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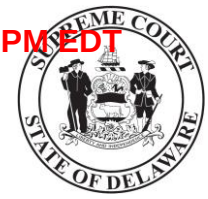

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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.	:	

APPELLEES'/CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL

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Dated: August 10, 2020

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Appellees/Cross-Appellants NGL Energy Partners, LP and NGL Energy Holdings, LLC (collectively, "NGL") submit this reply to Appellant/Cross-Appellee LCT Capital, LLC's ("LCT") answering brief ("AB") on NGL's cross-appeal.[1]

INTRODUCTION

By avoiding core issues and presenting incomplete record citations, LCT seeks an unjustified windfall even though (1) the jury's *quantum meruit* verdict makes LCT whole for its entire compensable loss; (2) LCT's admissions flatly refute reliance on any purported misrepresentation; and (3) the fraud instruction was plainly erroneous by inviting liability for innocent/negligent misstatements. Although LCT seeks to bolster its own appeal by devoting only minimal attention to these cross-appeal issues, they are dispositive of LCT's unjustified attempt to recover more than its actual loss – *i.e.,* the value of its services. It indisputably lost nothing else.

First, the Trial Court erred by unilaterally setting aside the *quantum meruit* verdict. Neither side challenged that verdict or moved for a retrial regarding it, and LCT agrees that "$4 million for *quantum meruit* should be affirmed." AB 3. That verdict is clearly justified: the jury specifically found that the fair value of LCT's services was $4 million, which fell exactly within the range of NGL's damages presentation. B2395:14-B2401:14; B1546-B1552. Because *quantum meruit* fully

[1] "OB" means NGL's opening brief.

covers the value of LCT's services, and it is undisputed on this appeal that no agreement existed to provide compensation exceeding that value, LCT has no basis to recover more as it concededly presented "no evidence of out-of-pocket damages." AB 35.

LCT argues as a contingency that if benefit-of-the-bargain damages are unavailable absent a contractual bargain, AB 33, a new trial as to *quantum meruit* is appropriate even though limitations on fraud damages are unrelated to the *quantum meruit* award. While LCT speculates whether the jury somehow misapprehended the clear terms of the *quantum meruit* instruction and verdict sheet, that conjecture is inadequate to reverse the *quantum meruit* verdict – particularly since the award equates to the proof that NGL presented.

Second, by stark contrast, the $29 million fraud verdict must be reversed because LCT's admissions preclude finding reliance on any representation in that amount. LCT's Talarico repeatedly admitted LCT did not provide (and would not have provided) services on an expectation of receiving $29 million, expressly disclaiming reliance upon any representation to that effect. As a matter of law, there can be no fraud liability without reliance and no fraud damages without liability.

Third, the fraud jury instruction was plainly erroneous because it permitted liability for innocent/negligent misrepresentations, materially reducing the required standard. NGL preserved its position by proposing a verdict form (rejected by the

Trial Court) that properly specified the required finding of intentional deception or reckless indifference to truth. A1313. And appellate relief is warranted even if NGL had not done so because the instruction constitutes plain, prejudicial error. Thus, a fraud retrial is required even if LCT's damages are not limited to pecuniary loss.

Lastly, LCT's assertions about "moral culpability," AB 7, and disparagement of NGL witnesses do not substitute for well-grounded argument. While LCT selects soundbites to distract from the issues and evidence, the record belies that caricature. As the Trial Court stated, LCT's "fee request … perhaps stretched the field of reasonableness;" the witnesses "have different opinions … I'm not going to make it something more than what it is;" and LCT's "greed [was] starting to filter into the thought process." Ex. A at 18; A1300:18-22; B1919:5-7. Notably, the jury credited the NGL CEO's testimony on the ultimate issue of the value of LCT's services. B2143:18-B2144:4 (equating appropriate fee to "standard half a percent to 2 percent" of transaction value). The jury also credited his testimony (and rejected Talarico's) on the critical issue whether NGL promised to pay LCT's taxes. Ex. A at 9.

In sum, the law and evidence support the *quantum meruit* verdict but not the fraud verdict.

ARGUMENT

I. THE *QUANTUM MERUIT* VERDICT SHOULD STAND.

LCT cannot dispute that neither party (i) appealed from the *quantum meruit* verdict, (ii) asserted that it was unsupported by evidence, or (iii) claimed any confusion with the *quantum meruit* question. A1138. Indeed, LCT states that the *quantum meruit* verdict "should be affirmed." AB 3.

Elsewhere, however, LCT argues for a contingent retrial if the Trial Court's rejection of benefit-of-the-bargain damages is upheld. LCT speculates it then might opt to present its case differently in the hope of a different result. But the jury's assessment of the value of LCT's services is not undercut if benefit-of-the-bargain damages are unavailable. Because the *quantum meruit* verdict is well-supported and fully compensates LCT for its cognizable loss, affirmance of the award negates any reason for retrial.

A. Affirmance of *quantum meruit* verdict is part of cross-appeal.

Unable to identify genuine grounds to attack the *quantum meruit* verdict, LCT suggests (by footnote) "it is not clear if this issue is before the Court." AB 32, n.11. That suggestion is baseless. Although LCT quotes a portion of this Court's certification order, it omits this Court's recognition that "NGL sought certification of the Superior Court's setting aside of the $4 million *quantum meruit* verdict…" Ex. C at 4. In accepting both side's interlocutory appeals, the Court held: "As to the

issues raised by NGL, we believe it would be inefficient to hear only some." *Id.*; BR0155 (NGL's application for certification) ("[a] new trial on *quantum meruit* damages is not warranted").

B. The Trial Court impermissibly ordered a *quantum meruit* retrial.

Although neither party requested it, the Court ordered a *quantum meruit* retrial in contravention of the 10-day deadline under Superior Court Rule 59(c). Ex. A at 18-19 (issued nearly 500 days after judgment entry). Unable to contest this timeline, LCT twists a selectively-cited portion of one paragraph from the introduction (not the argument or relief statement) in NGL's Rule 50(b) to falsely assert that the Trial Court did not act *sua sponte* because NGL somehow solicited that outcome. AB 33. In fact, however, NGL's brief raised retrial only in respect to the flawed fraud verdict – as made clear by the prior language from that same paragraph of NGL's Rule 50(b) brief that LCT chose to omit:

> At the close of evidence, NGL moved for a directed verdict/JMOL on LCT's fraudulent misrepresentation claim. That motion noted, among other things, that LCT's fraud claim should not be submitted to the jury because (a) LCT had not sought or proved any separate or additional damage for fraud beyond compensation for its services . . .

B2687 (emphasis added).

LCT likewise fails to mention that the very same paragraph then explicitly endorsed the validity of the "the jury's predicate finding" on *quantum meruit* as "determinative on [] damages." *Id.*

In fact, the only alternative that NGL proposed involving any retrial was at the conclusion of its brief, which "request[ed] a new trial on the fraudulent misrepresentation claim" if that verdict was not reversed as a matter of law. B2698-2699 (emphasis added).

NGL never sought retrial regarding *quantum meruit. E.g.,* A1428:13-21 ("[t]he $4 million *quantum meruit* verdict is unassailable. …[I]t's not under attack by any motion [and] there is plenty in the record to support it. …There was no confusion on the *quantum merit* verdict"); BR0262 ("the jury found the value to be $4 million. That determination stands unopposed; it may not be collaterally attacked now"). Neither did LCT. The Trial Court ordered retrial unilaterally.

C. *Quantum Meruit* disposes of all damages.

LCT now adopts conflicting positions regarding the $4 million *quantum meruit* award. On one hand, LCT seeks its affirmance. AB 3. On the other, it seeks retrial as a fallback if the Trial Court's rejection of benefit-of-the-bargain damages is sustained. AB 33 ("The Superior Court Properly Ordered A New Trial On Damages In the Event That Benefit-of-the-Bargain Is Not Allowed for Fraud"). Although LCT denigrates the $4 million *quantum meruit* award as "little or non-existent" compensation for seven weeks of work, AB 17, the propriety of that verdict is not at all dependent on the errors with the fraud verdict.

Contrary to LCT's position, the *quantum meruit* award fully compensates LCT for its loss and thereby negates any reason for another fraud trial. The jury answered $4 million (as to which LCT itself conditionally seeks affirmance) when unambiguously asked to "find … the fair value of [LCT's] services." A1338. That determination of "fair value" covers all loss – particularly since, as the Trial Court found, LCT advanced a "single unitary claim of damages," Ex. A at 16, and:

> the damages are the damages whether its *quantum meruit* or fraudulent misrepresentation. There's been no evidence separating them. … [T]here's nothing different in the damages associated with not being appropriately paid … versus a fraudulent misrepresentation.

A1295:13-A1296:6. LCT concedes that it "put in no evidence of out-of-pocket damages" above the value of its services. AB 35 (emphasis added). And while LCT describes its "significant role," AB 5, that role (however depicted) does not translate to agreed-upon compensation exceeding fair value.

Lacking contractual entitlement to damages beyond fair value, recovery of a higher amount would constitute an unjustified punitive remedy. In a decision not subject to this appeal, the Trial Court squarely rejected LCT's request for punitive damages. After hearing the evidence, the Trial Court held "I don't find … punitive damages [are] warranted" because:

> At 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.

A1300:8-9; 18-22.

Unable to provide evidence of any damages except the value of its services, LCT mistakenly argues that NGL failed to preserve on appeal that the *quantum meruit* verdict fully compensates LCT for its loss. AB 3. As NGL cited in its OB, however, NGL raised this very issue in its Rule 50(a) motion by arguing that LCT has:

> not put in a *quantum meruit* damages of X and fraud damages of Y case. They've essentially put in one damages case and said give it to me under one of these two theories.

A1284:3-7; *see also* A1294:10-15 ("The evidence that went to this jury had no difference between their so-called fraud case and a *quantum meruit* case. So we're not saying they can't recover. They can't articulate anything they lose by only going on their *quantum meruit* case since they tried the same case."). Likewise, NGL's Rule 50(b) brief (which NGL cited in its OB) identified the same issue:

> LCT advanced a unitary damages theory at trial that presented no difference between the actual value of its services (*quantum meruit*) and its loss due to NGL's alleged fraudulent misrepresentation. … NGL respectfully requests that: (a) the verdict on fraudulent misrepresentation be set aside as a matter of law; and (b) the verdict be conformed to the law and evidence to reflect a total damages award of $4 million.

B2684; B2689-98.

Although LCT argues that NGL's "post-trial motion … is too late to preserve the claim," AB 3, that motion reiterated the same point from trial. Further, NGL could only know post-verdict that the jury – having heard LCT's (objected to)

testimony confusingly referencing an "oral contract"/"agreement"/"deal" when none existed – would award contract-like damages by blending mere "negotiating positions." OB 18; Ex. A at 16.

D. LCT's current conjecture cannot create retroactive confusion.

As justification for its contradictory request that *quantum meruit* be retried depending on the scope of permissible fraud damage, LCT resorts to conjecture that the jury may have been confused. Although LCT references "two blanks for damages," AB 33 n.12, nothing about the fraud blank introduced ambiguity into the clear *quantum meruit* question (which attracted no requested clarification from anyone, including the jurors).

LCT also raises colloquy between counsel and the Trial Court, AB 34, regarding a "thought process" where "the numbers were reversed" between the two verdicts. Without identifying any actual indicia of confusion regarding *quantum meruit*, the Trial Court speculated that the verdicts "reflect, perhaps, a confusion that would not cause me to say, well, the $4 million must be right…" But that colloquy is insufficient to justify a retrial because indisputably the "evidence supported the jury's verdict" and the Trial Court merely "expressed some speculative concern…" *Reinco, Inc. v. Thompson*, 906 A.2d 103, 111-12, 110 n.15 (Del. 2006) (retrial improper if based on "speculative conclusion that the jury was confused"). LCT cannot claim confusion with the unambiguous question to "find … the fair value of

[LCT's] services," A1338, which the jury then answered with the number NGL presented – a verdict that LCT never challenged.

LCT belatedly argues that "[t]he *quantum meruit* jury instruction improperly precluded … 'value created.'" AB 34. However, the *quantum meruit* instruction is not the subject of appeal and LCT's untimely argument is barred by Supreme Court Rule 8. LCT's argument also fails substantively. Well-established law is clear that *quantum meruit* damages do not include recovery for value created, and the Trial Court's application of that law is not under review. *Hynansky v. 1492 Hosp. Group, Inc.*, 2007 WL 2319191, at *1 (Del. Super. Ct. Aug. 15, 2007) (*quantum meruit* recovery "is the value of the services provided, not the value of the benefit received"); *Caldera Properties - Lewes/Rehoboth VII, LLC v. Ridings Dev., LLC,* 2009 WL 2231716, *31 (Del. Super. Ct. May 29, 2009) (following *Hynansky*).

LCT cites no authority to support its self-created view on *quantum meruit* damages. LCT also ignores the evidence that the "value created" was a function of NGL's post-acquisition efforts, in which LCT played no role. A0236; B2126:9-B2127:5.

II. THE FRAUD VERDICT IS CONTRARY TO THE EVIDENCE.

Ignoring that LCT flatly and repeatedly admitted its non-reliance on any representation underlying the jury's fraud verdict, OB 55-58, LCT seeks to shift attention away from (1) the case it actually presented and (2) the record admissions about the three-component representation that served as the very centerpiece of LCT's fraud case.

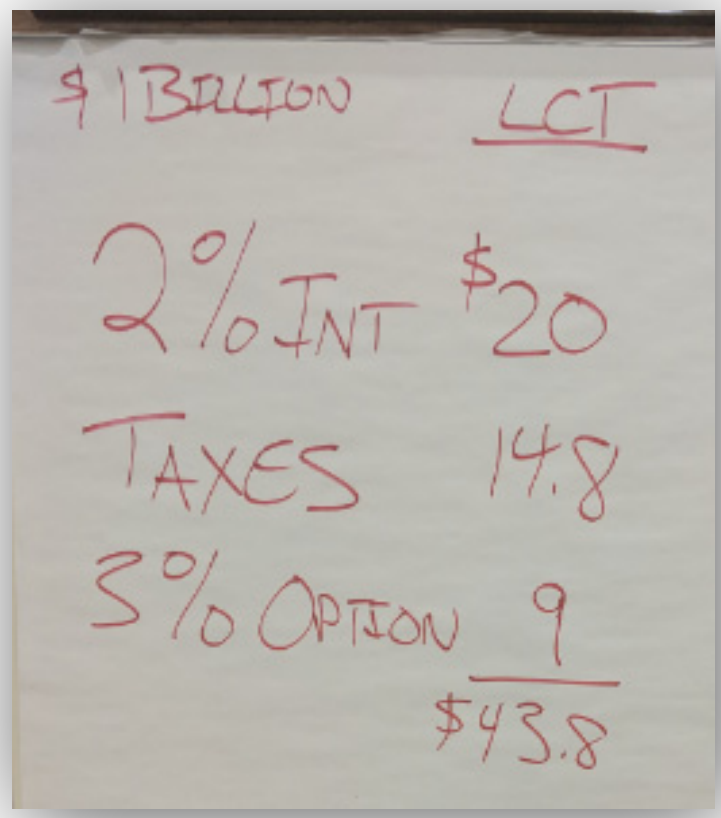
A. LCT's non-reliance admissions.

Although LCT may wish it presented a different case, Delaware law holds litigants to the "tactical decision[s]" they make. *E.g., Trans World Airlines, Inc. v. Summa Corp*., 394 A.2d 241, 246 (Del. Ch. 1978). Here, LCT chose to present the jury with what boiled down to a single question: do you believe Talarico's testimony that NGL promised in May/June 2014 that it would pay LCT a specific three-component fee of $43.8 million, including payment of taxes as an essential component. A0533; B2426-2428; B2606:9-22.

NGL's witnesses explained that they had never made that commitment or otherwise agreed to pay LCT's taxes. OB 11-15; A0899; A0904:3-8; B1975. LCT's witnesses insisted otherwise, repeatedly citing that alleged promise as the sole representation on which LCT relied "at the time" in May/June, A0500-0515 – with Talarico explaining that no other representation would have induced LCT to work. A0528:3-20; A05421:19-0542:4. LCT's liability case thus depended upon

finding that NGL made the precise, three-component representation upon which Talarico claimed to have relied – what he variously called (over NGL's objections) the "oral contract"/"agreement"/"deal." OB 18.

That same representation also defined LCT's damages model. In LCT's rebuttal case, Talarico draw a chart to re-emphasize the three components required to form LCT's $43.8 damages figure:

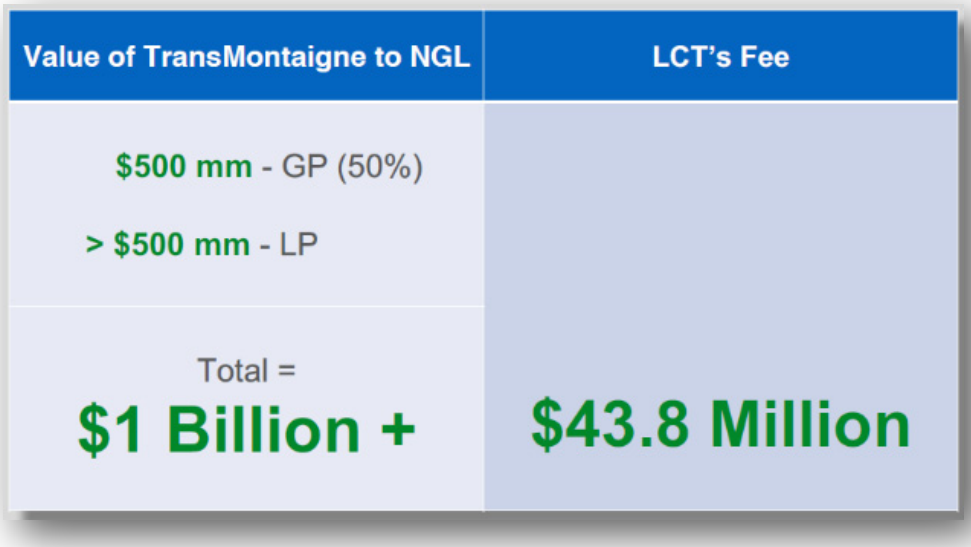


OB 57-58; B2606:9-22; B2755. And LCT's damages expert admitted that his opinion – which parroted that same figure – rested on Talarico's claim about the three-component representation. A1072; A1077:7-16; B1987; B2016-2017.

LCT also repeatedly told the jury that it never relied on any representation about payment of any lesser amount – including the $29 million "success fee" first mentioned in the October Letter that LCT now hypocritically cites to defend the fraud verdict. A0582-0583; A0535:9-0538:10. It is undisputed, however, that the October Letter: (a) did not exist until five months after LCT's claimed reliance in May/June, four months after LCT finished working; and (b) LCT never saw it until the following month. A0584:4-10.

Rejecting any suggestion that LCT was presenting a $29 million reliance case based on the October Letter or otherwise, Talarico expressly differentiated the proposal reflected in the October Letter from the "deal" that LCT claimed the parties "had agreed to back in May and June." He testified that the letter: (a) was "very, very different" from the three-component representation LCT relied upon; and (b) represented an attempt to "renegotiate" or "renege" on that purported understanding. A0584-0586; B2426-2428; B2432.

LCT then made the matter even simpler, telling the jury in no uncertain terms that if they believed Talarico's testimony about the alleged representation involving an essential tax component, their verdict would necessarily track the $43.8 million number in a demonstrative repeatedly shown to the jury:

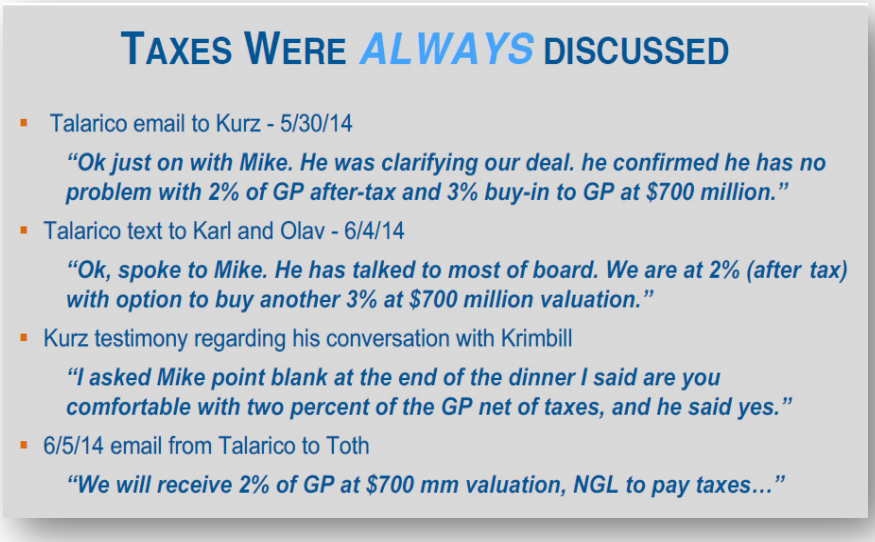


B2531; BR0269.

But the jury did not credit Talarico's testimony. Instead, it returned a verdict excluding the tax component that LCT consistently highlighted as a critical aspect of the three-component misrepresentation on which it claimed to have relied. That fact is uncontroverted. OB 1-2; 12-13; 23; Ex. A at 9. And thus the fraud verdict cannot stand because: (a) LCT failed to prove the misrepresentation on which its reliance case was dependent; and (b) there can be no damages without liability as a predicate.

LCT's attempt to suggest otherwise ignores what its counsel presented to the jury immediately before deliberations. Closing arguments are not evidence, of course, but they are instructive when contrasted against the line of advocacy LCT now advances. Specifically:

- "Talarico was quite clear that there were three components" to the $43.8 million fee representation on which LCT relied. B2529:12-17;
- The payment of LCT's taxes was "always discussed" as an essential component of that representation – a point so important to LCT that it warranted its own demonstrative:



B2538-2543; BR0268.

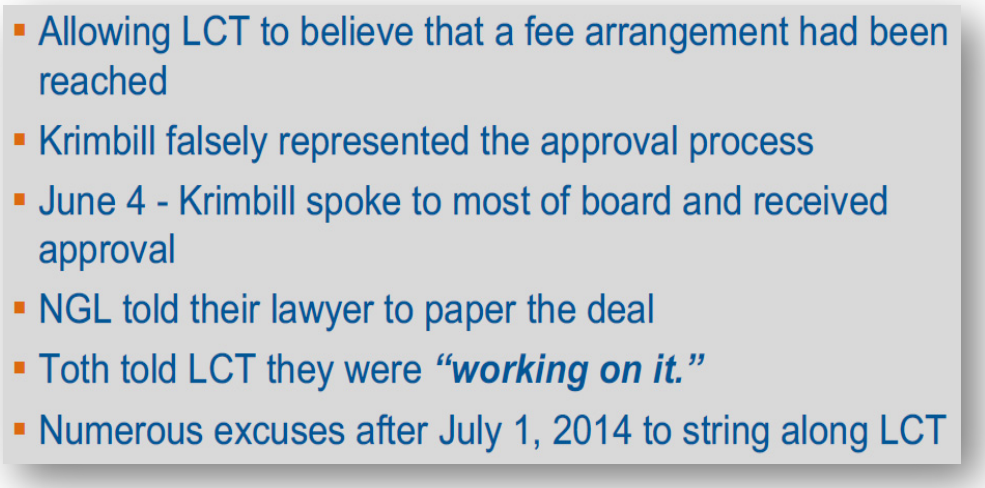
- LCT was "lull[ed] into believing" there was "a deal" for a three-component fee in May-June 2014. B2548; B2555.
- The "true crux of the dispute" was whether the jury believed that NGL had represented/promised to pay LCT's taxes in May/June 2014, which LCT's counsel argued was a credibility determination for the jury. B2547.

Those statements were consistent with the case LCT tried, and the jury made their credibility determination by accepting NGL's testimony that no such representation/promise was made on the critical issue of taxes despite Talarico's insistence otherwise. *See* Ex. A at 9 (emphasis added) ("it is clear the jury's damage award for fraudulent misrepresentation equated to" LCT's alleged components "minus the dispute regarding taxes"). That determination was fatal to the LCT's fraud claim, refuting any post-trial attempt to justify a fraud verdict tied to $29 million.

B. LCT's "other" fraud theories are unfounded.

While selectively quoting non-evidentiary colloquy from (sometimes heated) post-trial exchanges, LCT cannot rebut the objective evidence confirming that LCT's fraud claim was based solely on the alleged three-part fee representation that the jury concluded had not, in fact, been made by NGL. To save the unfounded fraud verdict, LCT now speculates that the jury might have found some other "misrepresentation" referenced by LCT's counsel during closing argument – which, again, is not evidence and cannot support a verdict.

That argument references five "false representations" collateral to NGL's alleged promise to pay the three-component fee, and LCT now presents them in almost the same way as the slide its counsel presented in closing:



B2549-2555; AB 37-38. The alleged representation about LCT's fee appears first, with each of the "other" items being listed as derivate of or collateral to that representation. There is nothing accidental about that ordering.

Although absent from LCT's brief, it is beyond dispute that LCT's complaint only sought recovery for alleged reliance on a single misrepresentation: the three-component fee to which NGL supposedly agreed in May/June 2014. *See* A0296 ¶ 169; *see also* A0533; B2426-2428. None of the other matters now cited by LCT were included in its pleading. LCT never amended that pleading to claim it had relied on any other statement. And none of the other "numerous false representations" were raised in its opposition to NGL's summary judgment motion on LCT's fraudulent misrepresentation claim.

Another key fact ignored by LCT's current argument: LCT never even attempted to suggest that NGL bore separate liability for any of those other "false

representations." Nor could LCT have done so, because each ties back to LCT's lone as-pled claim about the alleged fee agreement reached in May/June 2014. Read closely, LCT's brief (and Appendix cites) admit that:

- both references to "approval" related to the process of securing NGL Board approval for the same three-component "fee arrangement." AB 37; A0879:12-18;
- both references to NGL's "lawyer" (Toth) related to LCT's belief that it would receive a written version of that same "fee arrangement." AB 37-38; A0561:11-A0563:21; and
- the final reference about "excuses" related to the reasons LCT was supposedly given for why that same "fee arrangement" had not yet been papered months after LCT had completed its work.

Plus, none of these collateral "false references" support fraud – let alone fraud damages – as all depended upon LCT's claimed reliance on a claimed three-component representation that the jury decided was never made.[2]

C. The October Letter is a red herring.

Having nowhere else to turn for after-the-fact justification because it was the lone piece of evidence that referenced such a number, LCT argued post-trial that the $29 million fraud verdict was based on what "was described by Mr. Krimbill as a 'success fee' in his October 24, 2014 letter." B2725. NGL explained why that argument was never viable in light of the undeniable record, including LCT's

[2] Moreover, as a legal matter, the lack approval/papering cannot be a function of fraud because the Trial Court held (not subject to this appeal) that there was no agreement reached to be approved/papered.

admissions. Although the Trial Court disagreed, LCT now has admitted as much. AB 38-39 (admitting LCT did not rely on the October Letter).

Instead, LCT contends for the first time that the October Letter justifies the fraud verdict because its reference to $29 million "support[ed] the bottom range of damages testified to by LCT's expert." AB 39. That argument is another attempt to rewrite the record. In reality, no witness ever sponsored that figure as a damages amount – which is why LCT cannot cite any supporting testimony.[3] And, importantly, LCT's argument conflates damages with the predicate concept of reliance (which the expert did not address).

LCT's expert also admitted that his model was based upon blind acceptance of Talarico's testimony regarding the alleged three-component fee. A1072; A1077:7-16; B1987; B2016-2017. He thus adopted LCT's contentions that: (a) the sole representation at issue necessarily encompassed all three components equating to $43.8 million, which was the only damages figure LCT claimed; and (b) there was never any representation about, reliance upon, or damages being claimed in connection with the $29 million figure referenced by the October Letter – a figure Talarico expressly rejected. A0528:3-20 ("if it had anything but that [three-part

[3] In closing with respect solely to *quantum meruit*, LCT's counsel juxtaposed the $29 million against NGL's testimony that the value of LCT's services fell in the $2-$4 million range. B2512-2516. The jury rejected LCT's argument when finding in NGL's favor on the issue.

representation], we would have stopped right there and said, hold on, we got to figure this out").

Because neither Talarico nor LCT's expert ever sponsored $29 million, LCT is unable to offer any support for its revisionist notion that the jury was nevertheless free to "accept or reject each of th[ose] components separately in the damage award calculation." AB 39. That suggestion is nothing more than advocacy, and it cannot be reconciled with the evidence LCT actually presented.

Nor does it comport with the requirements of fraud. While juries in personal injury cases have leeway to set pain-and-suffering damage numbers, not so for fraud cases where damages are inherently tied to – and must be the "direct result of" – the specific misrepresentation on which the plaintiff proved reliance as a required predicate. A1323; AB 38 (fraud instruction LCT sponsored and now quotes).

It is therefore axiomatic that no verdict of $29 million can be upheld on this record because Talarico disclaimed reliance upon any representation in that amount, and the only verdict which could be returned given LCT's admissions was a no-liability finding. Indeed, LCT's admission that "the $29 million verdict has nothing to do with reliance" is self-defeating on liability. AB 39.

III. FRAUD INSTRUCTION CONSTITUTES PLAIN, PREJUDICIAL ERROR

A. NGL preserved its position.

NGL preserved its position on the Trial Court's incorrect fraud instruction by submitting a proposed verdict sheet which, by adding specific *mens rea* factors, sought to cure the error that was law of the case after the Trial Court's summary judgment decision. Rejected by the Trial Court, NGL's verdict sheet identified the representation on which LCT allegedly relied and asked the jury whether they specifically found NGL had "made that representation with knowledge or belief that it was in fact false [or] … with reckless indifference to its truth" and "with the intent to induce LCT's reliance." A1313-14 (emphasis added).

NGL's proposal was appropriate given the Trial Court's adoption of an incorrect liability standard on summary judgment, which was added to the jury instruction at LCT's request without a prayer conference being held.[4]

Notably, both parties presented the correct standard on summary judgment. BR0001-0041; BR0042-0090; BR0091-0119. The Trial Court, however, held that the lesser "negligent, or even innocent" standard governed, which became law of the case and subsequently applied as such. A0334; *see May v. Bigmar, Inc.*, 838 A.2d 285, 288 n.8 (Del. Ch. 2003) (treating issue decided at summary judgment as law of

[4]NGL at least twice inquired about a conference, the lack of which hindered discussion of jury instructions. A0494:9-11; B2184:5-11.

case). Indeed, LCT advocated at trial for the fraud instruction to include that lesser standard on the grounds that it came straight out of the summary judgment opinion without being subject to further consideration. BR0120-0122. And as LCT now acknowledges, AB 41, disposed of "issues" and "matters" constitute law-of-the-case – which applies to a liability standard. *See Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990) ("The 'law of the case' is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation.").

B. LCT ignores "plain error" review.

Any issue of preservation aside, the incorrect fraud instruction is subject to plain-error review because "a party does have the unqualified right to have the jury instructed with a correct statement of the substance of the law." *Culver v. Bennett*, 588 A.2d 1094, 1096 (Del. 1991). That is so even if a party fails to object at trial. *E.g.*, *Riggins v. Mauriello*, 603 A.2d 827, 830-31 (Del. 1992) (despite failure to timely object, reversible error where jury's decision based on "inappropriate" jury instruction); OB 65-66 (cases cited therein).

Whether the Trial Court correctly instructed the jury on fraud is a determinative question, yet LCT devotes just three sentences to it. That avoidance speaks volumes.

It is undisputed that negligent misrepresentation claims cannot be heard in Superior Court. OB 61-62. Thus, a jury cannot be instructed that the lower threshold for negligent misrepresentation claims is sufficient to find common-law fraud under its higher, fundamentally different burden – the requirement of intentional deception or reckless disregard for truth. *See* OB 61-62 (cases cited therein). Yet that is what happened in this case; the jury was erroneously instructed that "negligent or even innocent statements" were sufficient for fraud liability. A1322-1323. And the resulting verdict must therefore be reversed because, by definition, that erroneous instruction was prejudicial to NGL. *See, e.g.*, *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 546-52 (Del. 2006) (delivery of missing-evidence adverse instruction without distinguishing between innocent vs. intentional/reckless destruction was reversible error because instruction "was critical to plaintiffs' proof of liability" and "plaintiffs cannot fairly claim … instruction was harmless"). *Cf. Phillips v. State*, 154 A.3d 1146, 1160-61 (Del. 2017) (instruction with incorrect higher standard of proof deemed harmless because it necessarily represented finding at lower/correct standard).

Even assuming *arguendo* that LCT established reliance for its fraud claim (which it did not), a retrial on that claim would be required because there can be no assessment of fraud damages until there has been a predicate finding of liability based on a correct instruction.

By grossly misreading precedent, LCT argues that the jury instruction was proper because "it was consistent with this Court's opinion in *Twin Coach Co. v. Chance Voight Aircraft, Inc.*, 163 A.2d 278, 284 (Del. 1960)" and that common-law fraud is "sufficient[ly] broad to encompass … negligent or even innocent statements." AB 42 (emphasis added). But this Court never held any such thing, and neither did *Twin Coach*. Rather, that opinion (a) was issued by the Superior Court; and (b) correctly held that such statements cannot support a claim for common-law fraud. *Twin Coach*, 163 A.2d 278, 284 (Del. Super. Ct. 1960).

There is simply no room for debate: this Court and every trial-level venue in Delaware have been unanimous over decades of citation to *Twin Coach* for that very holding. *E.g.*, *Brzoska v. Olson*, 668 A.2d 1355, 1367 (Del. 1995); *Lea v. Griffin*, 1995 WL 106562, at *3 (Del. Ch. Feb. 15, 1995); *Davitt v. Saltzman*, 1979 WL 193332, at *2 (Del. Super. Ct. Jan. 22, 1979); *Wilmington Trust Co. v. Amrhein*, 2000 WL 33653413, at *1 (Del. Com. Pl. April 7, 2000). Nor is this the only such error now sponsored by LCT.

The Trial Court decision on which LCT's argument ultimately relies allowed that language based on an equally unfounded reading of *Vichi v. Koninklijke Philips Electronics, NV.*, 85 A.3d 725 (Del. Ch. 2014). *See* A0334 n.140.

Far from holding that negligent statements can constitute fraud, *Vichi* actually made the exact opposite point:

> [I]n Delaware, "[a] claim of negligent misrepresentation . . . requires proof of all of the elements of common law fraud except 'that plaintiff need not demonstrate that the misstatement or omission was made knowingly or recklessly.' Thus, negligent misrepresentation is essentially a species of common law fraud with a lesser state of mind requirement—i.e., scienter is replaced by negligence.

85 A.3d at 762 (emphasis added) (quoting *Williams v. White Oak Builders, Inc.*, 2006 WL 1668348 (Del. Ch. June 6, 2006)). The Trial Court and LCT have both ignored this clear difference between the high showing required for fraud and the significantly relaxed standard for negligent misrepresentation. Because it is undisputed that negligent misrepresentation is not part of LCT's claims, however, neither *Twin Coach* nor *Vichi* can justify the plainly erroneous jury instruction. Ex. A at 6.[5]

As a fallback, LCT contends that the prejudicial instruction should be considered harmless error because it was delivered "in the context" of another part of the recitation that included the intent requirement. AB 42-43. That argument ignores the very "context" it purports to address.

First, the operative question is whether the jury was instructed to return a fraud verdict if they found any "negligent or even innocent" statement by NGL. And it is undisputed that the jury was told precisely that by the Trial Court, regardless of any other language that appeared in the instructions. A1322-1323.

[5] To the extent LCT suggests its misreadings are somehow "consistent" with the Restatement, *see* OB 62-63.

Second, LCT fails to mention that the other language it now cites was in fact modified by the prejudicial instruction at issue, which appeared below that language and incorrectly expounded upon it by instructing that fraudulent intent was not required to find liability: "Moreover, the term 'misrepresentation' is sufficiently broad to encompass fraudulent, negligent, or even innocent statements." A1322 (emphasis added).

Third, LCT fails to provide any authority for the notion that instructing a jury to find fraud upon the lesser/lower standard reserved exclusively for negligent misrepresentation claims – which exist only in Chancery Court – may somehow be harmless. Instead, LCT speculates that the jury might have chosen to disregard the instruction. LCT, however, cannot rely on speculation or substitute its own viewpoint for the jury's. *E.g.*, *Riggins*, 603 A.2d at 831 (remanding for new trial despite contention of "sufficient evidence in the record to support the jury's verdict" because improper instruction "'undermined the jury's ability to intelligently perform its duty...'" (quoting *Culver*)). Nor is LCT saved by citing snippets of the Trial Court's commentary about its view of certain evidence. AB 43. In fact, the Trial Court elsewhere stated that it did not believe "the fraudulent misrepresentation case is a smoking gun." A1296:17-20. Recognizing as much, LCT opposed NGL's Rule 50(a) motion by then arguing that the alleged misrepresentation fell "squarely within the broad definition of misrepresentations that the court indicated in the summary

judgment opinion" – corroborating the clearly prejudicial impact of the lower standard. A1292:7-9 (emphasis added).

Thus, even if LCT could prove reliance and damages beyond *quantum meruit* (neither of which it can do), fraud still would require a retrial with the jury properly instructed on liability and damages.

CONCLUSION

On NGL's cross-appeal, the ordering below of a retrial should be reversed with the $4 million award fully compensating LCT; alternatively, if LCT is permitted to seek damages in excess of *quantum meruit*, any retrial should cover fraud liability and damages under correct jury instructions.

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2020, true and correct copies of the foregoing documents were caused to be served via File & Serve*Xpress* on the following counsel of record:

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