-B2754. Reiterating its position throughout trial that LCT could not obtain contract-based damages after dismissal of its contract claim, NGL argued that LCT could recover only its actual loss – the value of its services – and not the benefit of an unconsummated bargain. Accordingly, the fraud verdict was unjustified, and the $4 million award compensated LCT for its entire recoverable loss. NGL further explained that LCT's admissions precluded reliance on the $29 million figure and, even if judgment as a matter of law was not granted, a new trial on fraud was required because the jury was improperly instructed on the elements of fraud liability.

On December 5, 2019, the Trial Court granted NGL's motion in part, ruling that benefit-of-the-bargain damages are not recoverable because the parties never "created and formalized" a bargain. Ex. A at 16 (the "December 5 Order"). Because the fraud award could not be sustained, the Trial Court ruled that a new trial was

needed. However, it framed the scope of a new trial as covering: (a) the *quantum meruit* verdict that had never been challenged; and (b) the question of fraud damages, but not fraud liability. The Trial Court further held that its fraud liability instruction was proper, and that LCT had presented evidence to satisfy the standard.

NGL and LCT cross-moved for interlocutory review of the December 5 Order, which the Trial Court granted in part on December 23, 2019, Exhibit B, and this Court granted in full on January 7, 2020. Exhibit C.

ARGUMENT

I. LCT CANNOT RECOVER THE BENEFIT OF A NON-EXISTENT BARGAIN

A. Question Presented

Whether the Trial Court correctly ruled that LCT cannot recover benefit-of-the-bargain damages because "the discussions between the parties [were] simply negotiating positions to which a meeting of the minds has not been finalized" and a bargain was never "clearly created." Ex. A at 16.

B. Scope of Review

A trial court's legal conclusions are reviewed *de novo*. *Bank of N.Y. Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011). Further, because LCT argued (correctly) at trial that benefit-of-the-bargain damages are inapplicable here, it should be estopped on appeal from "'adopt[ing] a position that is inconsistent with, and contradictory of'" its prior position. *Olson v. Kendrick*, 1984 Del. Super. LEXIS 712, at *9 (Del. Super. Ct. May 1, 1984) (quoting 31 C.J.S. Estoppel § 119).

C. Merits of Argument

1. The Trial Court Correctly Determined that LCT Cannot Recover Benefit-of-the-Bargain Damages

Delaware law permits a plaintiff to recover for fraudulent misrepresentation the "'pecuniary loss caused to him by his justifiable reliance upon the

misrepresentation.'" *Grunstein,* 2014 WL 4473641, at *37 n.284 (*quoting* Restatement (Second) of Torts § 525 (1977)). Damages for "actual pecuniary loss … are usually referred to as 'out of pocket' losses." *1 Damages in Tort Actions* § 301 (Matthew Bender) (2020). Delaware courts have further held that a plaintiff may recover additional benefit-of-the-bargain damages for fraud only where the plaintiff was "induce[d] to form a contract." *Shuttleworth*, 1994 WL 384428, at *6 (where parties "form a contract", plaintiff "may then elect to affirm the contract and seek expectancy damages (i.e., to recover the benefit of her bargain)"); *Manzo v. Rite Aid Corp*, 2002 WL 31926606, at *5 (Del. Ch. Dec. 19, 2002) (rejecting benefit-of-the-bargain recovery where "complaint fails to articulate any specific bargain from which these benefits purportedly flow"), *aff'd*, 825 A.2d 239 (Del. 2003).

In *Shuttleworth*, plaintiff asserted fraud and contract claims arising from an alleged agreement. Plaintiff claimed that her husband promised to leave his entire estate to her, and that she acted in reliance on that representation by "support[ing] the household financially beyond her obligation to do so[.]" 1994 WL 384428, at *1. Because her contract claim was dismissed, the court rejected plaintiff's effort to recover "the benefit of the contract she asserts she made" and limited recovery on her fraud claim to actual losses incurred. *Id.* at *2. Having dismissed the contract claim, the court explained:

> any alleged or actual contract between [the parties] cannot thus be enforced in this action. The remedy for the remaining fraud claim, if there is to be one, is restricted to restitution, through which the court must endeavor to restore the plaintiff to her position prior to [the] alleged misrepresentations, or actual damages."

Id. at *6 (emphasis added). After holding that benefit-of-the-bargain damages were unavailable without a "presently enforceable contractual obligation," the court assessed plaintiff's reliance damages, or actual loss. *Id.* at *5.

LCT cannot explain why *Shuttleworth's* rejection of benefit-of-the-bargain damages absent a contract does not apply to this case. As a distraction, LCT instead focuses on the court's separate holding that plaintiff suffered no reliance damages. Citing to *Adams v. Jankouskas*, 452 A.2d 148 (Del. 1982), the court concluded that plaintiff "was not in fact financially injured" because she received from her husband's estate more than she allegedly lost in reliance on his misrepresentation. *Id.* at *13-15. However, *Shuttleworth*'s calculation of reliance damages is irrelevant to its independent rejection of benefit-of-the-bargain damages. As squarely applicable to LCT's fraud claim, *Shuttleworth* instructs that a party can recover "actual damages" incurred in reliance on a fraudulent misrepresentation, but it cannot recover for a contract that "cannot … be enforced[.]" 1994 WL 384428, at *6.

Reflecting the same unassailable logic as *Shuttleworth*, the court in *Manzo* recognized that benefit-of-the-bargain damages cannot be awarded where, like here, there is no bargain on which to base damages. There, plaintiff alleged that she held stock in reliance on defendants' misrepresentations and sought benefit-of-the-bargain damages after the stock value declined. The court rejected her claim, holding that her "complaint fails to articulate any specific bargain from which these benefits purportedly flow[.]" 2002 WL 31926606, at *5.

The rulings in *Shuttleworth* and *Manzo* follow basic legal principles set forth in the Restatement (Second) of Torts, which Delaware precedent applies. Section 549(1)(b), "Measure of Damages for Fraudulent Misrepresentation", provides that a party can recover the "pecuniary loss suffered otherwise as a consequence of … reliance upon the misrepresentation." When the parties enter a contract, however, the recipient of a misrepresentation "is also entitled to recover additional damages sufficient to give him the benefit of his contract with the maker, if these damages are proved with reasonable certainty." *Id.* § 549(2) (emphasis added); *see also id*. § 549 cmt. g ("[w]hen the plaintiff has made a bargain with the defendant", it can recover damages "necessary to give the plaintiff the benefit of the bargain"); *Tam v. Spitzer*, 1995 WL 510043, at *10, *12 (Del. Ch. Aug. 17, 1995) (emphasis added) (where "a party is fraudulently induced to enter into a contract," it "may seek damages

measured by the 'benefit of the bargain'"); *E.I. DuPont de Nemours and Co. v. Florida Evergreen Foliage*, 744 A.2d 457, 465 (Del. 1999) (same).

After thoroughly analyzing guiding precedent, the Trial Court correctly determined that benefit-of-the-bargain damages are not recoverable because the parties never reached an enforceable bargain. As the Trial Court explained:

> 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…[T]he court must find you do not get the bargain if it is not clearly created.

Ex. A at 16. Despite months of negotiations, "neither party manifested objective assent" to an alleged oral contract and "the essential terms were not sufficiently definite to determine a breach and an appropriate remedy." A0326-27. Accordingly, no cognizable bargain existed from which to benefit, and LCT's fraud recovery is limited under Delaware law to its actual loss – *i.e.*, the reasonable value of the services it provided in reliance on NGL's alleged misrepresentation.

Citing no support, LCT wrongly argues that "the rule in Delaware is benefit of the bargain" and impermissibly attempts to shift the burden to "NGL to show why … there should be a reason for creating an exception to this general rule." Op. Br. 25. As LCT acknowledges elsewhere in its brief, however, Delaware "recognizes

two measure[s] of damages for fraud" (*id.* at 20), with benefit-of-the-bargain damages applicable in a fraud case where it "'typically involves an inducement to form a contract.'" *Id.* at 28 (quoting *Shuttleworth*).

Moreover, LCT's post-trial contention that $29 million provides "a clear basis for establishing benefit of the bargain/expectancy damages," Op. Br. 32, is wrong because: (1) it has already been judicially determined that there was no bargain, A0320-28; Ex. A at 16; and (2) Talarico testified that he never relied on or accepted a proposal worth $29 million, which significantly differs from LCT's alleged "Promised Consideration." *See* Section III *infra*; B2755; A1270:4-9; Op. Br. 1-2.

LCT has not identified a single Delaware case awarding benefit-of-the-bargain damages for fraudulent misrepresentation where there is no enforceable agreement. In fact, in its own "bench memorandum" at trial, LCT acknowledged that "loss-of-the-bargain" damages are irrelevant in this case and explicitly argued that these damages "be omitted from the instruction." B2703 (emphasis added).[2] NGL

[2] Reversing course, LCT attempts in a footnote to invoke Delaware's inapplicable pattern instruction on benefit-of-the-bargain damages. Op. Br. 21 n. 11. However, that pattern instruction does not permit benefit-of-the-bargain recovery without a bargain, but merely sets forth a method for calculating damages when a bargain exists – *i.e.*, the difference between the actual value of the bargain and the "value represented by" the defendant. LCT also overlooks Delaware's pattern instruction on out-of-pocket-loss, which applies here and permits LCT to recover the

raised no objection to that request, which was consistent with its position that LCT could not recover on a contract that was never formed. LCT is estopped, "'simply because [its] interests have changed, [from] assum[ing] a position to the contrary'" on appeal. *Kendrick*, 1984 Del. Super. LEXIS 712, at *8 (quoting 31 C.J.S. Estoppel § 117); *see also U.S. Bank Nat. v. Swanson*, 2006 WL 1579779 (Del. Super. Ct. May 1, 2006), *aff'd*, 918 A.2d 339 (Del. 2006). "[T]he rule of law prohibiting a party from maintaining inconsistent positions in the same or subsequent litigation is not based solely on the principle of equitable estoppel, but it is also well grounded on a positive rule of procedure based on 'manifest justice'." *Kendrick*, 1984 Del. Super. LEXIS 712, at *9. Had LCT argued then, which it only does now, that it sought benefit-of-the-bargain damages, NGL would have taken further steps to establish the impropriety of that measure to this case, and the issue would have been addressed pre-verdict.

In reversing itself after trial, LCT relies extensively on *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069 (Del. 1983), which undercuts its new theory on fraud damages. There, unlike here, plaintiff was fraudulently induced to enter a contract. Specifically, defendant misrepresented to plaintiff the availability of "low interest

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"difference in value between" what it lost (its services) and what it received. Del. P.J.I. Civ. § 22.17.

mortgage" financing and thereby induced her to enter a sales contract by overstating the contract's value after financing. *Id.* at 1072, 1075. Recognizing that plaintiff entered the contract because of the false financing representation, the Supreme Court determined that "[t]he financing plans involved here cannot be regarded as independent and divisible from the sale of the land and the townhouse." *Id.* at 1075. As the Superior Court noted on remand, "[t]he Supreme Court held that financing at the advertised rate was an indivisible part of the sale agreement." *Stephenson v. Capano Dev. Co.*, 1985 WL 636429, at *3 (Del. Super. Ct. July 10, 1985).

"In the context of real estate transactions," the Supreme Court noted, "interest rate differentials have been awarded as damages for breach of contract and as ancillary relief in actions for specific performance." *Stephenson*, 462 A.2d at 1077. "Under such circumstances," plaintiff could recover the difference between the value of the contract as advertised and the value she received; unlike here, she was entitled to the benefit of her bargain because she made a bargain. *Id.*; *see also Harnish v. Widener Univ. Sch. of Law*, 833 F.3d 298, 309 n.5 (3d Cir. 2016) (emphasis added) (citing *Stephenson* and explaining that benefit-of-the-bargain damages require plaintiffs to prove they "reasonably expected more <u>from the bargain</u> than what they received").

As the Trial Court recognized, LCT "disregards the fact that, in *Stephenson*, the plaintiff had an option contract to buy a house, on which the benefit-of-the-bargain damages would be based." Ex. A at 11. In contrast, LCT had no bargain with NGL and therefore a contract "cannot thus be enforced in this action." *See Shuttleworth*, 1994 WL 384428, at *6. LCT incurred no loss beyond the services it provided, and it is made whole by recovering their reasonable value.[3]

Given the dismissal of LCT's contract claim, NGL made numerous (unsuccessful) attempts at trial to prevent an impermissible jury award of contract-based damages. On the first day of testimony, NGL objected that LCT's repeated references to "contract", "agreement" and "deal" risked confusing the jury that they were deciding a contract claim. A0493:17-A0495:7. NGL likewise proposed an instruction that the jury could not award contract damages:

> **NO CONTRACT BETWEEN THE PARTIES.** Plaintiff has advanced two claims in this trial; neither is a contract claim, because the Court has previously determined that there was no contract between the parties. Accordingly, you will not be rendering a verdict on any contract claim and your deliberations shall not include consideration of

[3] LCT repeatedly contends it conferred $500 million of value on NGL, and that it would be unjust for NGL to retain that benefit. Op. Br. at 29, 30, 42. However, LCT's unjust enrichment claim to recover the "benefit" it allegedly conferred on NGL was dismissed. As the Trial Court held, "this case is simply one to determine the fair compensation" for LCT's services. A0331.

any testimony about the claimed existence of an oral contract.

B2224:14-22; B2677. Thereafter, NGL requested a further limitation in the fraud instruction to clarify that the jury could award damages "suffered only as a direct result" of the fraud. B2462:16-B2463:7.

The Trial Court rejected each of NGL's proposals. As both parties agree, the jury then awarded fraud damages as if a contract existed based on a benefit-of-the-bargain measure, which LCT acknowledged during trial is inapplicable to this case. Accordingly, the award of $29 million in fraud damages is legally unjustified and, if a new trial proceeds, a proper jury instruction excluding benefit-of-the-bargain damages is required.

Finally, LCT's contention that NGL argued the unavailability of contract damages for the first time post-trial, Op. Br. 3, is plainly erroneous given NGL's numerous objections (identified above) at trial to a potential award of contract damages. A0493:17-A0495:7; B2224:14-22; B2677. Even had NGL not objected at trial (which it clearly did), the "failure to object at trial constitutes a waiver of the right to raise an issue on appeal *unless* the error is plain." *Culver v. Bennett*, 588 A.2d 1094, 1096 (Del. 1991) (emphasis in original). A party has the "unqualified right to have the jury instructed with a correct statement of the substance of the law." *Id.*

2. Inapplicability of Benefit-of-the-Bargain Damages Under Delaware Law is Consistent with Precedent in Other Jurisdictions

Delaware's rejection of expectancy damages absent a contract is consistent with the overwhelming weight (if not virtual unanimity) of authority across jurisdictions. Although LCT cites at most a handful of inapposite non-Delaware cases, at least 27 non-Delaware decisions apply the laws of at least 22 other jurisdictions in finding expectancy damages inapplicable without an underlying contract.

These highly instructive decisions are from 12 state courts[4], as well as circuit[5] and district courts[6] in 9 of the 12 regional federal circuits. For example, in

[4] *See Simon v. San Paolo U.S. Holding Co.,* 113 P.3d 63, 73 (Cal. 2005) (benefit-of-the-bargain damages unavailable where defendant "had no contractual obligation" to plaintiff); *Zanakis-Pico v. Cutter Dodge, Inc.*, 47 P.3d 1222, 1232 (Haw. 2002) (plaintiff "may not, however, recover 'benefit-of-the-bargain' damages, which are preconditioned on the breach of a contract"); *McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 532 (Iowa 2015) (benefit-of-the-bargain damages unavailable where plaintiff "had no contractual right to the bonus" and thus "could not have suffered an ascertainable loss of money or property when she was denied that bonus"); *Streeks, Inc. v. Diamond Hill Farms, Inc.*, 605 N.W.2d 110, 122 (Neb. 2000) ("Because this action is not based on a fraudulently induced contract, the benefit of the bargain rule is not the appropriate measure of damages"), *overruled on other grounds by Knights of Columbus Council 3152 v. KFS BD, Inc.*, 791 N.W.2d 317 (Neb. 2010); *Sorenson v. Gardner*, 334 P.2d 471, 476 (Or. 1959) (where "there is no contract between [plaintiff] and the maker of the representations … the reason for the [benefit-of-the-bargain] rule is absent and the rule is, therefore, not applicable"); *CGI Fed. Inc. v. FCi Fed., Inc.*, 814 S.E.2d 183, 190 (Va. 2018) (benefit-of-the-bargain damages not recoverable "when they are based on the provisions of an unenforceable contract"); *Roil Energy, LLC. v. Edington*, 2016 WL 4132471, at *15 (Wash. Ct. App. Aug. 2, 2016) (benefit-of-the-bargain damages unavailable because "the parties reached no enforceable joint venture agreement"); *Parks v. Macro-Dynamics, Inc.*, 591 P.2d 1005, 1009 (Ariz. Ct. App. 1979) (where contract is rescinded, benefit-of-the-bargain damages are not recoverable); *Weinshel v. Willott, LLC*, 2006 WL 1229933, at *8 (Conn. Super. Ct. Apr. 13, 2006) (benefit-of-the-bargain award "was improper and cannot stand due to the lack of an underlying contract"); *Rauch v. Rauch*, 2017 WL 3722545, at *8 (N.J. Super. Ct. App. Div. Aug. 30, 2017) (no expectation damages "in the absence of agreement on essential terms."); *Lambo v. Kathleen D'Acquisto Irrevocable Tr.*, 2007 WI App 230, ¶ 22 (Wis. Ct. App. Sept. 19, 2007) (benefit-of-the-bargain damages "are not appropriate in the absence of an actual, binding agreement").

Roboserve, Inc. v. Kato Kagaku Co., Ltd., 78 F.3d 266, 274-75 (7th Cir. 1996), like here, the parties were unable to reach an agreement after protracted negotiations. Without a contract, the Seventh Circuit determined that the plaintiff was "entitled to

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[5] *See B&P Holdings I, LLC. v. Grand Sasso, Inc.*, 114 F. App'x 461, 466-67 (3d Cir. 2004) (plaintiff "seeks the benefit of a bargain that never materialized … This type of recovery is prohibited"); *Harnish*, 833 F.3d at 309, n.5 (unlike out-of-pocket damages, "[a] benefit-of-the-bargain claim, by contrast, is contract-like"); *LHC Nashua Partnership, Ltd. v. PDNED Sagamore Nashua, L.L.C.*, 659 F3d 450, 464 (5th Cir. 2011) ("benefit-of-the-bargain damages are unavailable" where "the transaction … was never entered into"); *United States v. Turner*, 465 F.3d 667, 681 (6th Cir. 2006) ("benefit of the bargain theory is not applicable" where there "is not a bargained for exchange"); *Trytko v. Hubbell, Inc.*, 28 F.3d 715, 724 (7th Cir. 1994) (where "no bargain was induced by the misrepresentation," plaintiff "is not entitled to recover the expectancy described or contemplated by the misrepresentation because it is not a real loss suffered"); *Pelletier v. Stuart-James Co., Inc.*, 863 F.2d 1550, 1559 (11th Cir. 1989) ("In order to be entitled to 'benefit of the bargain' damages, however, there must in fact be a "bargain" or contract.")

[6] *See McQueen v. Woodstream Corp.*, 672 F. Supp. 2d 84, 90 (D.D.C. 2009) (benefit-of-the-bargain damages unavailable when contract claim has been dismissed); *Sudo Props., Inc. v. Terrebonne Par. Consol. Gov't*, 2008 WL 2623000, at *7 (E.D. La. July 2, 2008) (plaintiff "not entitled to the benefit-of-the-bargain recovery because [it] has not demonstrated the contractual prerequisite for benefit-of-the-bargain recovery"); *Dierker v. Eagle Nat. Bank*, 888 F. Supp. 2d 645, 657 (D. Md. 2012) ("Benefit-of-the-bargain damages require the plaintiff to show that a bargain existed."); *IPFS Corp. v. Cont'l Cas. Co.*, 2013 WL 11541918, at *28 (W.D. Mo. Aug. 15, 2013) (where parties have no bargain, plaintiff "not entitled to recover the interest it hoped to receive"); *Auto Chem Labs., Inc. v. Turtle Wax, Inc.,* 2010 WL 3769209, at *6 (S.D. Ohio Sept. 24, 2010) ("benefit-of-the-bargain damages are only appropriate in fraud claims that are based on a contract"); *Edward J. DeBartolo Corp. v. Coopers & Lybrand*, 928 F. Supp. 557, 565 (W.D. Pa. 1996) ("benefit of the bargain damages" limited "to the situation where the plaintiff has made a bargain with the defendant").

recover for those out-of-pocket losses attributable to [the defendant's] misrepresentation," including "reasonable compensation for the time and effort wasted in reliance upon misrepresentations." *Id.* at 274. Benefit-of-the-bargain damages, by contrast, are "available only under much narrower circumstances." *Id*. As the court explained:

> Where a misrepresentation induced the victim to consummate the bargain, benefit-of-the-bargain damages are appropriate to give the victim the rewards he reasonably expected under the contract. Such damages are clearly not appropriate, however, in the absence of an actual, binding agreement. Damages for common law fraud are not intended to restore what one never had.

Id. (emphasis added).

The court thus rejected the jury's fraud verdict because it "went far beyond compensation for [Plaintiff's] out-of-pocket losses. It obviously included benefit-of-the-bargain damages. But what bargain? … [Plaintiff] is not entitled to recover for the loss of contractual benefits it never actually secured." *Id.* The award was thereafter reduced to cover "compensation for lost time and effort—i.e., actual losses—due to the fraud." *Id.* at 275.

Similarly, in *Bohnsack v. Varco, L.P.*, the Fifth Circuit recognized that "benefit-of-the-bargain damages compensate litigants only for injuries that arise out of an enforceable contract[.]" 668 F.3d 262, 276 (5th Cir. 2012). Because plaintiff

failed to prove he was fraudulently induced to enter a contract, the court rejected the jury's award of benefit-of-the-bargain damages. *Id.* at 276-78.

In *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, the Massachusetts Superior Court likewise held that benefit-of-the-bargain damages were not recoverable for fraud where the court "already found that [plaintiff] is not entitled to recovery under a breach of contract theory[.]" 2002 WL 31875204, at *28 (Mass. Super. Ct. Dec. 16, 2002). Logically, a plaintiff "cannot recover the benefit of a bargain in tort when it cannot recover that benefit in contract." *Id*. That is because the purpose of the benefit-of-the-bargain rule is "to give the victim what he was entitled to as a matter of contract" not to "enforce[e] an otherwise unenforceable agreement[.]" *Id.* at *29.

In *In re Rollison*, the bankruptcy court explained that benefit-of-the-bargain damages are available only "where fraud was the inducement to enter into a contract, or 'bargain.'" 520 B.R. 109, 112-13 (D. Colo. Bankr. 2014). Because "there was no 'bargain' reached … upon which to base the [plaintiff's] damages," plaintiff could recover only its out-of-pocket loss. *Id*. at 113.

The overwhelming weight of authority across jurisdictions, as reflected in the 27 non-Delaware decisions NGL identified, further supports the Trial Court's rejection of benefit-of-the-bargain damages. In contrast, LCT cites six out-of-state

cases that are readily distinguishable and do not favor a different result. To begin with, none of LCT's foreign law cites involve parties who, as here, attempted but failed to reach an agreement. Further, some of these cases do not even award benefit-of the-bargain damages, but reliance damages.

Veilleux v. National Broadcasting Co., 206 F.3d 92 (1st Cir. 2000) and *Midwest Home Distrib., Inc. v. Domco Indus. Ltd.*, 585 N.W.2d 735 (Iowa 1998), for example, each involved a clear bargain that could be enforced: in *Veilleux*, the parties agreed to a television program that "would not include a group critical of the trucking industry[.]" 206 F.3d at 102; in *Midwest*, the parties agreed to an exclusive "distributor relationship[.]" 585 N.W.2d at 736. Unlike here, benefit-of-the-bargain damages were recoverable because defendants in both cases failed to satisfy the agreed-upon bargains. *See Veilleux*, 206 F.3d at 119 (contrary to an agreement, the program featured a group "criticizing trucking"); *Midwest*, 585 N.W.2d at 737 (contrary to an agreement, defendant "began secretly pursuing a distributorship" with another company). In *Midwest,* the court invoked 37 C.J.S. Fraud § 56, which provides that benefit-of-the-bargain damages are recoverable where plaintiff was led into an identifiable bargain, and further held that benefit-of-the-bargain damages are appropriate "[w]hen the plaintiff has no out-of-pocket losses[.]" *Id.* at 739. Here, by contrast, LCT is made whole by recovering the loss of the value of its services.

In *Dastgheib v. Genentech, Inc.*, 438 F. Supp. 2d 546 (E.D. Pa. 2006), the court did not rule that "there was no enforceable promise between plaintiff and defendant" as LCT asserts. Op. Br. 36. Rather, the court stated that it had "never decided that the alleged agreement was unenforceable. The Court also does not find that plaintiff's voluntary dismissal of the contract claim is dispositive of this issue." *Dastgheib*, 438 F. Supp. 2d at 552 n.6. Nor did the court award benefit-of-the-bargain damages; rather, it merely ruled on a motion *in limine* that an expert could testify on the topic. Unlike here, plaintiff was still able to establish the existence of a contract at trial on which to base benefit-of-the-bargain fraud damages.

Aerotech Res., Inc. v. Dodson Aviation, Inc., 91 F. App'x 37 (10th Cir. 2004), which LCT cites in passing, is similarly inapt. There, the court found that the jury could have determined a contractual relationship existed between defendant, plaintiff and the third-party purchaser. *Id.* at 41.

Lewis v. Citizens Agency of Madelia, Inc., 306 Minn. 194 (1975) and *Leftwich v. Gaines*, 521 S.E.2d 717 (N.C. Ct. App. 1999) likewise do not hold that a plaintiff can recover benefit-of-the-bargain damages for fraud where the parties have failed to reach agreement. Rather, these cases provide that a plaintiff may recover the value of a bargain that was foregone in reliance on defendant's misrepresentation. Having no relevance to LCT's claim, these decisions merely provide that a plaintiff's

reliance damages, in certain inapposite circumstances, may equal the value of a bargain it declined in reliance on a misrepresentation.

In *Lewis,* plaintiff forewent purchasing a life insurance policy after defendant negligently represented that her husband had already purchased one. 306 Minn. at 200-01. Thus, plaintiff was entitled to recover the value of the life insurance policy – *i.e.*, the bargain she refused in reliance on defendant's misrepresentation. *Id.* The Seventh Circuit in *Trytko v. Hubbell, Inc.*, 28 F.3d 715, 723 (7th Cir. 1994) (emphasis added) explained why the *Lewis* holding has no application to this case:

> In one sense, measuring plaintiff's recovery by what she had been assured existed seems to award her the benefit of a hypothetical bargain to buy life insurance. But, in fact, the misrepresentation in *Lewis* did not lead the plaintiff into a bargain which she sought to enforce. Rather, the misrepresentation caused her to forego something valuable, which, happenstantially, was a "bargain" … Illustrations from the Restatement make clear that reliance is recoverable and expectancy is not; but reliance is fully recoverable even when it matches expectancy.

The North Carolina court in *Leftwich* took the same approach as *Lewis*, which is inapplicable here. There, plaintiff forewent purchasing property in reliance on defendant's false representation that it could not be rezoned. 521 S.E.2d at 723. Accordingly, the court held that plaintiff could recover the value of the "property she would have owned if not defrauded" – *i.e.*, the bargain she refused in reliance on defendant's misrepresentations. *Id.* at 723-24.

Unlike the plaintiffs in *Lewis* and *Leftwich*, LCT did not forego a bargain in reliance on any misrepresentation. Rather, LCT provided services in the hope it could reach an agreement with NGL. Having failed to do so, LCT cannot recover the benefit of a non-existent bargain but instead is entitled to recover the fair value of its services.

3. LCT's Promissory Estoppel Cases are Irrelevant

As a red-herring, LCT misplaces reliance on the inapplicable doctrine of promissory estoppel. To begin with, LCT never alleged, let alone proved, promissory estoppel. Nor does the rationale of promissory estoppel fit this case.

LCT cannot claim it satisfied the doctrine's necessary elements: "'(1) a promise was made; (2) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (3) the promisee reasonably relied on the promise and took action to his detriment; and (4) such promise is binding because injustice can be avoided only by enforcement of the promise.'" *Lyons Ins. Agency, Inc. v. Wilson*, 2018 WL 481641, at *3 (Del. Ch. Jan. 19, 2018) (quoting *Grunstein v. Silva*, 2009 WL 4698541 at *7 (Del. Ch. Dec. 8, 2009)). In contrast to LCT's evidence, "[p]romissory estoppel requires 'a real promise, not just mere expressions of expectation,'" and the "promise must be 'reasonably definite and certain.'" *Id.* (quoting *James Cable, LLC v. Millenium Digital Media Sys., L.L.C.*,

2009 WL 1638634, at *5 (Del. Ch. June 11, 2009)).

Because promissory estoppel is invoked to "avoid injustice", it does not apply where a party can recover "on the theory of *quantum meruit.*" *See Avantix Labs., Inc. v. Pharmion, LLC*, 2012 WL 2309981, at *11 (Del. Super. Ct. June 18, 2012). Furthermore, "[w]hile Delaware courts have recognized some instances when expectation damages may be appropriate in the promissory estoppel context, this is clearly the exception rather than the rule. The 'quintessential remedy for promissory estoppel is an award of damages measured by the reliance costs reasonably incurred by the plaintiff[.]'" *Olson v. Halvorsen*, 2009 WL 1317148, at *12 (Del. Ch. May 13, 2009) (quoting *Ramone v. Lang*, 2006 WL 905347, at * 16 (Del. Ch. Apr. 3, 2006)). In *Ramone,* the court refused to award benefit-of-the-bargain damages where, like here, plaintiff "has not come close to meeting his burden of proving that [defendant] and he reached agreement on all material terms … [T]here is no reliable basis to enforce any specific deal or to use any specific deal as the foundation for an award of expectation damages." 2006 WL 905347, at *17.

LCT cites a single case, *RGC Int'l Invs., LDC v. Greka Energy Corp.*, 2001 WL 984689 (Del. Ch. Aug. 22, 2001), in which the court awarded benefit-of-the-bargain damages on a promissory estoppel claim. There, unlike here, the parties signed a comprehensive term sheet in which they "'acknowledge[d] their mutual

agreement to the above terms'", *id.* at *7 (quoting Term Sheet), and agreed to negotiate definitive documentation in good faith. *Id.* The court held that "negotiations broke down as a result of this need to 'memorialize' a set of provisions to which the parties had previously agreed" and due to defendant's bad faith attempt to condition further progress on renegotiation of a settled term. *Id.* at *12-13. In awarding benefit-of-the-bargain damages, the court relied on "the highly detailed nature of the Term sheet … [which] appears in all respects to be a binding contract as to certain promises[.]" *Id.* at *13.

LCT's reliance on *Grunstein v. Silva*, 2011 WL 378782 at *11 (Del. Ch. Jan. 31, 2011) is particularly misplaced. Indeed, LCT ignores the court's subsequent decision rejecting plaintiffs' promissory estoppel (and fraud) claims. In instructive language, the court held that plaintiff Grunstein: (1) failed to prove a "definite and certain promise" given that the parties "held divergent views on certain critical terms"; and (2) it was unreasonable for him to rely on defendant's alleged promise where the parties had attempted but failed to "document the transaction in a manner more befitting the complexity" of the transaction. *Grunstein*, 2014 WL 4473641, at *33-34. The court also rejected plaintiff Dwyer's promissory estoppel claim, holding that "because Dwyer's and Silva's conversations 'left for future resolution so many terms' it would have been 'manifestly unreasonable' for Dwyer to have

relied on such an indefinite promise … Dwyer was taking a chance that he and Silva would not be able to reach a deal." *Id.* at *34 (quoting *Stein v. Gelfand*, 476 F.Supp.2d 427, 436 (S.D.N.Y. 2007)).

In rejecting plaintiffs' theory, the court explained why benefit-of-the-bargain damages are unavailable in these circumstances:

> If the Court adopted Grunstein's position, a negotiator who realizes she is unable to secure the deal on the terms she believes she is entitled to could simply acquiesce in the transaction, avoid documenting it, gather evidence showing that in a general sense the two parties intended to work together and share in profits, and then assert a promissory estoppel claim to enforce the deal her arm's length counterparty declined to accept. This would seriously undermine the expectations of the business world.

Id.

4. LCT Cannot Recover for Failed Negotiations

In another distraction from the correct measure of fraud damages, LCT erroneously contends that "[t]he lack of a written contract was the direct result of the fraud itself." Op. Br. 38 (emphasis in original). However, there is no contract (whether written or oral) not because of fraud but because "the record demonstrates that neither party manifested objective assent regarding the alleged oral contract" and "the essential terms were not sufficiently definite to determine a breach and appropriate remedy." A0326-27. As the Trial Court determined, "LCT is asking this

Court to ignore the lack of discussions regarding many key details of the alleged fee agreement and to supply many undefined key terms with something that is 'reasonable in the circumstances.' The Court is unwilling to do so and holds that these negotiations never evolved into anything more." A0328.

5. Public Policy Does Not Permit LCT to Enforce a Non-Existent Bargain

LCT contends that it must be awarded $29 million – a value it rejected during negotiations – so that NGL "is punished" and "similar misconduct is deterred in the future." Op. Br. 42. However, Delaware policy squarely refutes LCT's position.

First, "compensatory damages attempt to make the plaintiff whole as of a specific time[.]" *Stephenson*, 462 A.2d at 1077 (by contrast, "punitive damages operate to punish the individual and deter similar conduct by others"). The policy of Delaware is to avoid windfalls except where punitive damages are recoverable as a deterrent. *See In re Asbestos Litig*., 1994 WL 553234, at *4 (Del. Super. Ct. Sept. 19, 1994) ("Most jurisdictions, Delaware included, treat punitive damages as a windfall to the plaintiff, rather than as compensation for injuries … [P]laintiffs are not entitled to punitive damage awards to make them whole[.]"), *rev'd on other grounds sub nom. Asbestos Litig. Pusey Trial Grp. v. Owens-Corning Fiberglas Corp*., 669 A.2d 108 (Del. 1995). The Trial Court denied LCT's request for punitive

damages, holding that this is not "a case where punitive damages is warranted." A1300.

Second, Delaware does not bind a party to a contract it did not enter nor provide the benefits of a contract a party did not successfully negotiate. *Shuttleworth*, 1994 WL 384428, at *6 (after dismissal of contract claim, "any alleged or actual contract between [the parties] cannot thus be enforced in this action"); *Manzo*, 2002 WL 31926606, at *5 (rejecting benefit-of-the-bargain recovery where "complaint fails to articulate any specific bargain from which these benefits purportedly flow").

Abry Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032 (Del. Ch. 2006) and *NAACO Indus., Inc. v. Applica Inc.*, 997 A.2d 1 (Del. Ch. 2009) are irrelevant to the measure of LCT's damages. *Abry* provides that parties cannot contractually waive fraud liability for intentional misrepresentations that are contained within a contract. 891 A.2d at 1035-36. *NAACO* concludes that "the ability of a Delaware court to hear a common law fraud claim based on statements made by a Delaware chartered entity in Exchange Act filings serves important Delaware interests." 997 A.2d at 26. LCT also misdescribes *United States v. Ben Grunstein & Sons, Inc.*, 137 F. Supp. 197 (D.N.J. 1955) to argue that out-of-pocket damages are "objectionable." Op. Br. 22 n.12. In reality, the court there noted only

that the "out-of-pocket rule does not in fact do justice to the person defrauded" where he can prove what he "expected to receive, by contract[.]" 137 F. Supp. at 209 (emphasis added).

None of those cases bear on available fraud damages, and no case permits LCT to simply delete the "bargain" requirement of benefit-of-the-bargain damages by transforming failed negotiations into an enforceable contract.

II. THE TRIAL COURT ERRED BY SETTING ASIDE THE UNCHALLENGED AWARD OF $4 MILLION, WHICH FULLY COMPENSATES LCT FOR ITS LOSS

A. Questions Presented

1. Whether the Trial Court erred in *sua sponte* ordering a new trial on LCT's *quantum meruit* claim when the jury was properly instructed on *quantum meruit* damages and found the value of LCT's services to be $4 million. (A1320-21; Ex. A at 9).

2. Whether the Trial Court erred in denying NGL's motion for a judgment as a matter of law on LCT's fraudulent misrepresentation claim because the $4 million *quantum meruit* award fully compensates LCT. (A1283-1285; B2689-2692).

B. Scope of Review

The decision to order a new trial is reviewed for an abuse of discretion. *O'Riley v. Rogers*, 69 A3d 1007, 1010 (Del. 2013). The *sua sponte* order of a new trial is subject to Superior Court Civil Rule 59(c), which requires the court to act within 10 days of entry of judgment if it orders a new trial on its own initiative. Denial of a motion for judgment as a matter of law is reviewed *de novo*. *CitiSteel USA, Inc. v. Connell Ltd. Pshp., Luria Bros. Div.*, 758 A.2d 928, 930 (Del. 2000); *Farm Family Mut. Ins. Co. v. Perdue, Inc.*, 608 A.2d 726, 1992 WL 21141, *2 (Del. 1992) (Table) (because "[i]t is plaintiff's burden … to establish a prima

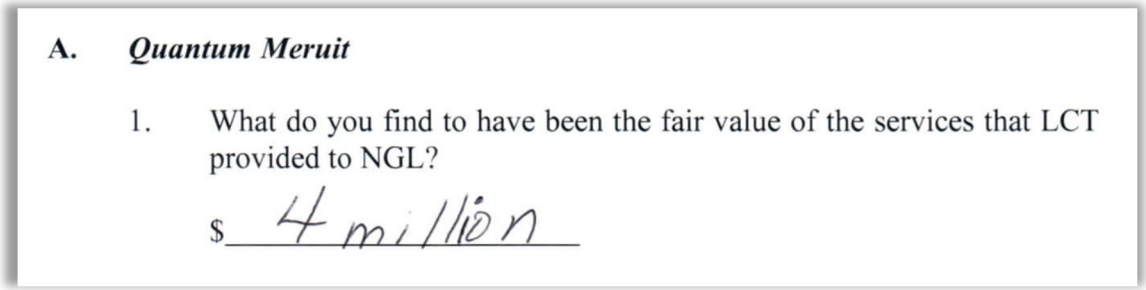
facie basis for recovery ... a mere scintilla of evidence in favor of the nonmoving [plaintiff] is insufficient to support [a] verdict").

C. Merits of Argument

1. No Basis Exists to Set Aside the Jury's Quantum Meruit Verdict

Although neither party requested it, the Trial Court erred by striking the jury's *quantum meruit* verdict and ordering a new trial covering *quantum meruit* damages. As is uncontroverted, a plaintiff can recover in *quantum meruit* "the reasonable value of his services" rendered to defendant. *Hynansky v. 1492 Hospitality Grp., Inc.*, 2007 WL 2319191, at *1 (Del. Super. Ct. Aug. 15, 2007). "The standard for measuring the value of the performance under quantum meruit is the amount for which such services could have been purchased from one in the plaintiff's position at the time and place the services were rendered." *Id.*

The Trial Court recognized this standard, correctly finding that "the question here is … what is the real value of the services Plaintiff provided." Ex. A at 16. A new trial on *quantum meruit* damages is not warranted because the jury was presented with – and clearly answered – that very question on its verdict sheet:



A. *Quantum Meruit*

1. What do you find to have been the fair value of the services that LCT provided to NGL?

$ 4 million

A1338. That verdict was consistent with the related jury instruction, which correctly stated: "Quantum meruit is the 'reasonable worth or value of services rendered for the benefit of another'"; "the standard for measuring the value of LCT's services under quantum meruit is the reasonable value of the services at the time they were provided." A1320-21.

Having been properly instructed on *quantum meruit* damages, the jury determined that the value of LCT's services was $4 million after considering seven days of trial focused on this precise question, including testimony from NGL's damages expert that a reasonable fee for the type of services LCT provided is .5%-2% of the deal price, or $1-$4 million, as confirmed by contemporaneous compensation data that Talarico himself had sent to Kurz. B2395:14-B2401:14 (NGL damages expert); B1546-B1552.

Neither side challenged that verdict on any grounds. The record contains no indicia the jury was confused in rendering that verdict. The Trial Court nevertheless ordered a new trial on *quantum meruit*, ruling that "the Court's decision to include

an opportunity for the jury to set forth separate damage awards for both quantum meruit and fraudulent misrepresentation has simply muddied the damage award to the point that it [was] impossible to determine what the jury believed was a fair and reasonable determination of the real damages here." Ex. A at 16. The Trial Court abused its discretion by doing so on this record. *See Tyndall v. Tyndall*, 214 A.2d 124, 126 (Del. 1965) (trial court abused its discretion where "there was no legal justification for the striking of the judgment").

NGL presented fact and expert evidence that the reasonable value of LCT's services was in the range of $1-$4 million, B2395:14-B2401:14 (NGL damages expert); B2088:4-12 (Krimbill); B2333:22-B2334:5 (UBS witness). The jury valued LCT's services within that exact range, despite consistently hearing from Talarico (and LCT's other witnesses) that LCT's services were worth magnitudes more – a position LCT's counsel stressed repeatedly during closing, telling the jury it was a matter of whose witnesses they believed. Having heard that evidence and made its credibility assessment, the jury credited NGL's mountain of evidence over Talarico's testimony by finding that $4 million was, in fact, the reasonable value of LCT's services. That determination should not have been disturbed; as the Trial Court itself explained to the jurors, they served as "the sole judges of each witness's credibility." B2629:18-20 (emphasis added).

In addition, the Trial Court's ruling violated Rule 59(c)'s limitation on the authority to issue such *sua sponte* orders: "Not later than 10 days after entry of judgment the Court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party." Super. Ct. Civ. R. 59(c). The Trial Court's ruling did not come until more than 16 months after the *quantum meruit* verdict was entered, A1338, thereby providing independent grounds for overturning the new-trial order.

2. Because the *Quantum Meruit* Award Fully Compensates LCT, No Additional Fraud Damages Are Recoverable

As the Trial Court recognized, the only compensable loss that LCT identified was the value of the work it performed. Ex. A at 16 (emphasis added) ("it is clear that evidence was only presented on a single unitary claim for damages."); A1295:14-17 (emphasis added) ("the damages are the damages whether it's quantum meruit or it's fraudulent misrepresentation. There's been no evidence separating them. They're the same."). Thus, the $4 million *quantum meruit* award fully compensates LCT for the value of its services. In fact, LCT's fraudulent misrepresentation loss, if any, would be less than the value of its services. The *quantum meruit* award captures the full value of LCT's seven weeks of services, while a fraudulent misrepresentation award would only cover the value of services

it provided in reliance on a misrepresentation (and here, the earliest claimed misrepresentation occurred May 17, 2014, over three weeks after LCT began providing services to NGL).

Because LCT cannot recover for the same loss twice, and no additional damages are recoverable, no justification exists for another trial. *See EEOC v. Waffle House*, 534 U.S. 279, 297 (2002) (quoting *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 333 (1980)) ("[I]t 'goes without saying that the courts can and should preclude double recovery[.]'"); *Hercules Inc. v. Aetna Cas. and Sur. Co*., 1998 WL 962089, *13 (Del. Super. Ct. Sept. 30, 1998) ("Hercules can not receive a double recovery"), *rev'd in part on other grounds by* 784 A.2d 481 (Del. 2001); *Duncan v. Theratx, Inc*., 775 A.2d 1019, 1024 (Del. 2001) (plaintiffs are not permitted to receive a double recovery). Therefore, the Trial Court erred by denying NGL's motion for judgment as a matter of law as to the impermissibility of additional fraud damages.

III. THE VERDICT ON FRAUD LIABILITY IS CONTRARY TO EVIDENCE OF LCT'S ADMITTED NON-RELIANCE

A. Question Presented

Whether the Trial Court erred in denying NGL's motion for judgment as a matter of law on LCT's fraud claim because LCT failed to prove reliance and, in fact, admitted non-reliance. (Ex. A at 5-6; B2693-2696).

B. Scope of Review

Denial of a motion for judgment as a matter of law is reviewed *de novo*. *CitiSteel USA, Inc. v. Connell Ltd. Pshp., Luria Bros. Div.*, 758 A.2d 928, 930 (Del. 2000); *Farm Family Mut. Ins. Co. v. Perdue, Inc.*, 608 A.2d 726, 1992 WL 21141, *2 (Del. 1992) (Table) (because "[i]t is plaintiff's burden … to establish a prima facie basis for recovery ... a mere scintilla of evidence in favor of the nonmoving [plaintiff] is insufficient to support [a] verdict"); *accord Fritz v. Yeager*, 790 A.2d 469, 470–71 (Del. 2002).

C. Merits of Argument

To succeed on its claim, a plaintiff must prove not only a misrepresentation, but that it actually and reasonably relied to its detriment on that misrepresentation. *DCV Holdings, Inc. v. ConAgra, Inc*., 889 A.2d 954, 958 (Del. 2005). LCT failed to do so because its principal and lead witness (Talarico) repeatedly testified that LCT never relied – and never would have relied – on any representation entitling it

to compensation worth $29 million. *See Universal Enter. Grp., L.P. v. Duncan Petroleum Corp.*, 2014 WL 1760023, at *4-5 (Del. Ch. Apr. 29, 2014) (where plaintiff "did not rely on the representations", it "failed to prove fraud"). The Trial Court therefore erred by denying NGL's motion for judgment as a matter of law on fraud liability.

According to Talarico, NGL misrepresented that LCT would "receive two percent of the GP plus the taxes that result from that plus an option to buy three percent of the GP." A0743:2-8 (Talarico). LCT claimed this three-part alleged misrepresentation amounted to $43.8 million in damages: (a) $20 million for the 2% GP interest; (b) $14.8 million for a tax catch-up on the 2% interest; and (c) $9 million for the 3% buy-in. *See* B2755; A1270:4-9; Op. Br. 1-2 (defining collectively as the "Promised Consideration").

As the Trial Court stated, "it is clear the jury's damage award for fraudulent misrepresentation equated to the alleged agreed upon compensation between Mr. Talarico and Mr. Krimbill minus the dispute regarding taxes." Ex. A at 9 (emphasis added). Critically, however, LCT admitted that it would not accept terms that did not contain the tax catch-up. According to Talarico, LCT would not have provided services without a commitment for tax reimbursement:

And this conversation, this conversation with EMG and NGL, we made

> it very clear at the beginning, very clear at the beginning that any fee compensation involving equity needed to have a tax gross-up associated with it. That was in every discussion we ever had about equity compensation. It always had a cash component to it in every transaction and in every compensation discussion. So if it had anything but that, we would have stopped right there and said, hold on, we got to figure this out.

A0528:7-20 (emphasis added).

Talarico re-emphasized that precise point during rebuttal testimony:

> COUNSEL: Would LCT and its partners ever have considered a fee with respect to the TransMontaigne acquisition based on a 3 percent mandatory buy-in, 2 percent on top of that with no taxes paid as compensation for its services?
>
> TALARICO: No. It just makes no sense.

A1268:9-14 (emphasis added); *see also* B2529:12-17 (LCT's closing argument: "Talarico was quite clear that there were three components to a fee," including "cash to pay the taxes," which together correspond to $43.8 million.).

While LCT referred to the October Letter and its $29 million "success fee" reference as the "single best piece of evidence" and urged the jury to "pay very close attention to it," B2513:1-3; B2525:3-7, that letter has no bearing on the fraudulent misrepresentation claim. Rather, it is undisputed that:

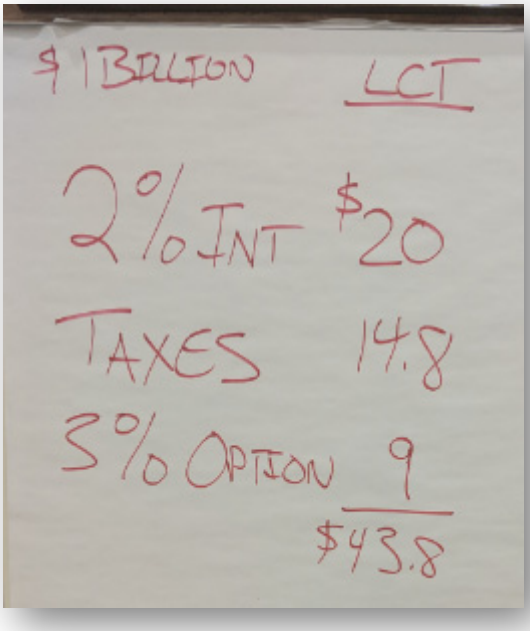
- the alleged misrepresentation by NGL occurred at the time LCT rendered its services in May and June 2014; but

- the October Letter did not exist until months later, long after LCT's work had ended; and

- Talarico admitted that the first time he saw the October Letter or heard about any $29 million proposal without a tax catch-up "was on November 25, 2014, nearly four - almost five months after the deal closed." A0235; A0535:5-13.

Moreover, the October Letter itself confirms Krimbill was only "asking" the GP owners (which included certain Board members) for approval of a complex equity compensation arrangement – clearly reflecting that the parties understood no deal had been made. A0236.

Recognizing as much, LCT never mentioned the October Letter or the $29 million figure in closing arguments about its fraud claim, reiterating instead that the operative reliance came in mid-May when LCT "believed they had an agreement with NGL" that included the tax catch-up, B2555:16-17, as illustrated by a chart Talarico drew during LCT's rebuttal case and the related demonstrative LCT repeatedly showed the jury:



Value of TransMontaigne to NGL	LCT's Fee
$500 mm - GP (50%) **> $500 mm** - LP	
Total = **$1 Billion +**	**$43.8 Million**

B2606:9-22. In fact, the only time LCT mentioned the $29 million figure/October Letter during its closing was in connection with its *quantum meruit* claim. B2504:23-B2547:10; B2603:19-B2611:19. LCT then expressly "move[d]" on from that claim to discuss the separate elements of its fraud case, reiterating that LCT's reliance claim was based entirely on the three components that LCT contended had been discussed in mid-May. B2547:2-4; B2555:9-12.

Because LCT testified that it did not and would not rely on any representation worth $29 million – which necessarily excluded a tax catch-up – there could be no finding of reliance on such a proposal, and the jury's verdict was in direct contradiction of the evidence. *See Burgos v. Hickok*, 695 A.2d 1141, 1144 (Del. 1997) (Rule 50(b) motion must be granted where "reasonable minds could draw but one inference … that a verdict favorable to the plaintiff is not justified"). Even apart from the pecuniary loss measure of damages governing this case, fraud liability cannot be based on a representation that LCT admittedly never relied upon. *See Hinchey v. NYNEX Corp.*, 144 F.3d 134, 145-46 (1st Cir. 1998) (a party cannot reasonably rely on an offer it rejected); *In re HH Liquidation, LLC*, 590 B.R. 211, 260 (D. Del. Bankr. 2018) (rejecting claim where "[n]ot one creditor testified that they actually and reasonably relied" on the supposed understanding). Thus, the Trial Court erred by denying NGL's motion for judgment as a matter of law on fraud liability.

IV. THE TRIAL COURT INSTRUCTED THE JURY TO APPLY AN INCORRECT FRAUDULENT MISREPRESENTATION STANDARD

A. Questions Presented

Whether the Trial Court erred by instructing the jury that negligent or innocent statements can satisfy the elements of a fraudulent misrepresentation claim and denying NGL's request for a new trial on fraud liability. (A1313; Ex. A at 5; B2696-2697).

B. Scope of Review

A jury instruction challenged on appeal is reviewed to determine "'whether the instruction correctly stated the law and enabled the jury to perform its duty.'" *Banther v. State*, 884 A2d 487, 493 (Del. 2005) (quoting *Cabrera v. State*, 747 A.2d 543, 545 (Del. 2000)). If the court applies a plain error standard, the trial court's decision will be overruled if the instruction "undermine[s] the jury's ability to intelligently perform its duty in returning a verdict." *Volkswagen of America, Inc. v. Costello*, 880 A.2d 230, 234-235 (Del. 2005). The Trial Court's denial of a new trial is reviewed for abuse of discretion. *R.T. Vanderbilt Co. v Galliher*, 98 A.3d 122, 125 (Del. 2014).

C. Merits of Argument

In its post-trial December 5 Order, the Trial Court approved its jury instruction on fraudulent misrepresentation even though that instruction stated: "the term

'misrepresentation' is sufficiently broad to encompass fraudulent, negligent, or even innocent statements." B2624:2-4 (emphasis added) (jury instruction); Ex. A at 6.

It has long been established, however, that common law fraud requires a representation to be made with "'the defendant's knowledge or belief that the representation was false, or … with reckless indifference to the truth[.]'" *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992) (quoting *Stephenson*, 462 A.2d at 1074). Innocent or negligent statements cannot support a claim for common law fraud; they can only support a distinct claim for equitable fraud. *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 144 (Del. Ch. 2009) (quoting Donald J. Wolfe, Jr. & Michael A. Pittinger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 2.03[b][1]) ("equitable fraud does not require a showing of *scienter*, 'reflecting its willingness to provide a remedy for negligent or innocent misrepresentation'"); *see also Johnson v. Preferred Professional Ins. Co.*, 91 A.3d 994, 1017 (Del. Super. Ct. 2014) ("equitable fraud … is also known as negligent or innocent misrepresentation"). "'The equitable theory of fraud is much more comprehensive than that of the law, and contains elements entirely different from any which enter into the legal notion.'" *Airborne*, 984 A.2d at 143 (quoting 3 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 872 (5th ed. 2002)).

It is equally well-established that "[t]he Court of Chancery has exclusive

jurisdiction over claims of equitable fraud[.]" *Johnson*, 91 A.3d at 1017 (emphasis added); *see also Stephenson*, 462 A.2d at 1074 (difference between common law fraud and equitable fraud is "Chancery's willingness to provide a remedy for negligent or innocent misrepresentations: the defendant did not have to know or believe that his statement was false or to have proceeded in reckless disregard of the truth").

The Trial Court's fraudulent misrepresentation instruction was thus highly prejudicial to NGL because it permitted the jury to find liability for innocent or negligent statements when no such claim is cognizable in Superior Court. *Radius Servs., LLC v. Jack Corrozi Const., Inc.*, 2009 WL 3273509, at *2 (Del. Super. Ct. Sept. 30, 2009) ("the Superior Court does not have jurisdiction over actions for negligent misrepresentation").

Denying NGL's 50(b) motion, the Trial Court explained its instruction by stating that it "simply rephrased the wording" of standards set forth in the Restatement (Second) of Contracts Section 162, which provides:

> [a] misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he states or implies in the truth of the assertion, or (c) knows that he does not have the basis that he states or implies for the assertion.

Ex. A at 6-7.[7] However, Comment a to Section 162 makes clear: "[i]n order that a misrepresentation be fraudulent within the meaning of this Section, it must not only be consciously false but must also be intended to mislead another." Restatement (Second) of Contracts § 162, cmt. a (1981) (emphasis added). Thus, Section 162 only confirms the fundamental flaw with an instruction that allowed for liability based on an innocent or negligent statement that, by definition, is neither consciously false nor intended to mislead.

The Trial Court also denied NGL's Rule 50(b) motion by speculating that the jury might have found a knowing misrepresentation. Ex. A at 8. But a court is not permitted to substitute its own viewpoint for that of the jury, and the way this instruction was framed indisputably prevents a determination of whether the negligent or intentional standard was applied. *See Hardy v. Adam McMillan Constr., LLC*, 2011 WL 2163598, at *3 (Del. Super. Ct. May 31, 2011) ("It is not for this Court to substitute its own view of the evidence (different as it may be) for that of the jury."); *Riggins v. Mauriello,* 603 A.2d 827, 831 (Del. 1992) (quoting *Culver*, 588 A.2d at 1098) (despite contention that there was "sufficient evidence in the

[7] The Trial Court cited to Restatement (Second) of Contracts § 164 (1981), Ex. A at 7, titled "When a Misrepresentation Makes a Contact Voidable", but the language quoted in the Opinion is found in § 162, titled "When a Misrepresentation is Fraudulent or Material".

record to support the jury's verdict," matter remanded for trial because improper instruction "'undermined the jury's ability to intelligently perform its duty'").

The Trial Court's conjecture is further undermined by its summary judgment finding that the alleged misrepresentations "fall into the broad definition of misrepresentations" that encompasses "negligent, or even innocent statements." A0334, 0337 (emphasis added); *see also* B1925:16-19 (tr. pg. 67) (Court: "to say that in essence that one side is intentionally misleading the other, that he's saying it because they are false and he knows they are false; really? … This is not what it is."). In opposing NGL's 50(a) argument that fraud liability had not been proven, A1285:22-A1286:7, LCT itself described the alleged representations as "fall[ing] squarely within the broad definition of misrepresentations that the court indicated in the summary judgment opinion." A1292:7-9 (emphasis added). The Trial Court then noted that LCT had just barely cleared the erroneously lowered bar: "Do I think the fraudulent misrepresentation case is a smoking gun? No. Do I think there's sufficient evidence to allow it to go to the jury? Yes." A1296:17-20. There is no reason to conclude the jury did not similarly determine that LCT had only satisfied the impermissibly "broad" definition submitted to them.

Although the Trial Court's jury instruction regarding negligent and innocent statements reflected law of the case from its summary judgment ruling, NGL sought

to clarify the knowledge element necessary for a finding of fraud liability at trial. *See, e.g.*, *May v. Bigmar, Inc.*, 838 A.2d 285, 288 n.8 (Del. Ch. 2003) (summary judgment opinion determined law of the case as to particular issue). NGL proposed a verdict form that asked the jury to determine if LCT had established each element of common law fraud, including whether: "NGL: (a) made that representation with knowledge or belief that it was in fact false; or (b) made that representation with reckless indifference to its truth?" A1313 (emphasis added). LCT opposed NGL's proposal as including too many "questions in order to get to a verdict," and the Court decided against including it. B2463:23-B2464:6.

Even had NGL not preserved the issue at trial (which it did), a plain-error standard of review applies, and the instruction still constitutes reversible error because it "'undermine[d] the jury's ability to intelligently perform its duty in returning a verdict.'" *Volkswagen of Am.*, 880 A.2d at 234-35 (quoting *Culver*, 588 A.2d at 1096) ("'an improper jury instruction may amount to plain error despite a defendant's acceptance of it'"). First, the instruction improperly permitted the jury to find equitable fraud, which applies a substantially relaxed standard and is outside the jurisdiction of the Superior Court. Second, the instruction asked the jury to reconcile two inconsistent concepts – that "NGL had knowledge or belief that these representations were false or were made with reckless indifference to the truth" and

that "'misrepresentation' is sufficiently broad to encompass fraudulent, negligent or even innocent statements." *Compare* B2623:4-6 *with* B2624:2-4.

NGL has the "unqualified right to have the jury instructed with a correct statement of the substance of the law." *Id.* at 1096. If a new trial is ordered, it must encompass both fraud liability and fraud damages, with the jury properly instructed on the elements of fraud liability.

CONCLUSION

The Trial Court's order rejecting application of benefit-of-the bargain damages should be sustained; its grant of a new trial on *quantum meruit* should be reversed, with the jury award of $4 million allowed to stand as fully compensating LCT for its cognizable damages; and its denial of judgment as a matter of law on LCT's fraud claim should be reversed as to liability and damages. Alternatively, any new trial should cover fraud liability and damages and include correct jury instructions excluding negligent and/or innocent statements, as well as limiting damages to actual pecuniary loss.

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Dated: July 29, 2020

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2020, a true and correct copy of the foregoing document was caused to be served via File & Serve*Xpress* on the following counsel of record:

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